

CASE NUMBER
2520071032
SN:42.0 PC:12

FILED
7/14/2025
Timothy W Fitzgerald
Spokane County Clerk

SUPERIOR COURT OF WASHINGTON IN AND FOR SPOKANE COUNTY

CITY OF SPOKANE VALLEY, a municipal
corporation,

Plaintiff,

v.

ALBERT W. MERKEL, an individual,

Defendant.

NO. 25-2-00710-32

MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION TO STRIKE

I. INTRODUCTION

Plaintiff City of Spokane Valley ("Spokane Valley") moves this Court for an Order striking portions of the Declaration of Albert W. Mekel [sic] in Support of Motion for Protective Order ("Merkel Declaration"). This declaration submitted by Defendant Albert W. Merkel ("Merkel") is riddled with inadmissible testimony. In particular, the Merkel Declaration is replete with statements that: (1) lack an adequate foundation and are too speculative to be admissible; (2) contain inadmissible conclusory statements; (3) constitute inadmissible hearsay; (4) constitute improper legal conclusions; and (5) violate the best evidence rule. All inadmissible statements contained in the Merkel Declaration should be struck from the record.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S
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II. FACTS

The relevant facts are set forth in Spokane Valley's Response to Merkel's Motion for Protective Order, which it incorporates herein by reference.

III. ARGUMENT

A. LEGAL STANDARDS

Where an affidavit contains inadmissible evidence, the Court should strike the affidavit (or the offending portion of the affidavit) from the record. See e.g., Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) (trial court properly excluded portions of expert affidavits which contained inadmissible evidence); Moore v. Hagge, 158 Wn. App. 137, 241 P.3d 787 (2010) (trial court properly excluded statements in declaration that were inadmissible under ER 701). A court's decision to admit or exclude evidence lies within its sound discretion. State v. Bourgeois, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997).

1. Hearsay Standards

Hearsay is an oral or written assertion, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801. Hearsay evidence is not admissible unless it fits under a recognized exception to the hearsay rule. ER 802; State v. Athan, 160 Wn.2d 354, 383, 158 P.3d 27 (2007). The purpose of the hearsay rule is to exclude inherently unreliable evidence which may prejudice a litigant's cause or defense. State v. Picard, 90 Wn. App. 890, 899, 954 P.2d 336 (1998). Hearsay statements which do not fit under a recognized exception to the hearsay rule must be struck from supporting affidavits. See e.g., Ebel v. Fairwood Park II Homeowners' Ass'n, 136 Wn. App. 787, 792, 150 P.3d 1163, 1165 (2007).

1 **2. Lack of Foundation Standards**

2 Pursuant to ER 602 “[a] witness may not testify to a matter unless evidence is
3 introduced sufficient to support a finding that the witness has personal knowledge of the
4 matter.” The offering party must provide a sufficient foundation of personal knowledge. Tapio
5 Inv. Co. v. State by and through the Dep’t of Transp., 196 Wn. App. 528, 551, 384 P.3d 600
6 (2016).

7 ER 701 provides as follows:

8 If the witness is not testifying as an expert, the witness' testimony in the form of
9 opinions or inferences is limited to those opinions or inferences which are (a) rationally based
10 on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony
11 or the determination of a fact in issue, and (c) not based on scientific, technical, or other
12 specialized knowledge within the scope of rule 702.

13 **3. Best Evidence Rule Standards**

14 ER 1002 provides, “To prove the content of a writing, recording, or photograph, the
15 original writing, recording, or photograph is required,” unless other rules or statutes provide
16 otherwise. This rule, known as the best evidence rule, plainly applies when a party is
17 attempting to prove the contents of a writing or photograph. See In re Pers. Restraint of
18 Adolph, 170 Wn.2d 556, 567, 243 P.3d 540 (2010).

19 **4. Legal Conclusion Standards**

20 A Declarant must testify from personal knowledge and ultimate facts or conclusions of
21 law are insufficient. Snohomish County v. Rugg, 115 Wn. App. 218, 224, 61 P.3d 1184 (2002);
22 see also, Keates v. City of Vancouver, 73 Wn. App. 257, 265, 869 P.2d 88 (1994) (holding that
23 an affidavit is to be disregarded to the extent that it contains legal conclusions); Hyatt v. Sellen
24 Constr. Co., Inc., 40 Wn. App. 893, 899, 700 P.2d 1164 (1985) (holding that on summary
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1 judgment witness could not properly testify to the meaning of certain statutes, whether they
2 applied to the case, or whether the defendant violated the statutes).

3 **B. MERKEL'S DECLARATION CONTAINS INADMISSIBLE EVIDENCE THAT**
4 **MUST BY STRUCK**

5 The following statements and evidence submitted by Merkel in his declaration violate
6 multiple evidentiary rules and must be struck:

7 **4. The compelled disclosure of my electronic private**
8 **communications will subject me and my political associates, supporters,**
9 **and groups to further harassment, intimidation, and reprisal, which will**
10 **affect our physical well-being, political activities, and economic interests**
11 **and have a chilling effect on the willingness of potential members to**
12 **associate with my and my political group. Below are just a few examples of**
13 **the threats, harassment, and intimidation from the City of Spokane Valley's**
14 **leadership and their political allies directed towards my family, friends, and**
15 **political supporters, and me because of my political beliefs, activities, and**
16 **group associations.**

17 This statement lacks any foundation and is too speculative and conclusory to be admitted.
18 Merkel has no personal knowledge regarding the "willingness" of theoretical, not actual,
19 persons and their future desire to not associate with Merkel based upon events that have yet to
20 occur. No "political associate," "supporter," or "group" has even been identified, and of course
21 no witness has provided any testimony supporting these broad, conclusory allegations.
22 Similarly, Merkel cannot speculate as to what hypothetical outcomes could arise. These
23 statements lack foundation and are inadmissible. Merkel further cannot speculate on the reason
24 why Spokane Valley took any alleged actions because he lacks personal knowledge.

25 **5. ...This fear is not theoretical. It is supported by a well-**
26 **documented pattern of harassment, political targeting, and abuse of**
27 **government authority.**

28 Merkel lacks foundation and speculates regarding the motive behind any alleged actions taken
29 by Spokane Valley. This statement is conclusory and not based in fact or upon personal
30

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1 knowledge. This statement also violates the Best Evidence Rule. Merkel claims that this is
2 “well-documented,” yet fails to include any documents in his declaration that support these
3 false allegations.

4 **6. On January 11, 2024, during open public comment at a City**
5 **Counsel meeting, a known and vocal supporter of Mayor Pam Haley, who**
6 **has publicly backed and financially supported her campaigns, took to the**
7 **podium and stand on the public record that now that I was elected, my**
8 **“family and friends are fair game,” and she would be “coming after them.”**
9 **This was not vague political rhetoric—it was a direct threat issued in a**
10 **government forum, with no objection from city leadership.**

11 This paragraph contains inadmissible hearsay regarding statements allegedly made by an
12 unnamed person and further violates the Best Evidence Rule. These statements are admitted for
13 the truth of the matter asserted and are inadmissible. Merkel also lacks foundation and
14 speculates regarding the financial involvement of this unnamed person to the mayor. Moreover,
15 this paragraph is factually false because, among other things, there was not a city council
16 meeting on January 11, 2024, and no similar statements were made at the meetings around the
17 date alleged by Defendant. *Declaration of John Hohman in Support of Plaintiff's Motion to*
18 *Strike Declaration of Albert W. Merkel in Support of Motion for Protective Order (“Hohman*
19 *Decl.”) ¶¶ 7-7.2.*

20 **7. Roughly a month later, on or about February 10, 2024, both City**
21 **Manager John Hohman and City Attorney Kelly Konkright personally**
22 **threatened me with legal action due to my association with the Painted Hills**
23 **Preservation Association. Specifically, they targeted my use of a private and**
24 **social media account to help the group raise funds—a clear exercise of my**
25 **First Amendment rights to free speech and association. This marked a**
deliberate attempt to criminalize private, constitutionally protected political
activity.

This entire paragraph consists of speculative and conclusory allegations that lack any
foundation. Merkel cannot speak to what violates the constitution or any other legally protected
activity as it is a legal conclusion and not based on facts or personal knowledge. Moreover,

1 Merkel's claims that these individuals threatened him constitutes inadmissible hearsay.
2 Moreover, the allegations contained in this paragraph lack foundation and are simply false.
3 John Hohman and Kelly Konkright have not threatened legal action against Merkel due to his
4 association with Painted Hills Preservation Association and no admissible evidence has been
5 submitted to substantiate these allegations. *Declaration of Kelly E. Konkright in Support of*
6 *Plaintiff's Motion to Strike Declaration of Albert W. Merkel in Support of Protection Order*
7 (*"Konkright Decl."*) ¶¶ 3-7, Ex. A; *Hohman Decl.* ¶¶ 8-8.4.

8 **8. Further, during a politically motivated investigation that the City**
9 **Manager initiated against me, evidence emerged that city staff were**
10 **coordinating behind closed doors with elected officials to plan and execute**
11 **efforts to attack and discredit me. These meetings occurred on paid city**
12 **time, were deliberately kept hidden from me and the public, and amounted**
13 **to secretive political sabotage under the guise of administrative process.**
14 **Making matters worse, the so-called "independent" investigator allowed**
15 **City Manager Hohman to review and "get all the ducks in a row" before**
16 **the final report was issued—effectively giving the subject of the**
17 **investigation control over its conclusions. Transcripts from interviews with**
18 **both John Hohman and Deanna Horton support this conclusion and**
19 **demonstrate that the entire investigation was weaponized to politically**
20 **target me (March 2024).**

21 This entire paragraph should be struck as it is made entirely of conclusory speculative
22 statements for which Merkel lacks personal knowledge. Merkel references "evidence" that has
23 "emerged" but does not include any exhibits that support this paragraph, violating the Best
24 Evidence Rule. Merkel speculates on the reasons why the City Manager and Independent
25 Investigator took the alleged actions against Merkel without any foundation. Merkel further
attempts to speak to actions that occurred that were "hidden from me" which directly supports
that Merkel has no personal knowledge of the alleged statements and alleged actions. Afterall,
how could he have personal knowledge of events that were "hidden" from him. Merkel further
references transcripts that allegedly support his claims and failed to include them, which

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1 violates the best evidence rule. In addition to all of the above, the statements made in this
2 paragraph about the City Manager are false as there was no politically motivated investigation
3 coordinated against him. *Hohman Decl.*, ¶¶ 9-9.5, Ex. A. This paragraph should be struck.

4 **9. When I was running for office and after I took office, I have also**
5 **been harassed repeatedly at home by the city's code enforcement**
6 **department. Officers have cited me over parked vehicles, threatened fines,**
7 **and forced me to present proof—often regarding license plates plainly**
8 **visible from the street—despite my consistent success in fighting every**
9 **allegation. This harassment persisted even after vindication and was**
10 **ultimately leaked to the press in what I believe to be a deliberate act of**
11 **retaliation. (See Spokesman-Review, February 26, 2024.)**

12 Moreover, without any evidence to support his allegation, Merkel speculates as to why the
13 city's code enforcement cited Merkel. His narrative regarding the officers' actions is without
14 foundation and conclusory, including legal conclusions. Moreover, his allegations are false and
15 expressly contradicted by clear evidence. *See Declaration of Jenny Nickerson in Support of*
16 *Plaintiff's Motion to Strike Declaration of Albert W. Merkel in Support of Motion for*
17 *Protective Order ("Nickerson Decl."), ¶¶ 3-4.4, Exs. A-I.*

18 **10. In addition, Councilmembers Rod Higgins and Jessica Yaeger**
19 **have made a habit of appearing on the local radio show "Right Perspective**
20 **Spokane," where they have peddled wild and false claims about my**
21 **personal life and political affiliations. These broadcasts—on August 16,**
22 **2023; October 23, 2023; February 22, 2024; March 6, 2024; March 27,**
23 **2024; November 20, 2024; December 19, 2024; and January 8, 2025, among**
24 **others—show an ongoing obsession with undermining me publicly,**
25 **smearing my reputation, and creating the illusion of impropriety to justify**
invading my privacy.

Merkel's relies on out-of-court statements and inadmissible hearsay. Moreover, these
statements are false because Mr. Higgins and Ms. Yeager only appeared on a radio show of a
similar name on a few of the eight alleged dates and, as demonstrated by the podcasts, no false
claims were made about Merkel. *Declaration of Rod Higgins in Support of Plaintiff's Motion to*
Strike Declaration of Albert W. Merkel in Support of Motion for Protective Order ("Higgins

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Decl.”), ¶¶ 3-3.7, Exs. A and B; *Declaration of Jessica Yeager in Support of Motion for Protective Order* (“*Yeager Decl.*”), ¶3-6, Exs. A and B. Several of these interviews occurred without Merkel being brought up at all. *Higgins Decl.* ¶¶ 3.4(a); *Yeager Decl.* ¶¶ 5.4-5.5. Further Merkel speculates to the motive behind the alleged statements made by Councilmembers Higgins and Yaeger. This paragraph further violates the Best Evidence Rule as the transcripts would more accurately depict any statements made.

11. On or about June 8, 2024, a private investigator—hired by a known supporter of the Mayor, in coordination with Councilmember Higgins and reportedly with Mayor Haley’s awareness—contacted my friends, family, and former workplaces with intimidating and defamatory questions. The resulting report was not only libelous but was allowed to be read, aloud during a public council meeting, in direct violation of council comment rules. No action was taken by the city to prevent this abuse of the public process.

The statements lack personal knowledge, lack foundation, are speculative, and constitute inadmissible hearsay. As demonstrated by the declarations, Merkel’s allegations lack foundation and are false. *See Hohman Decl.* ¶¶ 10-10.4; *Higgins Decl.* ¶ 4. The only known comment made by a private investigator was on June 4, 2025. *Hohman Decl.* ¶¶ 10-10.4; *Higgins Decl.* ¶ 5. Therefore, any report resulting from an alleged investigation that took place on July 8, 2025, could not have been read at the meeting four days earlier. *Hohman Decl.* ¶¶ 10-10.4. Furthermore, Merkel fails to demonstrate how he has any knowledge about who hired the unnamed investigator and alleges it was “reportedly” known by the mayor but fails to support how it was known or how Merkel has such knowledge. This paragraph is simply hearsay in a gossip-like narrative and must be struck. Furthermore, Merkel references a report that supports his allegations that was not entered into evidence and violates the Best Evidence Rule.

12. Private citizens who support me have also become targets. In two cases, individuals who spoke in favor of me during council meetings—Mike

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1 **Dolan and Tracy Christian—had their properties personally visited by City**
2 **Manager Hohman, who hand-selected alleged code violations and then**
3 **prioritized enforcement against them, bypassing hundreds of citizen-**
4 **reported cases. This was not normal enforcement—it was retaliatory action**
 directly tied to their public political speech. As a result, Mr. Dolan decided
 against running for City Council.

5 These statements regarding the alleged actions taken by the City Manager against two third-
6 parties constitute inadmissible hearsay. Merkel further lacks any personal knowledge as to the
7 events that he alleges took place. His statements demonstrate on their face that Merkel was not
8 present during any of the alleged events. Furthermore, Merkel makes speculative and
9 conclusory statements as to the motive behind such alleged actions and the alleged resulting
10 action supposedly taken by Mr. Dolan. Moreover, Merkel's speculative statements are again
11 false because the City Manager did not direct City Code Enforcement to enforce any code
12 violations, nor has he ever visited Mike Dolan or Tracy Christian's properties, as alleged by
13 Merkel. *Hohman Decl.* ¶¶ 11-11.3; *Nickerson Decl.* ¶¶ 5-7, Exs. J and K. Therefore, this entire
14 paragraph must be struck as inadmissible.

15 **13. Jodie Buehler is a private citizen of Spokane Valley and a**
16 **political supporter of mine, and an open critic of the City council and City**
17 **leadership. Plaintiff's counsel in this action have targeted her by seeking all**
18 **my communications with her. See RFP Nos. 25, 26. On February 25, 2025,**
19 **after Ms. Buehler spoke out on my behalf at a City Council meeting,**
20 **Councilmember Higgins, during the City Council meeting, threatened to**
21 **investigate whether Ms. Buehler's dog was a certified service dog, implying**
 that he wanted to ban her dog from escorting her to City Council meetings.
 This behavior chills free speech and discourages civic participation,
 especially from those who are aligned with me politically. As a result, Ms.
 Buehler decided against running for City Council.

22 Merkel's conclusion that Plaintiff's counsel is somehow targeting non-parties to this lawsuit
23 based upon Plaintiff's discovery request is unfounded, conclusory, and speculative. Further,
24 Merkel's statements regarding actions and statements made during a city council meeting
25 constitute inadmissible hearsay and lack foundation. Merkel's statements regarding alleged

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1 threats, his speculation as to what was being implied, and legal conclusions about chilling free
2 speech are irrelevant to the issue being decided, lack foundation, are not evidence based and are
3 therefore inadmissible. Moreover, the statements made about threats stemming from
4 Councilmember Higgins are false. *Hohman Decl.* ¶ 12. This entire paragraph must be struck.

5 **14. Dozens of other residents have expressed their fears to me**
6 **privately that they are afraid to speak out, attend meetings, or donate to my**
7 **legal defense out of fear of city retaliation, particularly due to public**
8 **disclosure requirements through the Public Disclosure Commission (PDC).**
9 **They are not paranoid; their fears are based on what they have seen**
10 **happening to others.**

11 Merkel continues to attempt to testify about out-of-court statements allegedly made by
12 unnamed third parties. Merkel further speculates as to what these third parties have seen and
13 makes argumentative conclusions about the validity of their alleged emotions. These statements
14 are plainly inadmissible.

15 **15. Finally, I have received multiple anonymous threats targeting my**
16 **family, friends, business associates, and political allies. These threats were**
17 **delivered through both my personal and business Facebook accounts, with**
18 **documented instances in December 2024, January 2025, and February 6,**
19 **2025. These threats coincided with heightened public attacks and media**
20 **attention orchestrated by political actors aligned against me. . . .**

21 This paragraph contains hearsay regarding “multiple anonymous threats” that Merkel provides
22 no evidence of beyond the one message dated February 6, 2025. Merkel speculates and makes
23 conclusory statements regarding unnamed political actors and claims they orchestrated public
24 attacks and media attention without any foundation or personal knowledge. These speculative
25 and conclusory statements lack any foundation.

18. . . .These materials are protected by the First Amendment of the
United States Constitution, safeguarding my right to free speech,
association, and political participation without undue government
interference.

1 Merkel submits improper and inadmissible legal conclusions regarding whether actions meet
2 the threshold of a constitutional violation and what constitutes undue government interference.

3 **IV. CONCLUSION**

4 Based on the foregoing, Spokane Valley respectfully requests that the Court strike the
5 identified portions Merkel's Declaration because they are replete with inadmissible statements.

6
7 DATED this 14th day of July 2025.

8
9 LUKINS & ANNIS, P.S.

10 By: /s/ Michael J. Hines

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