

<p>COURT OF APPEALS, STATE OF COLORADO 101 West Colfax, Suite 800 Denver, CO 80202</p>	<p>DATE FILED: March 20, 2015 10:36 AM</p>
<p>District Court, Adams County, Judge Mark Warner 13CV32279 Division : W</p>	
<p>Appellee: DAVID CUBBAGE and Appellants: DEREL RICHTER, DANIEL SCHAEFER, ERIC EWING and KEN HARRIS.</p>	<p>▲ Court Use Only ▲</p>
<p><i>Attorney for Appellee:</i> John W. McKendree, #1209 OFFICES OF JOHN W. MCKENDREE LAWYER & CONSULTANT 7582 E. 121st Drive Thornton, CO 80602 Phone: (303) 618-8780 E-mail: jwm@mckendreeflaw.com</p>	<p>Case No.: 2014CA2102</p>
<p>APPELLEE'S ANSWER TO APPELLANT'S OPENING BRIEF</p>	

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules.

Specifically the undersigned certifies that:

The Brief complies with C.A.R. 28(g).

It contains 6949 words, and is accordingly within the 9,500 word limit and does not exceed 30 pages.

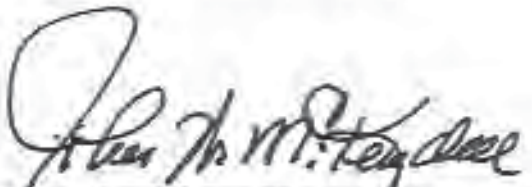
The Brief complies with C.A.R. 28(k).

For the party responding to the issue:

It contains under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for Appeal, and if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

OFFICES OF JOHN W. MCKENDREE
LAWYER & CONSULTANT

s/s 

John W. McKendree, #1209
Attorney for Appellee

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APPELLANT'S ISSUES PRESENTED FOR REVIEW

I.

Whether the District Court erred when it found that the Appellants were not acting within their scope of their public employment when they published the Report and therefore did not enjoy sovereign immunity as public employees [Aplt. Opening, p. 1].

STATEMENT OF THE CASE

1. Identity of the Parties

A. This case arose out of allegations that the individual Defendant and Appellants, Derek Richter, Daniel Schaefer, Eric Ewing and Ken Harris ["Richter", "Schaefer", "Ewing", and "Harris"] members and officers of the Labor Organizations, Defendants, Fraternal Order of Police, Lodge 19 [Hereafter, "Lodge 19"] and the Colorado State Fraternal Order of Police [Hereafter, "State Order"] published defamatory statements against Cabbage, which were later published on the Commerce City Website and the Denver Post Newspaper [*Supp. R. CF, Def. Supp. Exh.*, p.233; also see *R. CF, TCR*, p.563]. Cabbage's original suit was filed on September 17, 2013, and his suit against Richter, Schaefer, Ewing and Harris, was for Slander *per se* and Slander *per quod* [*R. CF, TCR*, pp. 50-52] and for Libel *per se* or in the alternative, Libel *per quod* [*Id.*, pp.52-54] and other claims [*Id.*, pp.54-56].

On April 16, 2014, Richter, Schaefer, Ewing and Harris, filed their Motion to Dismiss for Lack of Subject Matter Jurisdiction [Hereafter, “12(b)(1) Motion”] [*R. CF, TCR*, pp.163-180], Cabbage responded on May 6, 2014 [*Id.*, pp.199-212] and Defendants replied on May 13, 2014 [*Id.*, pp.223-241]. In the individual Appellant’s Motion, they contend Cabbage’s defamation claims are barred by the Colorado Government Immunity Act, [“CGIA”] since, according to the individual Appellants, they were acting as employees of the City of Commerce City when they uttered and published the defamation at issue. From the inception, Cabbage’s position and his evidence demonstrated that these individual Appellants were representing and acting in the interest of and on behalf of Lodge 19/State Order when they published the defamation at issue and were, thus, not protected from immunity under the CGIA.

The District Court directed a Trinity Hearing [*Id.*, pp.258-261; *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916 (1993); all references herein to the August 29, 2014 Trinity Hearing Transcript are, “*R. CF: Def. Sealed Exh., R. Tr. (date)*, p.#, Tr.#, p.#]. In its Order, the District Court determined that the issue of Governmental immunity raised by the individual Appellants, “Is a question of Subject Matter Jurisdiction to be determined by the Trial Court” citing, *Podboy and Gallagher* [*Id.*, p.258; *Podboy v. Fraternal Order of Police, Denver Sherriff Lodge 27*, 94 P.3d 1226, 1229 (Colo. App. 2004);

Gallagher v. Board of Trustees for the University of Northern Colorado, 54 P.3d 386, 388-89 (Colo. 2002)].

The Trinity Hearing was held on August 29, 2014, and the Court thereafter entered the following:

"Findings of Fact

1. All individual defendants were at the time employed by the City of Commerce City, Commerce City Police Department.
2. By virtue of a collective bargaining agreement, the Fraternal Order of Police, Lodge 19, is the sole and exclusive collective bargaining agent for the police officers employed by the Commerce City Police Department.
3. All of the individual Defendants were at the time members of the Colorado Fraternal Order of Police, Lodge 19.
4. AT the time of the original publication of the alleged defamatory document, Philip Baca was the Chief of Police for the Commerce City Police Department.
5. Sean Ford was at relevant times the Mayor of Commerce City.
6. Brian McBroom was at relevant times the Interim City Manager for the City of Commerce City.
7. The Plaintiff was at relevant times employed by the City of Commerce City, Police Department in a supervisory capacity as a Lieutenant.
8. The Defendants explored indemnity from the City of Commerce City after the initiation of the litigation in this case. That request was not approved by the City of Commerce City and/or the insurance carrier. (Ts. Pp. 23-24 Testimony of Karen Stevens.)
9. After the resignation of Chief Phil Baca, Charles Saunier was appointed as the Interim Chief of Police.
10. The, "FOP Letter", the subject of this litigation, was written on Fraternal Order of Police letterhead.
11. Harris signed the "FOP Letter" as president of the FOP. "[i]n representation of the membership".
12. The City Manager and Mayor did not direct the individual Defendants to present the FOP letter and its contents to them."

[*R. CF, TCR*, pp.564-565].

Appellants in their Brief argue with these Courts' Findings of Fact but do not develop a substantial argument that there is not sufficient evidence to support the Trinity Hearing Court's Findings of Fact. In the Order denying the individual Appellant's 12(b)(1) Motion, the Court refers to the, "FOP report" as the, "FOP Letter" and/or alleged, "Defamatory documents" [*Id.*] [Hereafter, "FOP document"]. At the heart of Cabbage's lawsuit, is this document referred to as the, "FOP document" and attached to the Complaint as Exhibit 1 [*R. CF, TCR*, pp. 15-37 and, ¶¶19-24, p.43; *R. CF. Def. Sealed Exh., R. Tr. (August 29, 2014)*, p.20, Tr.20, ln.13-25].

In the Trial Court's review of the evidence and arguments at the Trinity Hearing, it examined the legal standard regarding Governmental Immunity, *citing Podboy, Id.*, 94 P.3d 1229] and *Hovan*, finding that Labor Organizations are traditionally private organizations [*Hovan v. United Bhd. of Carpenters & Joiners*, 704 F.2d 641 (1st Cir. 1983); *R. CF, TCR*, p. 565] and found that, "whether Chief Baca instructed Harris" to draft the FOP document. "It is clear from the language within the FOP letter that it was written with regard to violations" of the Collective Bargaining Agreement between the FOP Defendants and the City of Commerce City [*R. CF, TRC*, pp.569-570, *also see, Supp. R. CF. Def. Supp. Exh., R. Ex. 9*, pp.377-397]. The Court in its Trinity Hearing Order, after reviewing the Collective Bargaining Agreement, the FOP document and the

testimony of the witnesses, concluded, *inter alia*, “It is clear that the [individual Appellants] were acting in a capacity of collective bargaining agents and not as City employees. The conclusion of the [FOP document] indicates that the Defendants were requesting the City to enforce the terms of the Collective Bargaining Agreement in accordance with Article 6 [R. CF. TCR, p.572; R. CF. Def. Sealed Exh., R. Tr. (August 29, 2014), pp.21 Tr,21, ln.11-24; pp.29-31, Tr,29, ln.22-Tr.31, ln.15]. Additionally, after a review of the FOP document, the Trinity Court stated, “[g]iven that the FOP letter itself states that it is written by the FOP members in the attempt to stop the harassment, intimidation, and lack of accountability in the Police Department, the Court may make reasonable inferences to determine that the publication by Harris, Richter, Ewing was while they were acting pursuant to the CBA while serving on their, ‘Special Committee’ [of the FOP]” [*Id.*, p.574]. Therefore the Court found that the FOP document was written by these individual Appellants and Union representatives, “While acting under the terms of the CBA, and only collaterally as public employees.” Thus, the Court concluded that it was in their capacity as Union representatives and officials that the FOP document was published, “Because its *contents* fall within the scope of the Collective Bargaining Agreement, and it was the contents that were published to the City Manager and Mayor,” and later republished. Consequently, the Court ruled that Plaintiff met his burden of proof that the individual Appellants, “Were

not acting in the course or scope of their employment and thus not qualified for governmental immunity from suit under the CGIA regarding Plaintiff's Tort Claims as they are pled." [*Id.*, p.575.]

Cabbage demonstrates herein that this determination of the Trinity Court must be sustained.

STATEMENT OF FACTS

1. Background [Aplt. Opening, pp.2-3].

Cabbage agrees to that portion of the background cited by the individual Appellants [*Aplt. Opening*, pp.2-3].

a. Course of Proceeding

On or about November 1, 2013, all the Defendants filed their Motion to Dismiss pursuant to C.R.C.P. 12(b)(5) arguing, *inter alia*, that should the Court deny the Motion, it should hold a Trinity Hearing in order to ascertain whether the Defendants as public employees are entitled to sovereign immunity [*Id.*, *TCR*, p. 80]. In ruling on this 12(b)(5) Motion to Dismiss, on the issue of a Trinity Hearing, the Trial Court ruled that it would not permit a Trinity Hearing on whether Lodge 19 or the State Order were public entities for purposes of the CGIA. In reaching this determination, the Court relied upon [*Walker v. Bd. of Trustees, Reg'l Transp. Dist.*, 76 F. SUPP. 2d 1105 (D. Colo. 1999) and *Podboy, id.*]. In dismissing the Defendant's Motion, the Court opined, "[b]ased on this understanding of how labor

unions fit into the spectrum of 'public' versus 'non-public' entities, the Court finds that the FOP is not a public entity for the purposes of the CGIA" [*R. CF, TCR*, p.108]. In this same Order, the Court found that CGIA would not apply to the claims against the individual Appellants based on the allegations of willful and wanton conduct [*id.*, pp.107-108].

Additionally, on September 29, 2014, all of the Defendants filed their Motion for Determination of Questions of Law [*R. CF, TCR*, pp.543-544]. The Court after reviewing Defendants' Motion, and Cabbage's Opposition and Motion to Strike [*id.*, pp.577-589], ordered on October 15, 2014, that the Defendants' statements are not subject to absolute privilege, "as statements of 'opinion' but are subject to qualified privilege as they involve the qualifications and on-the-job behavior as a, 'public official' and involved matters of, 'public concern,'" [*Id.* p.656].

Finally, all of the Defendants filed their Motion for Summary Judgment on August 14, 2014 [*R. CF, TCR*, pp.322-344], to which Plaintiff filed his Response in Opposition on September 3, 2014 [*Id.*, pp.361-389] and to which Defendants replied on September 10, 2014 [*Id.*, pp.411-439] and the Court entered its Order denying Defendants' Motion for Summary Judgment on all issues on October 15, 2014 [*Id.*, pp.658-669]. It should be noted that in denying the State FOP's Summary Judgment Claim, the Court ruled that its involvement is supported by the

evidence; Schaefer became Secretary of the State FOP in August 2012, and testified that individual Defendants, “Had numerous conversations regarding the defamation at issue with State FOP Executives.” Additionally, the State FOP Executive testimony was that Harris, Richter and Ewing had continuous conversations with Executive Officers of the State Order. Additionally, the Court found that Ewing wrote a letter on June 24, 2012, confirming the State FOP involvement [*Id.*, pp.666-669].

2. Alleged Sovereign Immunity Facts [*Aplt. Opening*, pp.3-12].

Cubbage does not dispute that prior to the report being created, Harris met with Commerce City Chief of Police, Baca. Cubbage does dispute, however, that such conversation was in his capacity as a Police Official and not as President of Lodge 19 [*Aplt. Opening*, pp. 2-3]. However, Harris, Lodge 19 President, described the decision to create the FOP document, was made by a membership vote and it became an anonymous clump of complaints [*R. CF. TCR*, p.378; *R. CF. Def. Sealed Exh., R. Tr. (August 29, 2014)*, pp.43-44, Tr.43, ln.3-Tr.44, ln.15]. Harris also testified that he organized a committee which included Richter, Ewing, Schaefer and himself to put member complaints in the report [*Id.*, p.378; *also see. R. CF. PTF. Supp. Exh., R. Tr. (April 25, 2014)*, pp.214-215, Tr.142, ln.9-Tr.148, ln.17; pp.40-41, Tr.40, ln.15-Tr.41, ln.23]. Harris also testified that he issued no directives to keep the FOP document confidential, admitted the FOP document was

on FOP letterhead [*R. CF. Def. Sealed Exh., R. Tr. (August 29, 2014)*, p.37, Tr.37, ln.1-16] and that the document was just basically completed because it started out as an FOP venture with Chief Baca's input and direction [*R. CF. TCR*, p.379; *R. CF. Def. Sealed Exh., R. Tr. (August 29, 2014)*, pp.43-44, Tr.43, ln.3-Tr.44, ln.15; *cf., id.*, pp.62-64, Tr.62, ln.9-Tr.64, ln.8].

Schaefer testified on deposition that he made grammatical corrections to the FOP document, placed it on FOP letterhead and prepared its Table of Contents [*Id.*, p.379; *also see, PTF. Supp. Exh. R. Tr. (April 29, 2014)*, pp.182-186, Tr.34, ln.9-Tr.37, ln.16; *and*, pp.184-186, Tr.42, ln.25-Tr.50, ln.8]. Schaefer also testified that in October 2011, there was a vote of the Union's membership that their complaints would be submitted directly by Lodge 19 President Harris [*R. CF. TCR*, p.379; *R. CF. PTF. Supp. Ex. Id.*, pp.187-188, Tr.54, ln.17-Tr.57, ln.12].

Contrary to the testimony of Lodge 19 President Harris, Former Police Chief Baca testified about his conversations with Interim City Manager McBroom, who first showed the FOP document to Baca and informed McBroom that the FOP wanted his resignation [*Id.*, p.380; *R. CF. PTF. Supp. Exh., R. Tr. (June 25, 2014)*, pp.221-222, Tr.16, ln.18-Tr.19, ln.17]; *also see, R. CF. PTF. Supp. Exh., R. Tr. (June 10, 2014)*, pp.157-159, 164-165, Tr. 12, ln.22-Tr.19, ln.13; Tr.62, ln.18-Tr.68, ln.5; *R. CF. Def. Sealed Exh., R. Tr. (August 29, 2014)*, pp.60, Tr.60, ln.16-Tr.61, ln.17]. Thus, the record does not support Appellants' claim that Harris,

following a directive of his supervisor went to Lodge 19 membership as a convenient forum [*Aplt. Opening*, p.4; *cf.*, *R. CF. Def. Sealed Exh., R. Tr. (August 29, 2014)*, pp.62-64, Tr.40, ln.9-Tr.64, ln.18]. Moreover, City Manager McBroom testified that he first saw the FOP document at a December 5, 2011 meeting, when the document was first published to him and Mayor Ford during a PowerPoint presentation by Ewing, Harris and Richter [*R. CF. Def. Sealed Exh., R. Tr. (August 29, 2014)*, pp.77, Tr.77, ln.15-Tr.79, ln.6]. Additionally, McBroom testified that Police Chief Baca never told him that he had in fact commissioned Harris to prepare the FOP document [*R. CF. TCR*, p.380; *R. CF. Def. Sealed Exh., R. Tr. (August 29, 2014)*, pp.62-64, Tr.62, ln.9-Tr.64, ln.8]. Therefore City Manager McBroom's testimony regarding the December 5, 2011 meeting does not support the claims presented by Appellants in their description of that transaction [*Aplt. Opening*, pp.4-5]. Thus, the Findings of Fact of the Trinity Hearing Court, numbered 1, 3-6, 10-12 are supported by substantial evidence in the record [*R. CF. TCR*, p.564]. The FOP document was drafted, prepared and made available to the City by Appellants and it is this publication by the Appellants of the defamatory FOP document at issue which is the principle publication to the City and the etiology of Plaintiff's Complaint. When the membership of the Lodge 19 enacted the resolution in October 2011, to compile their complaints against management, including they were acting in their capacities as members of Lodge 19; when the

officials and Appellants compiled the defamatory FOP document at issue, they did so in their capacity as members and officers of Lodge 19 [*R. CF. Def. Sealed Exh., R. Tr. (August 29, 2014)*, pp.77-79, Tr.77, ln.15-Tr.79, ln.6.]. When they published the report to City officials in early December 2011, they cannot escape liability for that publication by claiming publication was executed by City employees.

Commerce City Attorney, Karen Stevens (“Stevens”) testified in respect to the Collective Bargaining Agreement during the Trinity Hearing [*R. CF. Def. Sealed Exh., R. Tr. (August 29, 2014)*, pp.19-20, Tr.19, ln.18-Tr.20, ln.12; and *Supp. R. CF, Def. Supp. Exh.*, pp.377-397]. As noted by Appellants, [*Aplt. Opening*, pp.5-6], the objective of the Collective Bargaining Agreement is set forth in Lodge 19’s Constitution [*R. CE, TCR*, p. 361; also see, *R. CF. Def. Sealed Exh., R. Tr. (August 29, 2014)*, pp.38-39, Tr.40, ln.7-Tr.39, ln.17; *Supp. R. CF, Def. Supp. Exh.*, pp.341-354]. The Constitution of FOP Lodge 19 provides, *inter alia*, an association of individual employees of the Police Department to, “Unite all employed law enforcement officers and personnel...in an effort to promote our professions, and to strive to obtain terms and conditions relating to employment through representation, legislative activates and all other lawful means.” [*Id.*, Article II (a), p.4]. Further objectives of Lodge 19 are to protect statutory rights of members, encourage higher professional standards and, “To engage in and carry on such functions that will serve the interest of our profession, this organization, and

our FOP membership” [*Id.*, (C), (E), (F), p.4]. Thus, the fundamental law of Lodge 19, its Constitution shall, “Govern the conduct of the membership” [*Id.*, §5, p.5].

The Collective Bargaining Agreement at issue between the City of Commerce City and Defendants Lodge 19 and State Order (Unions), provides in its Preamble that it is, “Designed to promote the improvement of relations between the City of Commerce City and the Police Department employees;” and is governed by the principle of good faith [*Supp. R. CF, Def. Supp. Exh.*, pp.377-397]. This Agreement recognizes the Unions as the, “Sole and Exclusive Bargaining Agent” of Police Department employees in the Bargaining Unit established by Section 21.6(d) of Article VVI of the City of Commerce City Charter [*Id.*, art. 1, p.3]. Most importantly, to the issues at hand is the CBA’s Labor Management Committee’s obligation to discuss and review issues of mutual concern [*Id.*, art. 7(E), p.6] and not limited as suggested by Appellants to topics such as, “promotional procedures, shift bids, health insurance, dental insurance, vision insurance, over time pay and compensatory time” [*See, e.g., Aplt. Opening*, pp.5-6, and its record cites; *cf., R. CF. TCR*, pp. 569-570; also see, *R. CF. Def. Sealed Exh., R. Tr. (August 29, 2014)*, pp.19-20, Tr.40, ln.18-Tr.20, ln.7; pp.57-59, Tr. 57, ln.1-Tr.59, ln.10].

As a consequence, when members and officers of Lodge 19, acting in the interest of Lodge 19, they are Police Officers. As demonstrated herein, and set

forth *supra*, when acting in the capacity of union members or officers, they are not entitled to CGIA protection [*Supp. R. CF, Def. Supp. Exh.*, pp.377-397, *Exhibit 2, art. 7 (B)*, p.6; *also see, R. CF. Def. Sealed Exh., R. Tr. (August 29, 2014)*, pp.19-20, Tr.19, ln.8-Tr.20, ln.12; p.36, Tr.36, ln.15-25; pp.57-59, Tr.57, ln.1-Tr.59, ln.10; pp.77-79, Tr.77, ln.15-Tr.79, ln.6; *and* p.89, Tr.89, ln.13-18]. When Appellants, as noted in the Court's Order of December 10, 2013, noted that Defendant Harris had admitted that he wrote the FOP document along with Richter, Ewing and Schafer, and that they, "did not know, if the statements were true or not," form the foundation for Cabbage's Claims that the FOP document was malicious, intentional, deliberate and that the Appellants knew the statements to be false [*R. CF. TCR*, p. 107; *also see, Id.*, pp.46, 51-52].

The District Court in its Order of December 10, 2013, established the law of this case: "That the FOP is not a separate entity 'created by an intergovernmental contract' with the City and that as a labor organization," Lodge 19 is not a public entity for purpose of immunity under the CGIA. Specifically the Court concluded, "The FOP is not a public entity for purposes of the CGIA." [*R. CF, TCR*, p. 108]. Appellants nevertheless would argue that the members and the officers of the Union are protected by the CGIA while the organization itself is not! Appellants' efforts at escaping the effect of the December 10, 2013 ruling for the members and officers of the Union defies logic, common sense and the law of this case.

The Collective Bargaining Agreement was received into evidence at the Trinity Hearing as Plaintiff's Exhibit 9, during the Testimony of Deputy City Attorney, Ms. Stevens [*R. CF. TCR*, p.569; *R. CF. Def. Sealed Exh., R. Tr.* (August 29, 2014), pp.19-20, Tr.19, ln.18-Tr.20, ln.12]. The individual Appellants argue that their actions were not in furtherance of any Collective Bargaining purposes but were trying to rule out malfeasants, moral issues and criminal activity and that the grievance procedure is outlined in Article 9 of the Collective Bargaining Agreement was not followed [*Aplt. Opening*, pp.6-7]. The Trial Court found that the arguments advanced by the Appellants here were in fact covered by the Collective Bargaining Agreement's Preamble and Article 6 [*Id.*]. The Preamble to Article I sets forth the Collective Bargaining Agreement's objective which is, inter alia, "To provide improve of relations between... Commerce City and the Police Department employees, and to protect the health, safety and welfare by assuring at all times the orderly and uninterrupted operations of the City..." [*Id., Supp. R. CF. Def. Supp. Exh.*, pp.377-397; *R. Cf. TCR*, p.565]. Specifically, the Court found that the FOP document's reference to a new Employee Handbook which provided, "We found no less than 19 issues in violation of the FOP contract" is further evidence contradicting Appellant's arguments before the Trinity Court and this Honorable Court [*Id.*, p.570; *also see, R. CF. TCR*, pp.18-19].

Additionally, the Trial Court noted the specific behavior of the FOP document's complaints of and concerning Chief Baca, prohibited by Article 6 of the Collective Bargaining Agreement [*R. CF: TCR*, p.570]. Moreover, the Court correctly points to other complaints in the FOP document involving a "Hostile working environment," "intimidation," "ridicule," as violative of the Collective Bargaining Agreement, demonstrating the Union orientation and purposes of the FOP document and not a law enforcement purpose as suggested by the Appellants below and before this Court. Appellants suggest that City Attorney Stevens' testimony concerning the differences between grievances under the Collective Bargaining Agreement, and allegation of misconduct and violations of City policy matter in determining whether or not the FOP document was for the purposes claimed by Appellants [*Aplt. Opening*, pp.9-10, and *record cites*]. Appellants also urge that the Trial Court at the Trinity Hearing did not discuss in detail other allegations contained in the FOP document; i.e., an alleged commission of a crime by Cabbage, his alleged bullying behavior, his receipt of favorable treatment by Chief Baca, his complacency in allowing an officer to abuse his office by purchasing a vehicle, Cabbage's alleged complacency in permitting an officer to falsify time sheets and references to the conduct of Sergeant Granger [*Aplt. Opening*, pp.9-11].

Appellants fail to note that the Trial Court stated its analysis will not be to each page of the FOP document but, “only the most relevant factors” in order to determine whether Appellants were acting within the course and scope of their employment as public employees [*R. Cf. TCR*, p.568]. In resolving the question of the course and scope of Appellant’s actions at issue, the Trial Court noted that Harris testified that labor issues usually involve, “issues that can become part of... the Collective Bargaining Agreement” and that the Labor and Management Committee of the FOP could discuss such problems with the City [*Id.*, *also see, Supp. R. CF, Def. Supp. Exh.*, pp.377-397, *Article VII*]. As mentioned *supra*, Harris appointed a special committee to deal with all of the issues in the FOP document after a membership vote [*R. Cf. TCR*, pp.568-569; *R. CF, Def. Sealed Exh. R. Tr. (August 29, 2014)*, pp.40-41, *Tr.40*, ln.15-*Tr.41*, ln.23]. Of course the Trial Court correctly noted that there was no evidence that Chief Baca instructed Harris to draft the FOP document and itemizes in its decision that the evidence at the Hearing, “is clear from the language within the FOP [document] that it was written with regard to violations to the Collective Bargaining Agreement” [*Id.*, pp.569-570]. The Court specifically found that, “when viewing the gestalt, of the timing and circumstances, Defendants Richter, Ewing, Harris and Schaefer were exercising their rights under the CBA to write the FOP letter” [*Id.*, p.570]. The Court noted the FOP document’s detailing, “poor leadership” of then Chief of

Police Baca, complaints about the Employee Handbook, Chief Baca's alleged lying about the Employee Handbook, and the other issues noted above, violative of the Collective Bargaining Agreement [*Id.*, pp.570-572]. The evidence adduced at the Hearing supports all of these factual findings of the Court and the question of whether or not, as Appellant suggests, other references to the contents of the FOP letter were not cited by the Court in reaching its conclusions does not matter; substantial evidence adduced before the Trial Court supports its conclusions. In this latter connection, Baca testified at the Trinity Hearing that he'd been trying to get specifics of work force complaints from Harris and other Union officials from the commencement of his tenure as Chief of Police [*Supp. R. CF. Def. Sealed. Exh. R. Tr. (August 29, 2014)*, pp.62-68, Tr.62, ln.6-Tr.68, ln.13], Stevens testified concerning the provisions of Exhibit 9 dealing with pay for Lodge members while acting as Union officials, performing Union functions, specifically referenced in Article VII of the Collective Bargaining Agreement [*Supp. R. CF. Def. Supp. Exh., pp.377-397; also see, R. CF. TCR, p.503; R. CF. Def. Sealed Exh., R. Tr. (August 29, 2014)*, pp.19-20, Tr.19, ln.18-Tr.20, ln.12].

Thus, the evidence taken as a whole plainly demonstrates that both the slanderous PowerPoint presentation and the publication of the FOP document was nothing more than the action and follow through of the Lodge 19 membership meeting in October 2011. Baca testified, he did not direct Harris to prepare the

FOP document and that there was no duty on the part of any law enforcement officer to report false, unknown, intentionally defamatory information since police officers take an oath to always speak the truth [R. CF. Def. Sealed Exh., R. Tr. (August 29, 2014), pp.62-64, Tr.62, ln.9-Tr.64, ln.8; pp.67-68, Tr.67, ln.12-Tr.68, ln.13]. In this latter connection, then City Manager McBroom testified concerning the PowerPoint meeting presentation of December 5, 2011, that the purpose of the meeting was: "That Mr. Harris, Mr. Richter and Mr. Ewing were officers in the Union and the intent... was to bring to our attention concerns they had about the police department" [R. CF. Def. Sealed Exh., R. Tr. (August 29, 2014), pp.77-79, Tr.77, ln.15-Tr.79, ln.6; p.89, Tr.89, ln.13-18; and Hearing Transcript cites]. The Court correctly noted that the role of the City Manager and Mayor as argued by Appellants were as representatives of the City, meeting with members of the Union regarding areas of mutual concern [R. CF. TCR, pp.572-573].

A simple review of Appellant's claims that their purpose in publishing the FOP document was to comply with police procedures of, *inter alia*, alleged criminal activity, rings hollow when one reviews the FOP document itself. There are no specific allegations as required under neither Title 18 nor the Colorado Rules of Criminal Procedure required to charge a crime as police officers know how to do. Moreover, Appellant's arguments with reference to the Trial Court's complaints about Baca's alleged intimidation, falling within Article 6 make no

sense since the evidence at the Trinity Hearing demonstrated clearly that the Chief of Police was not within the Bargaining Unit [*R. CF. Def. Sealed Exh., R. Tr. (August 29, 2014)*, pp.22, Tr.22, ln.2- ln.17; also see, *Supp. R. CF, Def. Supp. Exh., pp.377*]. Both then Police chief Baca and Interim City Manager McBroom testified to their managerial responsibilities in the interest of the City to meet and confer with Union officials, “regarding generalized complaint of the police force regarding the administration of the department” [*R. CF. Def. Sealed Exh., R. Tr. (August 29, 2014)*, pp.57-59, Tr.57, ln.1-Tr.59, ln.10; pp.77-79, Tr.77, ln.15-Tr.79, ln.6; p.89, Tr. 89, ln.13-18]. Cabbage in his arguments will, as did the Trial Court below focus on the relevant factors of the FOP document and facts at issue.

SUMMARY OF ARGUMENT [Aplt. Opening, pp.12-13]

The evidence and law supports Appellee Cabbage’s claims that the individual Appellants, acting in their capacity as members and officers, drafted and published the FOP document and thus engaged in Slander, Libel, Tortious Interference with Contract and Civil Conspiracy. The record of evidence demonstrates that each of the Trial Courts Findings of Fact are supported by substantial evidence in the record before the Court and thus, the Court correctly did not dismiss Cabbage’s suit against these individual Defendants because as agents, members and employees of their Union, their actions in furtherance of their

membership's objectives are not protected under the Colorado Governmental Immunity Act, C.R.S. 24-10-101, *et seq.*

Moreover, Appellant's alternative argument that the FOP document's contents need to be individually re-examined by the Trial Court to determine if each such allegation were required to be reported by the Appellants, is not supported by either the evidence before the Trial Court or any reasonable analysis of the FOP document itself. The decision of the Court below should be sustained and the Appeal dismissed.

ARGUMENT [Aplt. Opening, pp.13-27]

Standard of Review [Aplt. Opening, pp.13-14].

As noted in *Medina*, the Appellate Court will not disturb the Trial Court's Findings on jurisdictional facts unless they are clearly erroneous [*Medina v. State*, 35 P.3d 443, 452 (Colo. 2001); *also see. Trinity Broadcasting, id.*, at 848 P.2d 924]. Finally, as noted in *Gallagher*, whether these public employees made defamatory comments within the scope of their employment is a question of fact [*Gallagher v. Bd. of Trs.*, TR.54 P.3d 386, 395 (Colo. 2002)].

Preservation of the Issues [Aplt. Opening, p.14].

Appellee, Cabbage agrees that Appellant's statement concerning the Standard of Review and Preservation for Appeal are correctly set forth in their Opening Brief.

- 1. The District Court did not err when it found that the Appellants were not acting within the scope of their public employment when they published the FOP document and therefore, were not entitled to the protection of the CGIA.**

Appellants acknowledge that Lodge 19 is not a public entity because Labor organizations are traditionally private organizations and that members and officers of the FOP cannot be deemed, “public employees” by virtue of their employment with or membership in the FOP. Thus, Appellants acknowledge they do not enjoy Sovereign Immunity if their actions occurred within the scope of their Labor organization activities [*Aplt. Opening*, pp.15-16, *citing, Podboy, Id.*, at 94 P.3d 1229].

At issue in Appellant’s brief is the notion that since the FOP document does not concern wages, hours, shifts or other specific provisions dealing with conditions of employment, it cannot be related to Union activity. For half a century or more, the obligation to bargain collectively has not been limited to the negotiation of an Agreement. Bargaining can and must be carried out during the term of an existing Agreement [*See, e.g., Conley v. Gibson*, 355 US 41, 46 (1957); *NLRB v. Acme Indus. Co.*, 385 US 432 (1967)]. As stated by the US Supreme Court in *Conley*, “Collective Bargaining is a continuing process. Among other things, it involves day to day adjustments in the contract and other working rules, resolution in new problems not covered by existing Agreements, and the protection of employee rights already secured by the contract [*Conley, id.*]. These principles

apply in the public sector Collective Bargaining environment and is intended to foster in a neutral manner, a system in which the conflict between the public employer and the public employee Union may be resolved [*Denver Fire Fighters Local 858, IAFF-CIO v. City and County of Denver*, 292 P.3d 1101, cited at {*R. CF. TCR*, pp.566-567}]. The FOP document at issue plainly fits within these concepts of continuing Bargaining obligations and its contents do not remove Appellants from their legitimate Union activity into law enforcement activity.

As demonstrated at the Hearing below and herein, the CGIA, C.R.S. §24-10-118 (2)(a) does not protect Appellants and that the Court has jurisdiction to proceed to Trial against these Appellants because the evidence supports the Court's Finding, their activities were in furtherance of the Union to which they were employees, officers and members. In other words, their participation in the FOP document was not within the scope of their employment as demonstrated by the totality of the circumstances presented to the Trial Court [*Capra v. Tucker*, 857 P.2d 1346 (Colo. App. 1993); *Klyiewer v. Sopata*, 797 F. Supp. 1569 (D. Colo. 1992); cited in *Podboy, id.*, at 94 P.3d 1230]. Governmental Immunity under the CGIA is, of course a question of subject matter jurisdiction to be determined by the Trial Court [*Podboy, id.*, at 94 P.3d 1229; and, *Gallagher, id.*, at 54 P.3d 388-89].

Although the CGIA establishes immunity from Tort Actions for police officers who are acting in the course and scope of their employment [C.R.S. 24-10-

102; 105; 108; *and* 118] it nevertheless is a statute that derogates Colorado's common law, and thus, its immunity provisions are to be strictly construed and the provisions withholding immunity in the interest of compensating victims of governmental wrong doing are to be broadly construed [*Padilla v. Sch. Dist. No. 1*, 25 P.3d 1176 (Colo. 2001); *Springer v. City and County of Denver*, 13 P.3d 794 (2000)]. Since the underlying facts here are in dispute, the question presented must be a review of the 12(b)(1) determinations made by the Trial Court [See, e.g., *Trinity Broadcasting of Denver, id.*]. As noted, the CGIA's immunity provisions must be strictly construed [*Walton v. State*, 968 P.2d 636, 643 (Colo. 1998)]. Labor organizations, even in the public sector have not only traditionally be considered not public, not private entities [*Hovan, id.*] and in this jurisdiction the Federal District Court has rejected the notion that a Labor Union representing public employees is a public entity under the CGIA, a concept accepted by this Honorable Court in *Podboy* [*Podboy, id.*, at 94 P.3d 1229].

It is undisputed that the individual Defendants were both members and officers of the FOP and employed as Police Officers with the City of Commerce City. The dispute between this Honorable Court between the parties is a factual dispute as to whether the Defendant's alleged defamatory statements occurred during their membership in the FOP or as employees of Commerce City. Two different District Court Judges have ruled on this issue in one form or another [*R.*

CF. TCR, p.576] and Judge Goodbee in his Order on Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction of May 20, 2014. Of course, Judge Goodbee entered the Order for the Trinity Hearing since the facts were disputed, which dispute was then resolved by the Court's September 30, 2014, determination at issue [*Also see, R. CF. TCR*, pp.103-109].

Appellants, noting the limited amount of precedent on the issues presented spends considerable time in their brief distinguishing the seminal case of, *Podboy* from the facts presented in this case [*Aplt. Opening*, pp.16-21]. In this effort Appellants fail, as noted in *Podboy*, the FOP officers there, as Union officials were expected to act in the best interest of the FOP in respect of Denver City interests; and the Court noted that the duties and responsibilities of the officers of the FOP are distinct upon their law enforcement duties for the City of Denver. The Court noted, "[T]hus, their employment as law enforcement officers for the City and County of Denver and their membership in FOP, may in some respects, be adverse to one another. Consequently, under strict construction of the CGIA's immunity provisions [the officers] are not entitled to immunity under the CGIA" [*Podboy, id.*, at 1230]. The Trial Court addressed these issues explicitly. In its analysis the Court focused on the most relevant factors, which were that Harris was at all relevant times President of the FOP Lodge 19 and that he testified before the Court that as President, he would meet members of the Police Department to

discuss labor issues or contractual issues [*R. CF. TCR*, p.568]. In its analysis, the Trial Court below described Harris' appointment of the Special Committee which included the Appellants, and then in October 2011, the Committee held a meeting at the Union Hall regarding preparation of the FOP document [*Id.*, pp.568-569]. Chief Baca, according to the Court's analysis, recalled asking Harris to bring forward specific complaints [*id.*, p.568, citing, *R. CF. Def. Sealed Exh., R. Tr. (August 29, 2014)*, pp.62-64, Tr.62, ln.6-Tr.64, ln.1]. The court noted that there was, "No evidence that Chief Baca specifically instructed" Harris to draft a document and that the FOP document lead to Baca's resignation as Chief of Police. Thereafter, the Court with specific reference to the evidence and the Collective Bargaining Agreement demonstrated that it, "Is clear from the language within the FOP [document] that it was written with regards to violations" of the Collective Bargaining Agreement [*R. CF. TCR*, p.568]. With specific reference to Hearing Exhibit 9, Article 6 of the Collective Bargaining Agreement, the Court demonstrated that Appellants, "were exercising their right under the CBA" to draft the FOP document. As discussed *supra*, the FOP document, as demonstrated by the Trial Court, detail Chief Baca's poor leadership, "no less than 19 issues in violation of the FOP contract" his involvement with regard to the Employee Handbook, violating the Collective Bargaining Agreement, his creation of a Hostile Work Environment, including intimidation and ridiculing employees in

violation of the Collective Bargaining Agreement; his favoritism and inequity in managing personnel, including the administration of discipline and bias in testing practices; and the Court notes according to the report, "He created an environment for fear of retaliation and the 'good ol' boys club'" [*id.*, pp.567-568]. In further demonstration of its analysis, that the FOP document is a Union as opposed to a law enforcement document, the Trial Court discussed Baca's management of resources and the budget, promotions without changes in responsibilities, and notes the FOP document's conclusion that, "As a recognized bargaining unit we cannot and will not allow this conduct to continue without rectification. We cannot allow Chief Baca to lead when he himself stated, '...I can't control my middle management...,' to the FOP Lodge 19 President, Harris, a mere three weeks ago." [*id.*, pp.568-569]. These issues in the FOP document include allegations against Cabbage and some ancillary allegations against Baca did not in the Court's view remove the complaint of behavior as part of the Collective Bargaining violation complaint of the Appellants. The Court then opined, "Viewing the meeting with the City Manager and the Mayor in light of the context in which the FOP [document] was written, it is clear that the Defendants were acting a capacity of Collective Bargaining Agents, and not as City employees." Thus, the Appellants, "Were requesting the City to enforce the terms of the Collective Bargaining Agreement, in accordance with Article 6." [*id.*, p.569]. In attempting to escape the

obvious conclusion of the Trial Court, including the impact of the Collective Bargaining Agreement, Appellants seek to avoid this obvious conclusion by changing history. They claim that Baca's conversation with Harris was a directive rather than action of the membership. Appellants do not however, dispute that the report was prepared by the membership after a membership vote [*Aplt. Opening*, pp.18-19]. Rather than acknowledging for the protection of the Collection Bargaining obligation regarding the administration of the affairs between the Union and the City, Appellants assert all communications between these Union officials and City officials were matter of law enforcement rather than membership concerns of the FOP. There is little citation to the record of evidence cited by Appellants to support this proposition, primarily because it does not exist. They urge that the Trial Court pigeon holed the evidence to fall within Articles 6 and 7 of the Collective Agreement. Appellants then assert, "The mere fact that the CBA contains language stating that the parties will discuss issues of mutual concern does not make every discussion between a police officer/employee/union member and a City official exclusively within the context of the CBA" [*Aplt. Opening*, pp.20-21]. Of course, at no place does the Trial Court assert that every conversation between Union officials and the City were related to Union activity, but what the Court did do with reference to the evidence directly before it, pointed

directly to those provisions of the FOP document that specifically related to Union-management issues under the Collective Bargaining Agreement.

As noted in *Podboy*, under the common law, the most important factor in determining whether a worker qualifies as an employee is the alleged employers right to control the details of performance [*Norton v. Gilman*, 949 P.2d 565 (Colo. 1997), cited in *Podboy*, *id.*]. The *Podboy* Court correctly noted that the City did not have the right to control the officer's performance on behalf of the FOP, moreover, the City does not have the authority to hire, fire, appoint or dismiss members and officers of the FOP. Thus, the *Podboy* Court ruled, the officers, "In carrying out their duties as officers of FOP, cannot be considered employees of the City and County of Denver as a matter of law and thus are not entitled to CGIA immunity." Consequently, Appellants are inaccurate when they state that, "finding the entire contents of the FOP document fall within the scope of the CBA and that the conduct of Appellants were solely within their Union capacity" is erroneous. Plainly, the evidence adduced at the Hearing, demonstrated that the FOP document which was voted on by the Union membership, printed and published on the FOP letterhead and signed by the Union President, Harris, demonstrate that the actions of compiling the defamation against Cabbage contained therein is as the Court found, union activity, not protected by the CGIA.

CONCLUSION

Since the record of evidence demonstrates that the Appellant's actions were in their Union interest and not their public employment interest, thus, not eligible for protection under the CGIA, this Appeal should be denied and the determinations of the District Court sustained.

REQUEST FOR ORAL ARGUMENT

Appellee respectfully requests that the Appellate Court order Oral Argument:

Respectfully submitted on this 20th day of March, 2015.

OFFICES OF JOHN W. MCKENDREE
LAWYER & CONSULTANT

s/s


John W. McKendree, #1209

Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify on this 20th day of March, 2015, a true and correct copy of the forgoing: Appellee's Answer to Appellant's Opening Brief was filed with the Court of Appeals and Adams County District Court via ICCES File & Serve and served on the following via ICCES and UPS, sufficient postage prepaid, as indicated below:

Colorado Court of Appeals
2 East 14th Avenue
Denver, CO 80203

Adams County District Court
1100 Judicial Center Drive
Brighton, CO 80601

Reid Elkus
Ryan Coward
501 South Cherry Street, Suite 920,
Denver CO 80246

s/s 
Shanna Waterson