DATE FILED: February 18, 2015 5:56 PM

COURT OF APPEALS, STATE OF COLORADO 101 West Colfax, Suite 800 Denver, CO 80202 District Court, Adams County. Judge Mark Warner 13CV32279 Division: W **Appellee: David Cubbage** and **Appellant**: **DEREK RICHTER, DANIEL SCHAEFER, ERIC EWING and KEN HARRIS.**	▲ **COURT USE ONLY** ▲
Attorneys for Appellants Reid J. Elkus, #32516 Ryan Coward, #38906 Address: Elkus Sisson & Rosenstein, P.C. 501 South Cherry Street, Suite 920 Denver, Colorado 80246 Telephone Number: (303) 567-7981 Email: relkus@elkusandsisson.com rcoward@elkusandsisson.com	Case Number: 2014CA2102
OPENING BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this amended 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 6,110 words, and is accordingly within the 9,500 word limit.

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

For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.___, p.___), not to an entire document, where the issue was raised and ruled on.

Elkus, Sisson & Rosenstein, P.C.

/s/Ryan S. Coward /original signature on file
Ryan S. Coward, #38906
Reid J. Elkus, #32516
Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ISSUES PRESENTED FOR REVIEW

I.

Whether the District Court erred when it found that the Appellants were not acting within the scope of their public employment when they published The Report and therefore did not enjoy sovereign immunity as public employees.

STATEMENT OF THE CASE

1. Identity of the Parties

A. This case arises out of allegations of libel and slander. The Appellee, David Cubbage, was a member of the Commerce City Police Department in late 2011 through 2013 and was also a member of the Colorado Fraternal Order of Police, Lodge 19. *Supp. R. Court File, Def. Supp. Exh.*, p. 234. Mr. Cubbage is the Plaintiff in an on-going lawsuit where he alleges that a document (hereinafter "The Report) drafted by the Appellants, and partially published by the Denver Post, caused harm to his reputation. The Appellants and Defendants, Derek Richter, Daniel Schaefer, Eric Ewing and Ken Harris were also police officers with the Commerce City Police Department in late 2011 through 2013. *Id*. These individuals are also members of the Colorado Fraternal Order of Police, Lodge 19. *Id*. The Appellants have alleged that the Appellee lacks subject matter jurisdiction

because the Appellants are immune from suit under the Colorado Governmental Immunity Act - due to the fact that the alleged conduct occurred within the scope of their public employment. The Trial Court held a *Trinity* hearing where ultimately, on September 30, 2014, the Court found that the Appellants were not public employees when they published The Report. In finding that the Appellants were not public employees, the Trial Court concluded that the Appellants did not enjoy sovereign immunity under the Colorado Governmental Immunity Act, C.R.S. § 24-10-118(2)(a). The Appellants are seeking appellate review of this final order pursuant to C.R.S. § 24-10-118(2.5).

STATEMENT OF FACTS

1. Background.

The allegations in this case arise out of a report created by the Appellants that was given to their employer. *Supp. R. Court File, Def. Supp. Exh.*, p. 233. Following a Colorado Open Records Act request by the Denver Post, portions of the report were published by the newspaper. *Id*; *R. Tr. (Aug. 29, 2014)*, p. 22. ln. 19-22. The Appellee alleges in his lawsuit that the statements within The Report were defamatory. *Id.*

On April 16, 2014, the Appellants filed a C.R.C.P. 12(b)(1) motion to dismiss for lack for lack of subject matter jurisdiction. *Supp. R. Court File, Def.*

Supp. Exh., p. 304 – 317. The Appellants argued that they were immune from suit under the Colorado Governmental Immunity Act, C.R.S. § 24-10-118(2)(a), because their actions were within the scope of their public employment. *Id*. On August 29, 2014, a hearing was held by the Trial Court where evidence was presented on the question of whether the Appellants enjoy sovereign immunity with respect to their actions at the heart of the lawsuit. On September 30, 2014, the trial court issued an order denying the motion to dismiss and finding that the Appellants did not enjoy sovereign immunity as their actions fell within their capacity as union members and not as public employees. *Supp. R. Court File, Def. Supp. Exh.*, p. 245.

2. Facts Relevant to the Appellant's Sovereign Immunity.

At all relevant times Ken Harris (hereinafter "Harris") was both the President of Colorado Fraternal Order of Police, Lodge 19 (hereinafter "Lodge 19"), and also a police officer employed by the Commerce City Police Department. *Id*. at 234. Sometime prior to The Report being created, Harris met with the Commerce City Chief of Police, Phil Baca (hereinafter "Baca") to discuss concerns about the department. *Id*. at 239; *R. Tr. (Aug. 29, 2014)*, p. 42, ln. 24 – p. 42, ln. 12. This meeting occurred not because Harris wanted to discuss Lodge 19 business with Baca, but instead because of concerns expressed to Harris by members of the

police department. *Id*. After hearing the concerns that Harris had brought to Baca, which were vague and lacked specifics, Baca instructed Harris to "gather specifics." *Id*; *R. Tr. (Aug. 29, 2014)*, p. 67, ln 12 – 22. Baca admitted that he directed Harris to do this. *R. Tr. (Aug. 29, 2014)*, p. 67, ln 12 – 22.

While Baca did not tell Harris how to gather specifics or how to present the complaints, Harris, following the directive of his supervisor, went to the Lodge 19 membership because the membership consisted of a convenient forum consisting of almost all the police officers within the Commerce City Police Department. *R. Tr. (Aug. 29, 2014)*, p. 46, ln 24 – p. 47, ln 12. Harris then took the matter to a Special Committee, which consisted of members of the FOP that Harris tasked with gathering the specific complaints. *Supp. R. Court File, Def. Supp. Exh.*, p. 238. On the Special Committee were the Appellants, who like Harris, were both simultaneously members of Lodge 19 and police officers employed by Commerce City. *Id*, at 234.

After specific complains where gathered, a meeting was held at a firehouse attended by members of the Special Committee and Sean Ford (hereinafter "Ford"), the Mayor of Commerce City. *R. Tr. (Aug. 29, 2014)*, p. 93, ln 12 – p. 94 ln 22. At the meeting, the Appellants discussed concerns they had resulting from what they had learned when gathering complaints. The Appellants did not provide

Ford with anything in writing during the meeting. *Id*. at p. 94, ln 12 – 13. As a result of the complaints discussed during the meeting, Ford helped arrange a meeting at City Hall with City Manager Brian McBroom (hereinafter "McBroom") to discuss the complaints. *Supp. R. Court File, Def. Supp. Exh.*, p. 243 - 244. Ford directed the Appellants to "put the information together" for presentation to McBroom. *R. Tr. (Aug. 29, 2014)*, p. 94, ln. 14 – 19. Like Baca, Ford was not specific in how the information should be presented.

On December 5, 2011, a meeting was held with the Appellants, McBroom and Ford where, for the first time, The Report was provided to city officials. *Supp. R. Court File, Def. Supp. Exh.*, p. 244; *R. Tr. (Aug. 29, 2014)*, p. 93, ln. 25 – p. 94, ln. 2. The Report appeared on FOP letterhead and was signed by Harris. *Supp. R. Court File, Def. Supp. Exh.*, p. 234. During this meeting a collective bargaining agreement, which exists between Lodge 19 and the City of Commerce City, was never discussed *R. Tr. (Aug. 29, 2014)*, p. 86, ln. 8 – 11. No specific complaints were discussed during this meeting.

According to Karen Stevens (hereinafter "Stevens"), a Commerce City Attorney, the collective bargaining agreement (hereinafter "CBA") between Commerce City and Lodge 19 addresses topics such as promotional procedures, shift bids, health insurance, dental insurance, vision insurance, overtime pay and

compensatory time. *R. Tr. (Aug. 29, 2014)*, p. 26, ln. 22 – p. 27, ln. 12. *See also Supp. R. Court File, Def. Supp. Exh.*, p. 175 - 195. As found by the Trial Court, while the CBA contains a grievance process to address the concerns of Lodge 19 in relation to the topics covered by the CBA, the grievance procedures outlined in Article 9 were not followed. *Supp. R. Court File, Def. Supp. Exh.*, p. 235.

The Trial Court found that on December 5, 2011, The Report was provided to city officials pursuant to Article 7 of the CBA. *Id*. Article 7(e) of the CBA contains a "catch-all" phrase where it states:

> The City and Employee Organization agree to establish a Labor Management Committee which shall consist of two members appointed by the President, and two members appointed by the Chief. *The Committee will discuss and review issues of mutual concern*. Meetings will be held upon request and shall be scheduled as expeditiously as possible.

Supp. R. Court File, Def. Supp. Exh., p. 180. (*emphasis added*). There was no evidence introduced during the August 29, 2014, hearing to establish that the Appellants and city officials reached an agreement to meet specifically in accordance with Article 7 of the CBA. While testimony was introduced during the hearing that Article 7 exists and that the meeting could have been held pursuant to the Article, such a determination was not made at the time of the meeting. *R. Tr. (Aug. 29, 2014)*, p. 29, ln. 25 – p. 30 ln. 8.

In determining whether the Appellants actions were within the scope of their employment, the Trial Court, *sua sponte*, considered The Report as evidence though it was not introduced by either party. *Supp. R. Court File, Def. Supp. Exh.*, p. 238. The Trial Court considered the document in whole when determining whether its contents were drafted within the scope of the Appellants' public employment as opposed to considering each of the statements contained within and the nature of those statements. *See generally, Supp. R. Court File, Def. Supp. Exh.*, p. 233 - 246.

In making his determination, the Trial Court found that:

> Given the overall context in which the FOP letter was drafted, written, published to the City, *and the scope of the complaints written against Baca*, the FOP letter was written by FOP representatives while acting under the terms of the CBA*, and only collaterally as public employees*.

Supp. R. Court File, Def. Supp. Exh., p. 245. (*emphasis added*). The Trial Court further found that the contents of The Report fall within the scope of the CBA.

In finding that the contents of The Report fall within the four-corners of the CBA, the Trial Court took note of certain allegations within The Report, to include: the allegation that Baca lied about his involvement with the Employee Handbook and had a duty to inform the city staff about the elements in the handbook pursuant to the CBA; that Baca created a hostile work environment and

ridiculed employees for speaking out against his ideas; that based upon his demeanor, employees should fear to disagree with Baca; that Baca engaged in favoritism and inequity in leadership and management; that Baca reached out to some officers but not others when they were involved in shootings; that Baca hired certain officers without requiring them to go through the normal selection process; that several officers were appointed to "special assignments" without any announcement or testing process; no discipline was taken against officers who engaged in bias testing practices or who did not fill out their timesheets accurately; that Baca failed to treat people equally or fairly; that Baca mismanaged resources and the budget; and that Baca created an environment of complacency, deceptiveness and general lack of integrity. *See Supp. R. Court File, Def. Supp. Exh.*, p. 240 - 241.

The CBA is only mentioned one time within the entire twenty-three (23) page report. *See Supp. R. Court File, Def. Supp. Exh.*, p. 196 – 218.

The Trial Court concluded that these complaints about Baca, which include complaints of intimidation, fell within Article 6 of the CBA – presumably because the Court found that Baca was a member of the Employee Organization. Article 6 begins with, "neither the Employee Organization nor its officers, agents, representatives, or members will intimidate, interfere with, or coerce employees

who are either members or non-members of the Employee Organization." Based upon this, the Trial Court concluded that the complaints within The Report were merely the Appellants requesting that Commerce City enforce the terms of the CBA in accordance with Article 6. *Supp. R. Court File, Def. Supp. Exh.*, p. 239, 242.

The Preamble of the CBA defines "Employee Organization" as the Fraternal Order of Police Lodge 19. *Supp. R. Court File, Def. Supp. Exh.*, p. 177. The Chief of Police is a member of management and not a member of the Employee Organization. *See generally id.* As explained by Stevens when discussing the CBA, "the bargaining unit is actually defined in our City charter. It is the members of the police department except for the Chief of Police and command . . . ." *R. Tr. (Aug. 29, 2014)*, p. 21, ln. 25 – p. 22, ln. 8. Thus the Trial Court made this finding about Article 6 of the CBA even though Baca is not a member of the Employee Organization and therefore his actions are not covered by this provision. *See Supp. R. Court File, Def. Supp. Exh.*, p. 242.

In testifying about the contents of The Report and whether the complaints fell within the scope of employment versus the types of complaints that might be discussed under the CBA, Stevens testified that the nature of the complaints are more akin to employee allegations of misconduct or malfeasance. *R. Tr. (Aug. 29,*

2014), p. 29, ln 10-16. Stevens testified that grievances under the CBA are different than those alleging misconduct and violations of city policy, which would be handled by Commerce City's Human Resources Department. *R. Tr. (Aug. 29, 2014)*, p. 28, ln. 2 – p. 29, ln. 8. Stevens acknowledged that allegations such as criminal conduct, lying on the job, falsifying time sheets and violations of city policy are outside the scope of the CBA. *Id*.

While the Trial Court took note of some allegations within of The Report, as discussed above, the Trial Court did not discuss other allegations - or in some cases briefly noted the nature of a complaint within a footnote. For example, the Trial Court mentioned in a footnote the allegation that the Appellee committed a crime himself by covering up a domestic violence incident that allegedly occurred at his house. *Supp. R. Court File, Def. Supp. Exh.*, p. 242, fn. 7. *See also Supp. R. Court File, Def. Supp. Exh.*, p. 208. The Trial Court also mentioned the allegations that the Appellee engaged in bullying behavior and received other favorable treatment from Baca. *Supp. R. Court File, Def. Supp. Exh.*, p. 242, fn. 7. The Trial Court excluded mention of: the allegation that Appellee was complacent in allowing an officer to abuse his office by purchasing a vehicle from an offender for one dollar while writing a ticket to that offender (*Supp. R. Court File, Def. Supp. Exh.*, p. 214); the allegation that the Appellee was complacent in permitting a fellow officer

to falsify timesheets (*Supp. R. Court File, Def. Supp. Exh.*, p. 207); that Sergeant Granger abused his office by opening criminal complaints against fellow officers without probable cause (*Supp. R. Court File, Def. Supp. Exh.*, p. 215); and an allegation that Sergeant Granger accepted gratuities in violation of state law (*Supp. R. Court File, Def. Supp. Exh.*, p. 207). These examples provide contrast to the portions of The Report discussed by the Trial Court.

While not specifically discussing the differences between allegations within the scope of employment and bargaining pursuant to the terms of the CBA, Chief Baca acknowledged that a complaint about morale is a different type of complaint than one regarding pay, vacation or overtime. *R. Tr. (Aug. 29, 2014)*, p. 69, ln. 22 - 25.

Though Charles Saunier (hereinafter "Saunier"), the interim Commerce City Chief of Police who replaced Baca, testified that he had not read The Report, he did explain that there is a Commerce City policy or departmental policy that required complaints be provided or made known to city management. *R. Tr. (Aug. 29, 2014)*, p. 120, ln 17 – p. 121, ln 6. Specifically, Saunier testified:

> The internal investigation policies for the police department call that every complaint has to be forwarded for investigation. The city has certainly conduct policies that require that any city employee brings forward the complaints of malfeasance or concerns about supervisors

> directly to HR. And then there's laws like Chief Baca had testified to that require possible criminal activity that has to be reported.

Id.

With respect to a police officer's obligation to report crimes, Chief Baca acknowledged that law enforcement officers have a duty to report crimes they believe were committed by fellow police officers. *R. Tr. (Aug. 29, 2014)*, p. 70, ln. 1 – 3. Stevens also gave similar testimony. *R. Tr. (Aug. 29, 2014)*, p. 28, ln. 22 – 25.

Despite this, the Trial Court concluded that all of the allegations within The Report were pursuant to the CBA and not within the scope of the Appellant's employment or in accordance with their mandate as law enforcement officers. *Supp. R. Court File, Def. Supp. Exh.*, p. 245.

SUMMARY OF THE ARGUMENT

On September 17, 2013, the Appellee filed suit. The Appellee alleged that Appellants, in their individual capacity and not as employees of the Commerce City Police Department, engaged in slander, libel, tortious interference with contract and civil conspiracy. The Appellee claims that the Appellants, acting in their role as members of the Fraternal Order of Police (FOP) Lodge 19, drafted and published The Report. At all times relevant, it has been the Appellants' contention

that when they produced the document to city management they did so as law enforcement officers and public employees and not as members of Lodge 19. As a result, the Appellants moved to dismiss the Appellee's claim under the Colorado Governmental Immunity Act, C.R.S. §24-10-101, *et seq*. The Trial Court committed reversible error when it found that the complaints within The Report were not made within the Appellants' scope of public employment.

In the alternative, the Appellants believe that their role as law enforcement officers creates a unique situation where public policy mandates the reporting of misconduct, malfeasance and potential criminal activity of other law enforcement officers. Because of this, the Court should have examined each allegation within The Report individually to determine if the allegation was of such a nature that the Appellants were required to report the allegation. Where the allegations concerned a report of alleged criminal conduct, the activity was within the scope of Appellants' employment and they enjoyed sovereign immunity as law enforcement officers and public employees.

ARGUMENT

Standard of Review.

If a C.R.C.P. 12(b)(1) motion asserting governmental immunity "is a factual attack on the jurisdictional allegations of the complaint . . . the trial court may

receive any competent evidence pertaining to the motion." *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 924 (Colo. 1993). "Just like any other finding of fact, an appellate court will not disturb the trial court's findings of jurisdictional fact unless they are clearly erroneous." *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001). The question of whether a public employee made defamatory comments within the scope of his employment is a question of fact. *Gallagher v. Bd. of Trs.,* 54 P.3d 386, 395 (Colo. 2002).

Determinations of law, however, are reviewed *de novo*. *See Medina v. State,* 35 P.3d 443, 452 (Colo. 2001).

Preservation of the Issues.

The matter being appealed in this case was preserved by the Appellants when they sought dismissal of case for lack of subject matter jurisdiction on April 16, 2014. *Supp. R. Court File, Def. Supp. Exh.*, p. 304 – 317. The Trial Court denied this request for dismissal on September 30, 2014. *Supp. R. Court File, Def. Supp. Exh.*, p. 233 – 246.

I.

Whether the District Court erred when it found that the Appellants were not acting within the scope of their public employment when they published The Report and therefore did not enjoy sovereign immunity as public employees.

Under the CGIA, C.R.S. § 24-10-118(2)(a),

> A public employee shall be immune from liability in any claim for injury, whether brought pursuant to this article, *section 29-5-111, C.R.S.*, the common law, or otherwise, which lies in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chose by a claimant and which arises out of an act or omission of such employee occurring during the performance of his duties and within the scope of his employment unless the act or omission causing such injury was willful and wanton; except that such immunity may be asserted in action for injuries resulting from the circumstances specified in *section 24-10-106(1)*.

Id. Pursuant to Colorado law, "public employee" means an *officer*, employee, servant, or authorized volunteer of the public entity, whether or not compensated, elected, or appointed. *See* C.R.S. 24-10-103(4)(a). A law enforcement officer is a public employee. *Podboy v. FOP,* 94 P.3d 1226, 1229 – 30 (Colo. Ct. App. 2004).

While a law enforcement officer is a public employee, Lodge 19 is not a public entity. *Id*. This is because labor organizations are traditionally private organizations. *Id*. Members and officers of the Fraternal Order of Police (FOP) cannot be deemed "public employees" simply by virtue of their employment with,

or membership in the FOP. *Id*. Thus, the Appellants in this case do not enjoy sovereign immunity if their actions occurred within the scope of their labor organization. However, if the Appellants' actions in this case occurred within the scope of their public employment, then they may be immune from suit under the CGIA.[1]

Within the context of law enforcement organizations and specifically the FOP, there is limited precedent. The seminal case addressing the question of governmental immunity in this context is *Podboy*. In *Podboy*, the defendants were members of the FOP. The plaintiff (*Podboy*) was counsel for the Denver Sheriff's union, a competing collective bargaining agent. Plaintiff and the Denver Sheriff's union submitted a bid to unseat FOP as the exclusive bargaining agent for the 2003-2004 collective bargaining session with the City and County of Denver. During the election of the collective bargaining agent, defendants sent a letter to the Denver Sheriff Department employees stating that plaintiff's "experience is 100% as a Criminal Attorney," that he has no experience in collective bargaining or labor law, and that he had been convicted of a crime. *Podboy*, 94 P.3d at 1228.

[1] In the Trial Court's order certifying the appeal in this case, the Court held that the Appellee failed to timely comply with the GCIA notice requirements. Therefore, if the Appellants' conduct is found to be within the scope of their public employment, the Appellee's claims against the Appellants must be dismissed. *Supp. R. Court File, Def. Supp. Exh.*, p. 219.

Podboy sued the FOP claiming defamation, which resulted in the FOP moving to dismiss the case under the CGIA. *Id*.

The Colorado Court of Appeals was tasked with determining whether the CGIA applies to the individual FOP defendants in the *Podboy* case. In determining the scope of the CGIA and its application to the *Podboy* defendants, the Court examined whether the actions of the defendants fell within the scope of their employment. Factors the court cited that guided its determination as to whether the defendants' actions were within the scope of their employment included: if the work done is assigned to him by his employer, was the work is necessarily incidental to employment, or if the work is customary in the employer's business. *Podboy*, 94 P.3d at 1230 (citing *Pediatric Neurosurgery, P.C. v. Russell*, 44 P.3d 1063 (Colo. 2002)). The court explained that the determination is based upon the totality of the circumstances. *Podboy*, 94 P.3d at 1230.

In reaching its determination that the *Podboy* defendants were *not* "public employees," the court found pertinent that the defendants' conduct occurred in the course of FOP Lodge 27 Board of Directors meetings which was in furtherance of FOP Lodge 27 business concerning collective bargaining between the Denver Sheriff Department employees and the City and County of Denver. The Court also considered the election that occurred during this meeting to select the collective

bargaining agent for negotiations. *Id*. at 1231. In other words, the conduct of the *Podboy* defendants was strictly oriented as union activity, which is not protected under the CGIA. *Id*. at 1230-31.

This case is distinguishable from *Podboy* in a number of ways. In *Podboy*, the court held that "[a]lthough [the defendants] would not be members of FOP but for their employment with the City and County of Denver, the actions for which they are being sued were not undertaken pursuant to their duties or within the scope of their employment as law enforcement officers." *Id*. at 1231. The court went on to note that "officers of FOP are expected to act in the best interests of FOP irrespective of the City and County of Denver's interest, the duties and responsibilities of [the defendants] as officers of FOP are distinct from those duties and responsibilities associated with their employment as law enforcement officers for the City and County of Denver. *Id.*

Unlike *Podboy* where the court found that the defendants' actions were distinct from their duties and responsibilities as law enforcement officers, the actions of the Appellants in this case are not separable.

The Appellants initially began to compile complaints because Harris was directed by his supervisor to "provide specifics." *R. Tr. (Aug. 29, 2014)*, p. 67, ln 12 – 22. This was an order from a supervisor to an employee and therefore within

the scope of employment. Harris then took the complaint to the Lodge 19 membership, which consisted of most of the employees of the Commerce City Police Department. This action should be viewed partially as Harris making his own choice as an employee on how to execute his supervisors' directive, and partially as union activity since he went to the members of Lodge 19 as opposed to staying within the walls of the police department. After the complaints were gathered, they were presented to Ford at a firehouse - as opposed a union hall or the police department. This again cuts both ways. Ford then directed the Appellants to "put things together" and he arranged a meeting at City Hall with McBroom. *R. Tr. (Aug. 29, 2014)*, p. 94, ln. 14 – 19. Like Baca's directive, this again appears to be a city official giving a city employee a directive and therefore within the scope of employment. Following Ford's non-specific directive, the Appellants put the complaints into a report on FOP Lodge 19 letterhead signed by Harris as president of the Lodge. This again appears to be mixed with the Appellants' actions viewed partially as following Ford's directive as employees by compiling the complaints into a written report, and partially as union activity since the report was on Lodge 19 letterhead signed by the lodge president. The Report was presented to Ford and McBroom in City Hall where the contents were not specifically discussed. Ultimately Commerce City, finding that the document was

subject to disclosure under the Colorado Open Records Act, disclosed The Report to the Denver Post upon the newspaper's request.

This sequence of events is unlike *Podboy* because the Appellants actions were not distinct from their duties and responsibilities as law enforcement officers. Instead, the actions of the Appellants were a complete mixture of their roles as public employees and union members. Indeed even the Trial Court noted the inseparable nature of the Appellants actions when it found that The Report was produced in the Appellants collateral role as public employees. *Supp. R. Court File, Def. Supp. Exh.*, p. 245.

Further muddying the water, and thus more closely associating the Appellants' actions with their role as public employees, is the nature of the allegations within The Report. In its written opinion, the Trial Court discusses a list of complaints within the report that relate to Chief Baca's conduct as the Chief of Police. *Supp. R. Court File, Def. Supp. Exh.*, p. 240 – 242. Though one complaint does mention the CBA, the gravamen of the allegations relate to workplace type complaints - as opposed to labor and collective bargaining types complaints such as overtime, insurance and vacation. Such was the opinion of Stevens as the Assistant City Attorney who testified that the types of allegations within The Report would typically be handled by the City's Human Resources

Department. *R. Tr. (Aug. 29, 2014)*, p. 28, ln. 2 – p. 29, ln. 8. This shows that the allegations in The Report were so closely related to the Appellants employment that the conduct was not sufficiently distinct under the *Podboy* standard.

In a clearly erroneous attempt to pigeonhole the Appellants' conduct as within the scope of the CBA, the Trial Court erroneously determined that the contents of The Report fell within Articles Six and Seven of the CBA. *Supp. R. Court File, Def. Supp. Exh.*, p. 235, 242.

As it relates to Article Seven, the Trial Court's conclusion is clearly erroneous because Article Seven simply contains a catch-all provision. *Supp. R. Court File, Def. Supp. Exh.*, p. 180. 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. This provision does not create a distinction between employment related activity and union activity under *Podboy*.

The Trial Court's application of Article Six is also clearly erroneous. As held by the Trial Court, "[t]he FOP letter details the poor leadership of then Chief of Police [Baca]." *Supp. R. Court File, Def. Supp. Exh.*, p. 240. The Court then undertakes a two-and-one-half page analysis of the allegations against Baca and how Baca's behavior is prohibited by Article Six of the CBA. This analysis is

clearly erroneous. As explained in the facts section, *supra*, the first sentence of Article Six states, "[n]either the Employee Organization nor its officers, agents, representative, or members will intimidate, interfere with, or coerce employees who are either members or non-members of the Employee Organization. *Supp. R. Court File, Def. Supp. Exh.*, p. 179. As explained in the facts section, *supra*, Baca was not a member of Lodge 19, and according to the Assistant City Attorney, "the bargaining unit is actually defined in our City Charter. It is the members of the police department except for the Chief of Police and command." *R. Tr. (Aug. 29, 2014)*, p. 21, ln. 25 – p. 22, ln. 8.

The Commerce City Charter defines Bargaining Unit as "all persons employed by the city in a full-time, Fair Labor Standards Act nonexempt position except for confidential and managerial employees and those employees who fall within the bargaining unit defined in section 21.2 of the Charter." *Commerce City Charter* § 2-5000. Section 21.2 of the Charter defines bargaining unit as "all full time police officers employed by the Commerce City Police Department plus the community service officers and crime analysts, *and excluding the chief of police, captains*, and the community service officer supervisor." *Id*. § 21.2(a). (*emphasis added*). Therefore, because Baca and his senior commanders were not members of the Employee Organization pursuant to Commerce City Charter, the conduct of

Baca and his command staff was not prohibited by Article Six of the CBA, and the provisions of Article 6 are not applicable under the facts of this case. As such, the complaints against Baca and his command staff were not complaints within the scope of the CBA. The Trial Court's finding was clearly erroneous.

Stated another way, because the Trial Court's finding was simply wrong pursuant to the Commerce City Charter, it was clearly erroneous for the Trial Court to find that the allegations in The Report alleging misconduct and malfeasance on behalf Baca and his command staff fell within the scope of Article Six of the CBA.

While the Trial Court's findings of fact were clearly erroneous, the Trial Court also committed clear error when it failed to consider other allegations such as those listed on pages 10 – 11 within the facts section of this brief, *supra*. These portions of The Report allege misconduct, malfeasance, violations of city policy and criminal activity. During the evidentiary hearing, Saunier, who had not read The Report but who had served as the interim Chief of Police following Baca, explained that Commerce City "has certain conduct policies that require that any city employee bring forward the complaints of malfeasance or concerns about supervisors directly to HR. . . . And then there are laws . . . that require possible criminal activity that has to be reported." *R. Tr. (Aug. 29, 2014)*, p., 120, ln 24 – p. 121, ln 3. Baca and Stevens also gave similar testimony and acknowledged that

law enforcement officers have a duty to report crimes they believe were committed by fellow police officers. *See R. Tr. (Aug. 29, 2014)*, p. 70, ln 1 – 3; p. 28, ln. 22 – 25.

This makes clear that the Appellants had an affirmative employment obligation to report allegations falling within the category of misconduct, malfeasance, violations of city policy and criminal activity. This is not dissimilar to the Appellants' obligation to report criminal activity even when off-duty as discussed in *Kliewer v. Sopata*, 797 F. Supp. 1569, 1570 (D. Colo. 1992).

Within the law enforcement context, there is public necessity of ensuring that those who enforce the law are themselves adhering to the policies, procedures and laws that regulate their own conduct and the conduct of the public. For this very reason, all law enforcement organizations have investigation policies and internal agencies that investigate and regulate the conduct of law enforcement officers. As explained by Saunier, Commerce City and the Commerce City Police Department are no different. Saunier testified, "[t]he internal investigation policies for the police department call that every complaint has to be forwarded for investigation. The city has certain[] conduct policies that require that any city employee bring[] forward [] complaints of malfeasance . . . ." *R. Tr. (Aug. 29, 2014)*, p., 120, ln 23 – p. 121, ln 1. Policies such as this exist because there is a

public need to ensure that its law enforcement agencies are regulated. Law enforcement officers must be able to report even suspected misconduct, malfeasance, violations of policy and criminal activity without fear of being sued for defamation. The CGIA provides necessary protection so that law enforcement officers can make such reports. As long as a report of misconduct, malfeasance, violations of policy and criminal activity does not consist of willful or wanton defamation, a plaintiff will be unable to recover because the law enforcement officer's activity will be protected under the CGIA. C.R.S. § 24-10-118(2)(a)

The Trial Court's finding that the entire contents of The Report fall within the scope of the CBA, and that the conduct of the Appellants was solely within their union capacity, is clearly erroneous. As explained above, it was clear error for the Trial Court to conclude that the Appellants' allegations against Baca and his command were within the scope of Article Six of the CBA. These allegations were outside the scope of the CBA, and according to Stevens they were the type of complaints that would normally be handled by the Commerce City Human Resources Department. As explained above, the allegations and events leading up to their publication were so closely intertwined with the Appellants' public employment that they are not separately distinct under the *Podboy* analysis. Therefore, these allegations were within the scope of the Appellants' public

employment. Moreover, the Appellants report of suspected misconduct, malfeasance, violations of policy and criminal activity is closely tied to their role as law enforcement officers and there is a public need to encourage the open reporting of this category of conduct without reprise. As such, the Appellants actions as it relates to reports of suspected misconduct, malfeasance, violations of policy and criminal activity was also within the scope of their employment and fits squarely within the policy justifications behind the CGIA. For these reasons, it was clear error for the Trial Court to conclude that the Appellants' allegations and actions were outside the scope of their public employment.

Should this Court not agree with the positions argued above, the Court should, in the alternative, mandate that the Trial Court consider each and every allegation within The Report and find that those allegations of suspected misconduct, malfeasance, violations of policy and criminal activity be considered within the Appellants' scope of employment and therefore protected by the CGIA. For the public policy reasons articulated above, it is necessary that law enforcement officers benefit from sovereign immunity when it comes to this category of allegations. Without such protection, law enforcement officers will be disincentivized from reporting this type of conduct in fear that they may be sued. For these reasons, and in the alternative, the Court should find that the reporting of

allegations of suspected misconduct, malfeasance, violations of policy and criminal activity was within the Appellants' scope of public employment.

CONCLUSION

Because the conduct of the Appellants, publication of The Report, and the nature of the allegations within The Report are closely related to the Appellants public employment, and within the scope of their public employment, the Court should find that the Appellants enjoy sovereign immunity under the CGIA. As the Appellee failed to meet the notice requirements of the CGIA, the Appellee's claims against the Appellants should be dismissed.

REQUEST ORAL ARGUMENT

Appellant respectfully requests that the Appellate Court order oral argument.

Respectfully submitted this 18 day of February, 2015.

Elkus, Sisson & Rosenstein, P.C.

/s/Reid J. Elkus/original signature on file
Reid J. Elkus, ##32516
Attorney for Appellant

/s/Ryan S. Coward/original signature on file
Ryan S. Coward, #38906
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify on this 18th day of February, 2015, a true and correct copy of the foregoing **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 USPS, sufficient postage prepaid, as indicated below:

Colorado Court of Appeals
2 East 14th Avenue
Denver, CO 80203
(FILED VIA ICCES)

Adams County District Court
1100 Judicial Center Drive
Brighton, CO 80601
(FILED VIA ICCES – in case no. 13CV32279)

Offices of John W. McKendree
Lawyer and Consultant
John W. McKendree
7582 East 121st Drive
Thornton, CO 80602
(SERVED VIA ICCES in case no. 13CV32279 and via USPS)

/s/Ryan Coward
Ryan Coward