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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
REPLY 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 2,022 words, and is accordingly within the 5,700 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.

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.

Elkus, Sisson & Rosenstein, P.C.

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STATEMENT OF FACTS

While many of the factual assertions by the Appellee (hereinafter "Cubbage") are supported by the record, the Appellants urge caution in regards to the Court's acceptance of Cubbage's statements of fact. Upon review, some assertions are either unsupported by the record, improper citations to pleadings, or supported with evidence that was not accepted into evidence by the Trial Court and considered by the Trial Court during the Trinity Hearing on August 29, 2014.

By way of example, Cubbage discusses Schaefer's deposition testimony in the facts section of his brief. (Answer Br. 9.) However, Schaefer's deposition testimony was not accepted into evidence or considered by the Trial Court during the Trinity Hearing. This is one of many examples.

Because identifying each and every unsupported assertion or improper citation within lengthy string cites would be an undertaking that would consume a significant portion of this brief and distract from the main issues that must be considered, the Appellants will not embark down such a path.

As the relevant facts have been set forth in the Appellant's Opening Brief with concise citations to the record, they will not be repeated here. Where necessary, the Appellants will respond to the remainder of Cubbage's assertions within his facts section in the argument below.

Standard of Review

While Cubbage argues in his Answer Brief that the Appellants "do not develop a substantial argument that there is not sufficient evidence to support the Trinity Hearing Court's findings of fact," this assertion misstates the standard of review. (*See* Answer Br. 4.)

Though not fully explained in prior briefs, while the trial court must make findings of fact in order to rule on the motion to dismiss, the ultimate determination of whether the Appellants enjoy sovereign immunity under the Colorado Governmental Immunity Act (hereinafter "CGIA") is a mixed question of law and fact. *Medina v. State*, 35 P.3d 443, 462-63 (Colo. 2001). In essence, the trial court must make findings of fact and then apply those facts to the law in order to determine whether the Appellants were public employees and enjoyed immunity under the CGIA, C.R.S. § 24-10-118(2)(a).

When there is a mixed question of law and fact, the trial court's findings of historic fact are entitled to deference. Though this is the case, this Court may give different weight to those facts and reach a different conclusion in light of the legal standard. *Bernal v. People*, 44 P.3d 184, 190 (Colo. 2002); *People v. Borghesi*, 66 P.3d 93, 104 (Colo. 2003); *People v. Gonzales*, 987 P.2d 239, 242 (Colo. 1999).

Once a determination is made as to whether the Appellants were public or private employees, a finding of fact must be made on the timing of the publication and whether publication occurred during a time period when the declarants were public or private employees. *See Gallagher v. Bd. of Trs*., 54 P.3d 386, 395 (Colo. 2002). As a finding of fact, this determination is reviewed based upon a clearly erroneous standard. *Medina*, 35 P.3d at 452.

Determinations of law are reviewed *de novo*. *Id*.

ARGUMENT

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.

The conduct of the Appellants, the publication of The Report and the nature of the allegations within The Report are closely intertwined with the Appellants' public employment. Because of this, the publication of The Report should be considered to have occurred within the scope of the Appellants' public employment. As such, the Trial Court should have found that the Appellants enjoyed sovereign immunity under the CGIA.

Throughout Cubbage's Answer Brief, Cubbage takes the position that all of the Appellants' interactions with The City fall within the scope of the CBA. The proposition advanced by Cubbage is that collective bargaining is not limited to the negotiation of an agreement and that collective bargaining is ongoing throughout the entire course of the agreement. (*See* Answer Br. 21.) Where Cubbage's position falls short is that it fails to recognize that there must be a line which distinguishes the Appellants' union activity from their activities as public employees.

If this Court accepts Cubbage's proposition that all of the Appellants' interactions with The City occurred strictly within the scope of the CBA as part of a continuous collective bargaining negotiation, then it would render the CGIA inapplicable to every Colorado public employee's interactions with management when a collective bargaining agreement is in place. Nowhere within C.R.S. § 24-10-118 can there be found any hint that the legislation was intended to be inapplicable to the collective bargaining process between the State, local governments, and their employees. Therefore, this Court should not adopt the position advanced by Cubbage.

As recognized by *Podboy v. FOP*, 94 P.3d 1226 (Colo. App. 2004), *Trinity Broadcasting of Denver, Inc v. City of Westminster*, 848 P.2d 916 (Colo. 1993),

Medina, and a litany of other cases, employees of governments can at times act within the scope of their public employment and at other times act as private citizens or members of organizations.

As suggested by the Trial Court, traditional workplace complaints, in the absence of a CBA, "may well be raised by an employee within the traditional scope or incidental to one's [public] employment." (*Supp. R. Court File, Def. Supp. Ex.*, p. 237.) However, as the Trial Court also notes, the existence of a CBA muddies the waters. Though the existence of a CBA may make it more arduous to determine whether an employee is bringing forth a workplace complaint within the scope of their public employment or pursuant to a CBA, the terms of the CBA itself should aid in the analysis. *Id.*; *Miller v. City & County of Denver*, 2013 P.3d 1274, P15 (Colo. App. 2013).

Though the CBA can help guide the analysis, this should be one factor, amongst many factors, that are considered by the Court in determining whether the Appellants' actions occurred within the scope of their public employment. *See Podboy*, 94 P.3d at 1230.

Even though Cubbage argues the Trial Court properly determined that the Appellants' workplace complaints fell within the scope of collective bargaining negotiations, Cubbage fails to address the argument that the Trial Court's findings

were based upon an erroneous interpretation of the CBA. Whether the Trial Court erroneously interpreted Article 6 of the CBA is a matter of law and should therefore be reviewed *de novo*. *Medina*, 35 P.3d at 452.

The Trial Court erred as a matter of law when it found that the Appellants' workplace complaints were pursuant to Article 6 of the CBA. As the Trial Court noted, a portion of Article 6 of the CBA states:

> 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. . . .

As held by the Trial Court, The Report "details the poor leadership of then Chief of Police Phil Baca." (*Supp. R. Court File, Def. Supp. Ex.*, p. 240.) The Trial Court also held, "[w]hile there are some ancillary allegations as well, this does not take away from the thrust of the complaints regarding Baca and others in the management team. Such behavior is specifically proscribed by the CBA. Hearing Ex. 9, at Art. 6." (*Id*. at 242.) As explained in the Appellants' Opening Brief, Chief Baca and his management team, as a matter of law, are not part of the *Employee Organization, its officers, agents, representatives, or members*. As such, the Trial Court erred as a matter of law when it found that the conduct of Chief Baca and his management team is prohibited by Article 6 of the CBA.

As Article 6 is inapplicable, and the Trial Court found that the workplace complaints within The Report were not brought forth pursuant to the grievance procedures in Article 9 of the CBA, the only remaining and relevant Article is Article 7. As explained in the Appellant's Opening Brief, Article 7 simply includes a catch-all provision. Because this is a catch-all provision, it provides no guidance whatsoever on whether the Appellants' workplace complaints were part of the collective bargaining negotiation.

Where the Trial Court erred as a matter of law in its interpretation of Article 6 of the CBA, it also erred in its mixed findings of fact and law when it applied its erroneous interpretation of Article 6 to the facts. Therefore, this Court must reweight the facts under the proper legal analysis.

The totality of the circumstances show that the Appellants' conduct was within the scope of their public employment. As discussed at length in the Appellants' Opening Brief, the Appellants' actions were not distinct from their duties and responsibilities as law enforcement officers. (*See* Opening Br. 20-21.) This should lead to the conclusion that the workplace complaints within The Report were brought forth within their scope of public employment.

Though the Appellants are not aware of previous holdings, the Appellants also urge that, within the context of public employment, the nexus between the

workplace complaint and the public interest of disclosure should also be a factor considered. Such a consideration is necessary in order to ensure that Colorado's public employees can contribute to accountable government practices through reports of misconduct, malfeasance, violations of public policy and criminal activity.[1] Even when a collective bargaining agreement exists, public policy considerations weigh in favor of encouraging rather than discouraging public employees to make reports of this variety and for those reports to be considered within the scope of their public employment. The alternative is that Colorado public employees will not make reports of this variety in fear that they will not be immune from suit under the CGIA and may therefore be liable for defamation. This limitation of this protection under the CGIA is willful or wanton defamatory statements, which are not protected. *See* C.R.S. § 24-10-118(2)(a). For this reason, the nexus between the workplace complaint and the public interest of disclosure should also be a factor considered.

Applied to the facts of this case where the Appellants reported suspected misconduct, malfeasance, violations of policy and criminal activity, the workplace complaints brought forth by the Appellants should be considered within the scope of their public employment.

[1] This is discussed in greater detail in Appellant's Opening Brief at 23 – 27.

As discussed in the Appellants' Opening Brief, if this Court does not find that the entirety of the workplace complaints within The Report occurred within the scope of the Appellants' public employment, the Court should mandate that the Trial Court review each complaint individually and find that those allegations of suspected misconduct, malfeasance, violations of public policy and criminal activity be considered within the scope of the Appellants' public employment and therefore protected by the CGIA. (*See* Appellants Opening Br. 26-27.)

As set forth above and in the Appellants' Opening Brief, the totality of the circumstances show that the workplace complaints within The Report were brought within the scope of the Appellants' public employment. Where the Trial Court and Cubbage engage in a flawed interpretation of Article 6 of the CBA, this Court should review the interpretation *de novo*. Under a proper analysis, which considers factors such as the CBA itself, the Appellants' actions and the fact that they were not distinct from their duties and responsibilities as law enforcement officers, and the nexus between the workplace complaint and the public interest of disclosure, this Court should find that The Report was published within the scope of the Appellants' 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, this Court should find that the Appellants enjoy sovereign immunity under the CGIA unless their conduct is found to be willful or wanton. However, as Cubbage failed to meet the notice requirements of the CGIA, Cubbage's claims against the Appellants should be dismissed.

Respectfully submitted this 24th day of April, 2015.

Elkus, Sisson & Rosenstein, P.C.

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CERTIFICATE OF SERVICE

I hereby certify on this 24th day of April, 2015, a true and correct copy of the foregoing **REPLY 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:

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