

To be Argued by:  
DAVID M. LEE  
(Time Requested: 15 Minutes)

**APL 2018-00120**  
Erie County Clerk's Index No. 2016/70

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**Court of Appeals**  
*of the*  
**State of New York**

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In the Matter of the Application of

COREY KRUG,

*Petitioner-Respondent,*

– against –

CITY OF BUFFALO,

*Respondent-Appellant,*

For Relief Pursuant to Article 78 of the  
Civil Practice Law and Rules

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**REPLY BRIEF FOR RESPONDENT-APPELLANT**

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Date Completed: February 11, 2019

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## **REPLY ARGUMENT**

Corey Krug raises three principle arguments in support of his contention that he is entitled to a taxpayer-funded defense in the underlying civil action filed by Devin Ford. As shown below, none of Krug’s arguments has merit.

### **POINT I**

#### **THE CITY IS NOT OBLIGATED TO DEFEND KRUG UNDER GENERAL MUNICIPAL LAW §50-j.**

First, Krug argues that the City is obligated to defend him under General Municipal Law §50-j. However, the statutory protection applies only if the police officer, at the time of the alleged misconduct, “was acting in the performance of his duties and within the scope of his employment.” General Municipal Law §50-j(1). In the City of Buffalo, this issue is to be decided by the Corporation Counsel in the first instance, and the Corporation Counsel’s determination should be upheld if it has a rational basis. Here, the Corporation Counsel took the video and the criminal indictment into account in denying Krug’s request to be defended in Ford’s action. Because the Corporation Counsel’s determination has a factual basis it should be upheld, even if the video is subject to differing interpretations.

Krug argues that the video is unaccompanied by factual context, but the video plainly shows Krug beating a defenseless citizen with a baton. The allegations against Krug in the underlying civil complaint are based entirely on this

on-camera beating (R. 33-34). Furthermore, while Krug claims that his attack on Ford was justified to prevent a fight, there is no admissible evidence in the record to support his claim, only the affirmation of an attorney who lacks personal knowledge of the event (R. 83). Moreover, the fact that Krug simply let Ford walk away after the encounter belies his claim that he maintained order by stopping a fight. Regardless, “the mind struggles to even hypothesize an off-camera event that could have justified [Krug’s] conduct.” Krug v. City of Buffalo, 162 A.D.3d 1463, 1467 (4<sup>th</sup> Dept., 2018) (dissenting opinion).

## POINT II

### **KRUG RELIES ON CASE LAW THAT IS INAPPLICABLE TO THIS CPLR ARTICLE 78 PROCEEDING.**

Second, Krug argues that case law supports his position that he was acting within the scope of his employment during the encounter with Ford. However, the cases cited by Krug are not Article 78 proceedings challenging a municipality’s denial of an officer’s request for a defense in a civil action. See Clancy v. Nassau Cty., 142 A.D.2d 626, 628 (2<sup>nd</sup> Dept. 1988) (scope of employment issue arose in context of whether county was vicariously liable under doctrine of respondeat superior after a trial); Crosby v. Russell, 2014 WL 3809129, \*7 (N.D.N.Y. 2014) (scope of employment issue arose in context of whether immunity was available for state correctional employees); Cruz v. New York, 24 F. Supp. 3d 299, 310 (W.D.N.Y. 2014) (same); Delaney v. City of Albany, 2014 WL

701637, \*5 (N.D.N.Y. 2014) (scope of employment issue arose in context of whether plaintiff was required to serve a notice of claim), citing LaGrange v. Ryan, 142 F.Supp.2d 287, 295-96 (N.D.N.Y. 2001) (same).

In this Article 78 proceeding brought by Krug, the issue is whether the Corporation Counsel's denial of Krug's request for a legal defense was arbitrary and capricious. The issue was the same in Salino v. Cimino, 1 N.Y.3d 166 (2003), where the Court concluded that the County Attorney's decision denying a legal defense to a police officer was not arbitrary and capricious. The basic principle established in Salino is that a municipality's denial of a legal defense to a police officer will not be set aside unless it was arbitrary and capricious. Here, because the factual record supports the Corporation Counsel's determination, the order of the Appellate Division should be reversed. See also Riehle v. Cty. of Cattaraugus, 17 A.D.3d 1029 (4<sup>th</sup> Dept. 2005) (sustaining county's denial of defense to sheriff in a personal injury action because denial had a factual basis, where, during a defensive tactics training program, the petitioner sheriff approached another sheriff from behind and placed him a neck restraint, causing him to fall and sustain injury).

Finally, plaintiff attempts to distinguish Lemma v. Nassau Cty. Police Officer Indemnification Bd., 31 N.Y.3d 523 (2018) on the ground that the county held two hearings before denying a defense to a police officer. However, the Court

in Lemma recognized that where no administrative hearing is required – as is the case in the City of Buffalo involving employee defense – judicial review is limited to whether the municipality’s determination was rational. Id. at 528. Thus, like in Lemma, the outcome of this case simply turns on whether the determination against Krug has a factual basis, and in that sense, is not arbitrary and capricious.

Here, the Corporation Counsel had a rational basis for concluding that Krug acted outside the scope of his employment. He was not required to explore and eliminate every theatrically plausible claim that Krug’s actions were related to his job as a police officer. That is simply not the standard of review in an Article 78 proceeding. And while Krug argues that the City should have investigated his version of events more completely, nothing would change the sort of conduct captured on video here. Nothing would change the fact that Ford was lying on his back when Krug drove his knee into Ford’s chest and then hit him five times with a nightstick. Such conduct cannot constitute a “public duty performed . . . for the benefit of the citizens of the community.” General Municipal Law §50-j(2). At the very minimum, it was not irrational for the Corporation Counsel to so determine.

### **POINT III**

#### **VIDEO OF THE INCIDENT PROVIDES A RATIONAL BASIS FOR THE CHALLENGED DECISION.**

Lastly, Krug argues that the City’s grounds for its denial of defense do not form a rational basis for the decision. This is one of the rare situations in which

the incident that forms the basis of a lawsuit was videotaped. Here, Krug was caught red-handed, on video, assaulting a defenseless citizen with a baton. When the assault ended, Krug did not place Ford under arrest. He was free to go. Frankly, it would have been irrational and an irresponsible use of taxpayers' money for the Corporation Counsel to accept Krug's request for a civil defense in Ford's action. The video alone is more than enough to support the rationality of the Corporation Counsel's decision. Further, an indictment is not a worthless piece of information in the law. For example, in an action for malicious prosecution, the law holds that an indictment creates a presumption of probable cause to believe plaintiff committed the charged crimes. See Torres v. Jones, 26 N.Y.3d 742, 761 (2016). In the context of this Article 78 proceeding, it was reasonable for the Corporation Counsel to consider the indictment as one piece of information upon which to base his decision. The Corporation Counsel did not convict Krug of committing a crime, and he was not required to ignore the fact that Krug had been indicted for the very same conduct alleged in Ford's complaint.

## **CONCLUSION**

As shown above and in the City's principal brief, the Appellate Division erred in concluding that the City's denial of Krug's request for a defense in the civil action was arbitrary and capricious. The Appellate Division's order should therefore be reversed.

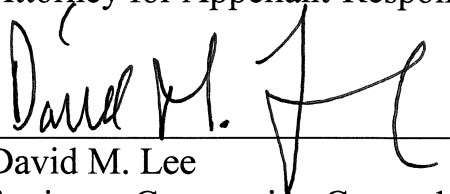


Dated: Buffalo, New York  
February 11, 2019

Respectfully submitted,

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Attorney for Appellant-Respondent

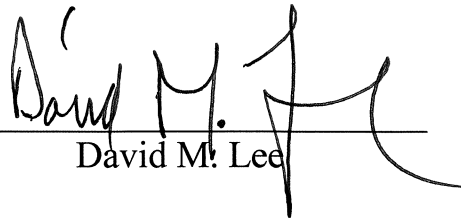
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**CERTIFICATION OF WORD COUNT**

I hereby certify pursuant to 22 NYCRR 500.13(c) that the total number of words in the body of this brief is 1,213.

Dated: Buffalo, New York  
February 11, 2019

  
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David M. Lee