CITY OF BUFFALO
DEPARTMENT OF LAW

BYRON W. BROWN
MAYOR

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UPS Next Day Air
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207

Re: Matter of Krug v City of Buffalo

Dear Court of Appeals:

Our office represents the respondent-appellant, City of Buffalo in the above-captioned appeal. Thank you for this opportunity to comment on the Court's subject matter jurisdiction with respect to whether the order appealed from finally determines the proceeding within the meaning of the constitution. For the reasons that follow, the Court should retain this appeal because there is no jurisdictional problem.

Petitioner, a police officer employed by the City of Buffalo, commenced this CPLR Article 78 proceeding to challenge the City's denial of his request for defense and indemnification in a civil action. The basis for the City's denial was that petitioner's actions fell outside the scope of his employment as a police officer. Supreme Court denied petitioner's request for indemnification as premature, and annulled the City's denial of petitioner's request for a defense as arbitrary and capacious. The Appellate Division affirmed, with two dissents, the majority rejecting the City's contention that its determination was not arbitrary and capacious. See Krug v. City of Buffalo, 2018 WL 2750869 (4th Dept. 2018).

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In general, no appeal in a civil matter may be entertained by this Court unless the order or judgment appealed from is final. See NY Const., Art. VI, § 3; CPLR 5601; CPLR 5602; Arthur Karger, Powers of the New York Court of Appeals § 3:1 at 33-36 (3d ed. rev. 2005) (hereinafter Karger). As a general rule, an order is final if it completely disposes the particular action and does not leave any further judicial action to be taken. See Karger § 4:1 at 48. Importantly, an order that finally determines an action, but also allows a party to seek relief in some future proceeding, retains its status as final. Id. § 4:2 at 48-52.

Notably, judgments in special proceedings are final "even though the relief granted consists of a direction with respect to proceedings in some other action or proceeding." Id. § 4:7 at 67. For example, in some cases, such as this one, an Article 78 proceeding is brought to compel a particular public officer to take certain action in relation to a pending litigation. Nevertheless, since the Article 78 proceeding in such a case "is entirely separate and distinct from the other pending litigation, a determination completely disposing of the Article 78 proceeding is a final determination." Id. § 5:25 at 181-82.

Here, the order of the Appellate Division is immediately effective as a final determination that the City must provide a defense to petitioner in the pending civil action. In other words, by its terms, the order is not contingent upon certain specified action by one of the parties, as, for example, an order that gives the plaintiff the right to undo a dismissal by serving an amended complaint. The order here is immediately effective as a final order of defense. The order is not contingent on the City's deciding not to take advantage of something.

There is simply nothing that remains to be done in petitioner's Article 78 proceeding. In Salino v. Cimino, 1 N.Y.3d 166 (2003), this Court entertained and decided an appeal in an Article 78 proceeding brought by a police officer challenging the county's denial of his request for a defense in a civil action. There, as here, the County Attorney decided that petitioner was not acting within the scope of his employment in connection with the incidents that formed the basis of the complaint. The Court ultimately concluded that the County Attorney's decision was not arbitrary and capricious. The Court also recognized that an issue regarding petitioner's right to indemnification might arise, should the jury in the civil action ultimately find that petitioner was indeed acting within the scope of his employment. Id. at n. 5.

Here, the petition contains separate claims for defense and indemnification. Supreme Court denied petitioner's request for indemnification as premature, presumably because petitioner's alleged liability in the civil action has not yet been determined and there has been no judgment against petitioner for which the City could indemnify him. In other words, the judgment was made without prejudice to petitioner being free to seek relief in a future proceeding, which, as stated above, does not impair the finality of the judgment. See Karger § 4:2 at 48-52.

Based on the foregoing, the disposition should be deemed final and hence appealable to this Court. Should the Court disagree, the doctrine of "implied severance" becomes relevant to determine finality in the multiple claims context. See Karger § 5:5–5:8 at 113-127. Under the doctrine of implied severance, which is an exception to the finality requirement, causes of action "that have been resolved may be deemed to be 'impliedly severed' from those that have been left pending." Burke v. Crosson, 85 N.Y.2d 10, 16 (1995). "Where implied severance is available, the order resolving a cause of action . . . is treated as a final one for purposes of determining its appealability or reviewability." Id. An order that disposes of some but not all of the claims asserted in an action may be deemed final, under the theory of implied severance, only if the claims it resolves "do not arise out of the same transaction or continuum of facts or out of the same legal relationship" as the unresolved claims. Id.

Here, petitioner's claims for defense and indemnification are not interrelated. In the City of Buffalo, the Corporation Counsel determines in the first instance whether an employee was acting within the scope of his employment when an alleged tort was committed, such that he receives a defense. See Buffalo City Code § 35-28 (AD R. 80); see Salino, 1 N.Y.3d at n. 4. And the Corporation Counsel's determination will be upheld so long as it is not arbitrary and capacious. See Salino, 1 N.Y.3d at 172. The City's duty to indemnify, on the other hand, is governed under General Municipal Law § 50-j and the related provisions of the Buffalo City Code. See AD R. 80-81.

"Moreover, the general principle that the duty to defend is broader than the duty to indemnify, which is applicable to private insurance contracts, is also applicable . . . where a public entity has undertaken those duties." Barkan v. Roslyn Union Free Sch. Dist., 67 A.D.3d 61, 67 (2nd Dept. 2009). For example, in Komlosi v. Cuomo, 99 A.D.3d 458, 459 (1st Dept. 2009), after a jury verdict was rendered in favor of the plaintiff, the State of New York took the position that its employee acted outside the scope of her employment, and accordingly, was not entitled to indemnification. In upholding the state's position, the court rejected the employee's argument that the State was estopped from taking that position since it previously decided that she was entitled to be represented by private counsel at the state's expense. The court reasoned that the state's prior decision was proffered during its defense of the employee, which duty is broader than the duty to indemnify. Komlosi illustrates that the duties to defend and indemnify do not have the same legal relationship.

In addition to the implied severance doctrine, an exception to the finality requirement exists on the basis of irreparable injury. Where an order directs an irrevocable change in the status quo and causes immediate irreparable injury, it is final to that extent for purposes of an appeal to this Court, even though other issues remain to be resolved. See Karger § 5:1–5:2 at 100-09. Here, the Court should permit the City an opportunity for an appeal and the stay pending such appeal, in order to protect the City from being irreparably injured by enforcement of the Appellate Division's order that might ultimately be reversed if counsel is allowed to brief this appeal on the merits.

Finally, I would ask the Court to consider the constitutional exception to the finality requirement, which allows the Court to entertain appeals from nonfinal orders in proceedings against public bodies and officers "upon the ground that, in its opinion, a question of law is involved which ought to be reviewed by it." NY Const., Art. VI, § 3(b)(5). Here, as detailed in the dissenting opinion at the Appellate Division, videotape of the incident appears to show petitioner, armed with a baton, striking a prone and unarmed man for no apparent reason. The dissent rightfully remarked that an average citizen would be surprised to learn that the person behind such conduct is entitled to a taxpayer-funded defense. And, in light of the majority's holding, the dissent was understandably concerned about whether there could be any circumstance in which the Corporation Counsel could validly withhold a taxpayer-funded defense in a civil suit. Furthermore, it is glaring that the majority simply disagreed with the Corporation Counsel about what is depicted on the videotape and, as a result, impermissibly substituted its own judgment for that of the Corporation Counsel, in contravention of the well settled principles of law regarding Article 78 proceedings. It is respectfully submitted that the Appellate Division's decision ought to be reviewed by this Court because it was wrongly decided and has potential statewide significance.

For the reasons stated above, it is respectfully submitted that the City's appeal is not jurisdictionally defective. I respectfully request that the Court set a schedule for the perfecting of the appeal.

Respectfully yours,

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