

To be Argued by:
IAN H. HAYES
(Time Requested: 15 Minutes)

APL 2018-00120

Erie County Clerk's Index No. 2016/70

Court of Appeals
of the
State of New York

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

BRIEF FOR PETITIONER-RESPONDENT

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STATUS OF RELATED LITIGATION

Devin Ford filed a civil Summons and Complaint against Buffalo Police Officer Corey Krug in Supreme Court, Erie County in November 2015. The Complaint alleges various wrongdoing by Officer Krug as he acted in his official capacity as a Buffalo Police Officer, and likewise names the City of Buffalo, the Buffalo Police Department, and ten (10) John Does as defendants for the same and related activity. The action, which has Erie County index number 813021/2015, is pending.

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QUESTION PRESENTED

Whether the City of Buffalo's Corporation Counsel had a rational factual basis to deny Buffalo Police Officer Corey Krug's request for defense in a civil action, when the action concerned Officer Krug's conduct in performing crowd control duties for the Buffalo Police Department, and the Corporation Counsel based its denial solely on a short video clip and the existence of a criminal indictment against Officer Krug?

The trial court and the majority at the Appellate Division answered "No."

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On November 27, 2014, Buffalo Police Officer Corey Krug was assigned by the Buffalo Police Department (BPD) to perform crowd control duties in the busy Chippewa area of the City of Buffalo. (R. 26-28). This was the night before Thanksgiving Day, which is traditionally one of the busiest nights at bars in Buffalo. The Chippewa area of the City is the epicenter of several popular bars, requiring BPD officers to be assigned to the area on such busy nights, with the purpose of maintaining order while hundreds or thousands of people patronize the bars in the area. (*See* R. 28). Because of this, Officer Krug and the several other BPD officers there were fulfilling crowd control duties, rather than simply being assigned to everyday patrol duties. *Id.*

That night, Devin Ford and a group of his friends were ejected from one of the bars in the Chippewa area for fighting with other patrons. (R. 83). Moments after that, Ford attempted to continue the fight in the street, and Officer Krug and several other BPD officers approached. *Id.* Ford did not comply with the police orders, and Officer Krug engaged Ford physically to stop the fight from continuing. *Id.*

On November 11, 2015, Ford filed a Summons and Complaint in New York Supreme Court, alleging several causes of action against Officer Krug, the City of Buffalo (“City”), the BPD, and ten unnamed individuals. (R. 31). Ford’s allegations were based entirely on the encounter between him, Officer Krug, and other BPD officers on the night of November 27 the previous year. *See id. et seq.*

Officer Krug delivered a copy of Ford’s Summons and Complaint to the City of Buffalo’s Corporation Counsel’s office and requested that the City defend and indemnify him regarding Ford’s suit. (*See* R. 56). On January 8, 2016, the Corporation Counsel’s office sent Officer Krug a letter stating it would neither defend nor indemnify him. *Id.* The letter offered no explanation for the Corporation Counsel’s decision, and said only that it was based upon their investigation of the incident between Officer Krug and Ford. *Id.*

Officer Krug filed a Verified Petition under CPLR Article 78 on May 5, 2016, challenging the City’s decision not to defend or indemnify him in Ford’s civil suit

against him. (*See* R. 25-29). Petitioner argued the City's determination was arbitrary and capricious because it had a duty to defend him under General Municipal Law section 50-j, which pertains to defense and indemnification of police officers. NY GML §50-j.

The parties filed several rounds of papers before the Supreme Court, Erie County. Throughout the process, the City maintained it had denied Officer Krug's request based on the fact that he had been indicted criminally for the encounter with Ford, and based upon a short video clip that had run on a Buffalo-area television station. (*See, e.g.*, R. 64 ¶ 21). This made it clear the Corporation Counsel had, in fact, not done any investigation of the encounter after all.

Justice Dillon at the trial court found it was arbitrary and capricious for the City to deny Officer Krug's request based on a short video clip and the existence of an indictment. The court thus granted the Article 78 Petition to the extent it ordered the City to defend Officer Krug in Ford's civil suit against him, in an Order dated March 31, 2017. (R. 4-5).

The City appealed. (R. 2). After the parties made the same arguments before the Appellate Division, the majority affirmed the decision of the trial court. (R. 136-37). The majority reached its holding on the same grounds as the trial court: the Buffalo Corporation Counsel's decision to deny Officer Krug's defense did not have a rational factual basis, since it was based only on the short television

clip and the existence of an indictment against Officer Krug. (*See* R. 136-37). Two Justices dissented, taking the position the video clip and indictment provided the Corporation Counsel with a rational and factual basis. (*See* R. 137-40). The City appealed to this Court. (R. 133-34).

ARGUMENT

THE CITY'S DENIAL OF OFFICER KRUG'S REQUEST WAS ARBITRARY AND CAPRICIOUS BECAUSE IT HAD NO RATIONAL BASIS TO CONCLUDE OFFICER KRUG ACTED OUTSIDE THE SCOPE OF HIS EMPLOYMENT.

The central issue in this case is what effect a thirty-second long video clip should have on the City of Buffalo's statutory obligation to defend a Buffalo Police Officer who is being sued for actions he took while performing his duties as a law enforcement officer. Simply put, the Corporation Counsel viewed a segment of video that showed neither the start nor finish of an interaction between Officer Krug and Ford, saw that it was televised, and decided this was enough to wash its hands of him, in direct contradiction of state law. This decision violated the City's obligation under GML §50-j.

The decision also left Officer Krug in a tenuous position that must not be repeated. While he and a handful of other officers attempted to keep order while surrounded by thousands of intoxicated bar patrons, he stopped a bar fight that had spilled out onto Buffalo's streets. Ford did not file a complaint with the BPD, seek

medical attention, or take any legal action against Officer Krug or the BPD. Later, when he saw that a television news crew had happened to record the brief encounter with Officer Krug and aired a story about it, Ford sued the officer, the City, and the City's Police Department. When Officer Krug learned he was being sued for stopping the fight as part of his job as a police officer and asked the City to defend him in the action, he was surprised to find the City refused on the grounds he was somehow not doing his job during the encounter.

The Corporation Counsel's position that it had the right to put Officer Krug in this position because of the television segment and the mere existence of an indictment – a fact to which it only halfheartedly refers – shows it acted arbitrarily and capriciously. The record shows it had no legitimate reason for the denial. The City has a duty to defend Officer Krug under GML §50-j. Its claim he was not acting within the scope of his employment when he was performing crowd control duties and stopping a fight is entirely unsupported by the case law applying the statute and by the common-sense analysis under Article 78. The trial court and Appellate Division properly came to this conclusion, and the decision ordering the City to defend Officer Krug must be affirmed.

A. The City is obligated under GML §50-j to defend Officer Krug in these circumstances.

New York's General Municipal Law §50-j states a municipality must indemnify a police officer when he is sued for actions he took as part of his job, and that the municipality can adopt a local law entitling an officer to defense when sued for actions taken within the scope of employment as a police officer. *See* GML §50-j(6). The City of Buffalo adopted such a local rule – Buffalo City Code §35-28. (R. 80). There is thus no dispute GML §50-j give Buffalo police officers like Corey Krug the protection of defense and indemnification for their actions within the scope of their employment. The dispute that emerged in the parties' many rounds of papers is over whether Officer Krug was acting within the scope of his employment during the encounter that is the subject of Ford's civil lawsuit.

An Article 78 petition can lead to overturning a municipality's decision when the decision was arbitrary and capricious. *See* CPLR 7803(3). Stated differently, if there was no rational basis for the decision being challenged, a court should overturn it. *See Pell v. Bd. of Ed. Of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaronek, Westchester Cty.*, 34 N.Y.2d 222, 231 (1974). In this case, it is undisputed that the Corporation Counsel made its decision not to defend Officer Krug based only on the thirty-second video clip and the existence of an indictment against Officer Krug. (*See* R. 64 ¶ 21).

The question before this Court is therefore whether those two pieces of information were a rational basis upon which the Corporation Counsel could decide Officer Krug did not act within the scope of his employment, and thus not entitled to a defense. It is important to return to this question while wading through the various arguments presented. The City and the dissent at the Appellate Division stray from it, and instead appear to answer the question of whether Officer Krug was proper in his actions depicted in the video clip, or to retroactively add more considerations that the Corporation Counsel already admitted it did not use in its denial. The question is not, as the City and dissent imply, whether reasonable minds disagree over the conclusion the Corporation Counsel reached; it is whether the Corporation Counsel could have reached its conclusion in a rational way, given the considerations it identified.

For the reasons here, it could not. The decision was arbitrary and capricious because a short clip presented without context and a grand jury's indictment simply could not provide a rational basis for the conclusion that Officer Krug acted outside the scope of his employment. This was exacerbated by the fact that the Corporation Counsel, by its own admission, conducted no investigation and made absolutely no attempt to gather its own evidence on the subject before making its decision. Both the factual setting and the relevant authority demonstrate why the City's denial was arbitrary and capricious.

First, the basic undisputed facts show Officer Krug was plainly acting within the scope of his employment during the encounter with Ford in 2014. Officer Krug was on duty and assigned to perform crowd control, during one of the busiest bar nights of the year, in a hub where thousands of bar patrons surrounded a small number of police officers. (R. 26-28, 83). Officer Krug and the other officers, who were in full uniform, attempted to stop a bar fight from continuing in the street by giving orders to Ford. (R. 83). Ford refused. *Id.* Officer Krug physically engaged with Ford. *Id.* Officer Krug did the work he was assigned to do and which police officers everywhere must do: he maintained order and prevented civilians from being hurt, and he did it by the book. In fact, if he had ignored the situation and allowed Ford to fight another civilian in the street, it would be reasonable to say Officer Krug would have ignored his duties.

These points are important not because Petitioner believes he has the better interpretation of the facts. Rather, the obvious conclusion that a rational decisionmaker would reach when faced with these facts – that Officer Krug was acting within his employment as a Buffalo Police Officer – accentuates the arbitrary nature of the City’s decision. Instead of reaching the common-sense conclusion to which the facts pointed or simply investigating the situation further, the Corporation Counsel did no investigation and arrived at the opposite conclusion.

Before reviewing the relevant case law, the City's brief point regarding an open discipline case against Officer Krug should be rejected for several reasons. First, the City has not presented any direct evidence regarding Officer Krug being disciplined or the status of any disciplinary charges against him. Second, upon information and belief, the BPD holds any pending discipline case open when there is even a possibility of criminal charges being brought for the alleged wrongdoing. If the City did decline to represent every officer in such a situation, it would never have to abide by its obligation to defend and indemnify BPD officers under GML §50-j. This is clearly not the case. Third, application of a local ordinance in the manner the City suggests here would create an incentive for the City to never resolve discipline cases against police officers on whom it wished not to expend resources for defense. In some cases, this would leave officers suspended for months or years, and without the possibility of a defense against in the suit by the City. To the extent the City continues to rely on this point, then, it should be dismissed.

B. Case law on point supports the conclusion that Officer Krug acted within the scope of his employment, further reinforcing the arbitrary nature of the City's decision.

The relevant case law supports the conclusion that Officer Krug was acting within the scope of his employment during the entire encounter with Ford, buttressing the conclusion that the City's decision was arbitrary and capricious

under Article 78. Courts have found officers in situations far more attenuated from the one here nonetheless acted within their employment.

In *Delaney v. City of Albany* before the U.S. District Court, Northern District of New York, the court summarized the question of scope of employment and its broad meaning under GML §50-j, holding:

A law enforcement defendant acts within the scope of his employment when he is “engaged in the immediate and actual performance of a public duty imposed by law and such public duty performed was for the benefit of the citizens of the community.” Courts have previously interpreted the putative intentional torts of police officers in furtherance of making an arrest as being within the scope of employment.

Delaney v. City of Albany, 2014 WL 701637 at *6 (N.D.N.Y. 2014) (citing *LaGrange v. Ryan*, 142 F.Supp.2d 287, 295–96 (N.D.N.Y. 2001)). In *Clancy v. County of Nassau*, Appellate Division, Second Department found that an off-duty police officer acted in the course of his employment, even when the court found he acted unreasonably, was not on duty, drew his weapon, and attempted to arrest people in a parking lot. *Clancy v. County of Nassau*, 142 A.D.2d 626 (2d Dep’t 1988).

Other courts ruling on law enforcement officers’ scope of employment in New York have adopted similarly broad conclusions. In *Cruz v. New York*, the court found two Corrections Officers who punched and kicked an inmate while transporting him acted within the scope of their employment. *Cruz v. New York*,

24 F.Supp.3d 299 (W.D.N.Y. 2014). In another case, Correctional Officers acted within the scope of their employment when they smashed an inmate's head against a window, put on handcuffs too tightly, stomped his ankle, and caused him to have a seizure. *Cosby v. Russell*, 2014 U.S. Dist. LEXIS 106686 (N.D.N.Y. 2014).

Officer Krug's encounter with Ford falls well within the bounds of GML §50-j's protections, as such case law makes clear. He carried out his duties as a Buffalo Police Officer "for the benefit of the citizens of the community," and the Corporation Counsel had no information before it that could have even hinted otherwise. *See Delaney, supra*, at *6.

By contrast, the authority upon which the City and the dissent place their weight is either not on point or supports Officer Krug's position. *Matter of Salino v. Cimino*, for example, has such a different factual setting that its holding cannot apply here. *See Matter of Salino v. Cimino*, 1 N.Y.3d 166 (2003). In that case, the Court held the language in a civil plaintiff's complaint does not in itself determine that a police officer acted within the scope of his employment, for purposes of determining whether the officer should be defended by a public employer. *Id.* at 172-73. That issue, while raised as a reinforcing point before the lower courts, is not at the heart of the dispute in this case. Furthermore, the officer in *Salino* claimed the Suffolk County code's protection for a lawsuit that arose as part of a property dispute in which he was embroiled. *Id.* at 168-69.

A more recent case upon which the City relies, *Matter of Lemma v. Nassau County Police Officer Indem. Bd.*, does not support its position, and instead serves to demonstrate how the City of Buffalo failed to obtain a rational basis for denying Officer Krug's request. In that case, an officer was accused of wrongful conduct, and he requested defense from the employer. *Matter of Lemma v. Nassau County Police Officer Indem. Bd.*, 31 N.Y.3d 523, 526 (2018). The body that decided whether such defense was appropriate then held a full hearing with the officer, who was represented by counsel, complete with witnesses, testimony, and the receipt of other evidence. *Id.* at 526-27. When the body denied defense and the officer objected to the decision, they then held a second hearing before affirming their decision. *Id.* at 527-28.

The body that had the statutory discretion to decide the scope of employment question in *Salino* took measures to investigate the events giving rise to the allegations against the police officer, and made its decision only after gathering a great deal of evidence, even going so far as to provide two separate hearings on the subject. *See id.* at 526-28. In other words, the employer had a rational basis supported by fact for its decision not to defend the officer, making it appropriate for the officer's Article 78 petition to be denied. *See CPLR §7803; Pell v. Bd. of Ed. Of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaronek, Westchester Cty.*, 34 N.Y.2d 222, 231 (1974).

The same cannot be said for the decision of the Buffalo Corporation Counsel. The City did no investigation of the encounter between Officer Krug and Ford before denying his request. Rather, after Officer Krug requested the City defend him in the civil suit, it looked to a short video clip and the fact that Officer Krug was a defendant in a criminal case, and ended its inquiry. Settling for such a lack of foundation for an important decision such as this meets the definition of arbitrary and capricious under the CPLR and case law. *See Pell, supra*, at 231. The trial court and Appellate Division were correct in finding so and ordering the City to defend Officer Krug.

C. The City's grounds for denying Officer Krug's request cannot form a rational basis for its decision.

Turning to the two pieces of information upon which the City made its decision to deny Officer Krug's request, it becomes clear they cannot be considered a rational basis for the decision, together or on their own. The existence of an indictment does not weaken the principle that a criminal defendant is presumed innocent in the United States' criminal justice system. The short video the City cites as its main reason for the denial is a feeble show of fact in itself, let alone as the sole source of tangible evidence of an event. This foundation for the Corporation Counsel's denial is so insubstantial that the decision was

properly annulled by the trial court and Appellate Division as arbitrary and capricious. *See* CPLR §7803.

The City now appears to virtually disclaim its prior position that it denied Officer Krug's request in part on the existence of an indictment against him. However, the point can be addressed briefly. At the hearing before Justice Dillon rendered his bench decision, he summarized the legal issue and the only appropriate conclusion deftly:

MR. LEE: Your Honor, the indictment certainly shows that there is something -- that there is something there.

THE COURT: That doesn't make any difference if he's guilty as all hell, Mr. Lee. He's a criminal defendant, and he is entitled in this Court to be presumed to be innocent and every other Court, and a failure to exercise the presumption of innocence is both arbitrary and capricious.

(R. 17). This is the only point this Court needs to consider when deciding whether the City was justified in drawing adverse conclusions from an indictment of Officer Krug.

Furthermore, the case law upon which the City relies regarding an indictment does not change the basic force of the presumption of innocence. Rather, the two U.S. Supreme Court cases it cites discuss the basic burden of proof when a jury reaches an indictment – a point that is not disputed here. *See Kaley v. United States*, 571 U.S. 320 (2014); *Brinegar v. United States*, 338 U.S. 160

(1949). These issues do not affect the meaning of an indictment in relation to a criminal trial as a whole.

While the City and the dissent at the Appellate Division refer to the existence of an indictment against an officer who requests defense, the references are brief, and avoid the simple fact that anyone charged with a crime is innocent until and unless they are convicted of a crime; an indictment has no effect on their innocence in the eyes of government, just as Officer Krug's indictment had no effect on his.

The video clip upon which the City relied is insufficient to draw any informed conclusion regarding Officer Krug's conduct, especially one that affects his defense against a civil lawsuit. Such a piece of information utterly fails to provide any context for the thirty-second video. As with many public cases involving police officers and others in recent years, a video that does not show the start of an interaction or its end cannot be said to be a fair depiction of the event.

As already discussed, the interaction between Ford and BPD officers that night did not begin at the start of the video. Rather, it began some time before it, when Ford was discharged from a bar for fighting with another patron. The clip does not show what Officer Krug and the other officers saw Ford doing as they approached him. In fact, it fails to show much at all since the camera operator jostled the camera and pointed it in different directions while running down the

street. The lack of lighting even obscures the interaction between Officer Krug and Ford, to the extent it does show anything of use. It is also clear the clip does not show the end of the encounter between Ford and the BPD.

It is a basic principle of investigation and evidence gathering that context is critical to placing significance and meaning on a piece of information. The video clip the City has cited contains no explanation for the events that are the subject of Ford's lawsuit, and do not show all of the events. On its own, it is of little use in seeking the truth of what occurred. Despite this, the City failed to breathe meaning and explanation into the clip, as it was free to do by conducting any investigation or gathering any other evidence. A municipality that makes a decision based on so little acts arbitrarily and capriciously, and that decision must be overturned under Article 78 of the CPLR. *Pell v. Bd. of Ed. Of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaronek, Westchester Cty.*, 34 N.Y.2d 222, 231 (1974).

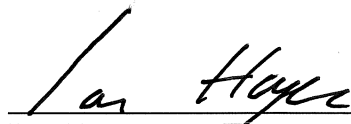
CONCLUSION

For these reasons, the decision of the trial court and Appellate Division should be affirmed. The City failed to establish a rational basis for its denial of Officer Krug's request for defense. Upon examination, the stated reasons for its decision could not possibly provide a rational basis. Furthermore, existing case law on the question of a law enforcement officer's scope of employment reinforces the conclusion that the City reached an arbitrary and capricious conclusion in

denying the request. The January 8, 2016 denial of Officer Corey Krug's defense should be overturned and the City ordered to defend him in the civil lawsuit brought by Devin Ford.

Dated: January 25, 2019
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**NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE**


I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Office Word 2007.

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