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COURT OF APPEALS
STATE OF NEW YORK

IN THE MATTER OF COREY KRUG,

Respondent,

-against-

CITY OF BUFFALO,

Appellant.

NO. 91

20 Eagle Street
Albany, New York
October 24, 2019

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The first appeal on this
2 afternoon's calendar is appeal number 91, Matter of Krug v.
3 City of Buffalo.

4 Counsel?

5 MR. LEE: Good afternoon, Your Honors. May it
6 please the court, David Lee, assistant corporation counsel,
7 here on behalf of the appellant, City of Buffalo.

8 Chief Judge, may I please request one minute
9 rebuttal time?

10 CHIEF JUDGE DIFIORE: You may, sir.

11 MR. LEE: They say that a picture says a thousand
12 words. In this case, we have a thirty-second long video
13 clip.

14 JUDGE FAHEY: So the question is then, is it a
15 complete picture? Following up on your metaphor.

16 MR. LEE: I - - - I think that it is, Judge
17 Fahey, because everything that is seen on that video is
18 what forms the basis of Devin Ford's civil complaint
19 against the City of Buffalo. So - - -

20 JUDGE FAHEY: Well, let - - - let me ask you
21 this. Has - - - has - - - Officer Krug subsequently to
22 this determination had criminal charges brought against
23 him, and he was acquitted two times by a jury trial, right?

24 MR. LEE: He was acquitted one time, Your Honor.

25 JUDGE FAHEY: One time, okay.



1 MR. LEE: And then on the retrial.

2 JUDGE FAHEY: On the retrial. And since that
3 determination, has the corporation counsel's office
4 reconsidered its original determination based on his
5 acquittal?

6 MR. LEE: No - - - no we have not, Your Honor,
7 because they are - - - they are separate issues. Now
8 although the indictment was one piece of information that
9 the corporate hear - - - corporation counsel relied on in
10 forming his decision, that certainly wasn't the only piece
11 of information.

12 JUDGE FAHEY: But the way - - - the way I read
13 it, and you can correct me, because you know the record
14 better, but I thought there were two pieces of information
15 that they relied on. First was the indictment, and the
16 second was the video. Right?

17 MR. LEE: That's correct.

18 JUDGE FAHEY: Okay. So the indictment, he's been
19 found not guilty. So now you've got the video, and the
20 video is the thirty-second video, and it's certainly not
21 favorable to Officer Krug, but you would grant that it's a
22 rather short period of time to make an ultimate
23 determination.

24 MR. LEE: I - - - I - - - I don't think it is,
25 Judge, and - - - and here's why. In - - -



1 JUDGE FAHEY: Okay.

2 MR. LEE: In a normal case, there - - - there
3 would never be a video. This is a rare situation where
4 there is a video. So where there is no video, what are you
5 doing? You're out there, you're interviewing witnesses,
6 you're obtaining documents, you're trying to figure out
7 exactly what happened.

8 But when there's a thirty-second video of what
9 happened, and what's on that thirty-second video, and this
10 is key, I think, that - - - those are the facts that form
11 the basis of Ford's civil complaint. Again - - -

12 CHIEF JUDGE DIFIORE: Yes, but this was based on
13 allegations on - - - as yet unproven in a federal
14 indictment, to Judge Fahey's point, it's a very short, few
15 seconds, thirty-seconds on a video, and the filing, as I
16 understand it of the disciplinary charges. Is that fair -
17 - - a fair basis on which to deny someone a defense?

18 MR. LEE: I - - - I - - - think it is, Chief
19 Judge, because I - - - and I'll - - - I'll keep - - - I
20 don't mean to repeat myself, but everything that Ford
21 complains about in his civil complaint is shown in that
22 thirty-second video clip. In other words, Ford's civil
23 complaint has nothing to do with Krug's initial decision to
24 interfere between Mr. Ford and whoever else was - - - was
25 out in that street. It's - - - it's the way he went about



1 it that - - - that is the issue that takes him outside the
2 scope of his employment.

3 JUDGE WILSON: So you - - - you're pointing to a
4 couple of portions of the city code that give the
5 corporation counsel some discretion. But when I look at
6 Section 1, it says, notwithstanding any provision of
7 basically other kind of law. Why do you think that is
8 there's any discretion that we own, and is - - - isn't this
9 just a state statute that we have to interpret?

10 MR. LEE: No, no, I - - - I don't think it is,
11 Judge, and I think the - - - the - - - this court's
12 decision in Salino makes clear that when there is a state
13 statute that provides for defense indemnification, that's
14 one thing. But when there's also a local ordinance, as
15 there is in the City of Buffalo, which gives the
16 corporation counsel the discretion, in the first instance,
17 to determine whether an employee was acting in the scope of
18 his employment, it's an arbitrary and capricious standard,
19 and the corporation counsel makes that decision.

20 JUDGE WILSON: Well, the state statute, you know,
21 Section 50-j, it looks as if only in Section 6 is there
22 discretion given to the local authority. Not in Sections 1
23 or 2, which is the ones you're relying on, in 6(b).

24 MR. LEE: I guess - - - I guess the discretion,
25 Your Honor, comes from - - - that does come from the city



1 code. I would agree that that Section 50-j(1) doesn't say
2 anything about the corporation counsel determining anything
3 in the first instance. Subdivision 6 does; you're correct.

4 But again, I would point to the - - - the Salino
5 case, decided by this - - - by - - - by this court, where I
6 think it was Suffolk County who had to defend and indemnify
7 - - - the - - - the issue of defense and indemnification
8 was governed by a state statute. But because Suffolk
9 County had a - - - a local ordinance that provided the
10 corporation counsel makes that determination in the first
11 instance, this court decided that it was an arbitrary and
12 capricious standard, and the corporation counsel did - - -
13 did have that discretion.

14 JUDGE GARCIA: Counsel, just to go back a - - - a
15 little bit to some of what Judge Fahey was asking you. So
16 let's say in a case where you just base this on the
17 indictment, and then there's an acquittal. Would that
18 affect the decision that the city made?

19 MR. LEE: I'm not - - - I'm not sure that - - -
20 that it would, because I - - - I don't view - - - the - - -
21 the issues are separate, right. I mean, so you have a
22 criminal trial, an acquittal that Krug was found not guilty
23 beyond - - - beyond a reasonable doubt. And in - - - in
24 the civil context, you have the scope of employment issue.
25 So they're totally - - - they're - - - they're different



1 issues, and I don't view - - -

2 JUDGE STEIN: So if - - - if - - - if the civil,
3 if in the civil trial, they found that it was within the
4 scope of employment, what would that mean? Would the city
5 then possibly have to indemnify the officer for any damages
6 assessed against him or would they have to go back and then
7 reimburse him for his defense or - - - or - - -

8 MR. LEE: I - - - I was - - - I was - - -

9 JUDGE STEIN: - - - or neither one?

10 MR. LEE: Yeah, I mean, I was - - - I was
11 thinking about that, and I'm not sure that I have that
12 answer totally prepared. I think that it would - - - it
13 would create an issue. It would be an interesting issue,
14 if a jury did ultimately determine that - - - that Krug
15 acted in the scope of his employment, what effect that
16 would have on indemnity? I don't think it's before this
17 court right now, and I'm not sure that I have a - - - a
18 great answer.

19 JUDGE STEIN: So scope of employment in - - - in
20 the city's view is not the issue here. The issue - - - was
21 - - - was the basis of the determination the intentional
22 wrongdoing or the violation of the department's rules? I -
23 - - I'm a little confused about that. Or is it all of
24 them?

25 MR. LEE: Well, I - - - I think I - - - I - - -



1 it's - - - I think it's a little bit of everything, but I
2 think what I really want to focus on here is that it's just
3 the - - - the scope of employment issue, and what 50-j
4 says. What Corey Krug, on that video - - - does that show
5 him per - - - performing a public duty for the benefits of
6 the citizens of the community? That is the standard in 50-
7 j. How - - - I don't under - - - that - - - if - - - if
8 you take a look at that video and what - - - what Mr. Krug
9 does in that video, how can anyone, respectfully, look at
10 that video, and say, oh, that's a public duty, performed
11 for the benefits of the citizens of the community?

12 JUDGE STEIN: So the question is, is whether
13 there's any basis in fact for that determination? Is that
14 - - - is that - - - is that the standard that - - -

15 MR. LEE: Yeah, and - - - and that is the
16 standard, Your Honor. May - - - I - - - I don't want to
17 suggest that Mr. Krug doesn't have reasonable arguments.
18 He very well may. But what I'm saying is the corporation
19 counsel also has reasonable arguments. And it - - -

20 JUDGE FAHEY: Well, did - - - did you - - - did -
21 - - what investigation was made? Did you just look at the
22 video and make the determination? Was there any other
23 investigation?

24 MR. LEE: There was - - -

25 JUDGE FAHEY: Did you talk to other officers?



1 Did you get affidavits from other officers? Were - - -
2 what was done? Tell me about the investigation.

3 MR. LEE: It was - - - it was viewing - - -
4 viewing the - - - the video, Judge.

5 JUDGE FAHEY: And - - - and the indictment?

6 MR. LEE: Yes. Those were - - -

7 JUDGE FAHEY: And that was it?

8 MR. LEE: Yes. And that's - - - and that's I
9 think why I wanted to start off, and I - - - because I
10 think that's what Mr. Krug's main argument is. Well, the
11 video is not enough; it doesn't have enough context. But
12 you know, the video shows - - - shows enough in my opinion
13 to - - -

14 JUDGE FAHEY: Well, you - - - the problem is,
15 it's not just the video that - - - that you've - - - you've
16 lost half the basis of your decision, by the - - - by the
17 acquittals. You know what I'm wondering is, you - - - you
18 said you - - - I think Judge Stein asked you about it. Did
19 - - - have you made any determination as to whether or not
20 you're going to indemnify Krug in the civil lawsuit?

21 MR. LEE: No, Judge.

22 JUDGE FAHEY: I see.

23 MR. LEE: There's - - -

24 JUDGE FAHEY: I see. So how about a defense?

25 Usually in an insurance situation, the obligation to defend



1 is broader than the obligation to indemnify. Has there
2 been - - - any determination been made there?

3 MR. LEE: On the - - - on the issue of defense,
4 Your Honor?

5 JUDGE FAHEY: Yeah.

6 MR. LEE: I believe there - - - there has been a
7 determination.

8 JUDGE FAHEY: I mean, this carries over, in other
9 words, all the way to the civil suit, is what you're
10 saying.

11 MR. LEE: Yes, yes.

12 JUDGE FAHEY: So if - - - if the obligation to
13 defend has been determined in the civil suit, then I'm
14 assuming that you've - - - that the city's also decided not
15 to indemnify?

16 MR. LEE: That would probably be the - - - be the
17 way that it goes, Your Honor, yes.

18 JUDGE FAHEY: So - - - so in this situation,
19 plaintiff's counsel could decide not to defend the case, or
20 it's - - - you know, well, I'm saying Krug's counsel would
21 say - - - not to defend the case, in exchange for a
22 guarantee that no recovery would be had from Krug's assets.
23 Krug could default on a complaint, refuse to challenge an
24 inquest on damages - - - this happens all the time with
25 plaintiffs - - - and then whatever inquest is put in, the



1 agreement would be that you would go against the city,
2 rather than go against Krug directly. Is the city prepared
3 for that?

4 MR. LEE: I - - -

5 JUDGE FAHEY: In other words is - - - you don't
6 know, you know. Okay, all right, thank you.

7 JUDGE FEINMAN: I - - - I have a slightly
8 different question. Can this case be resolved without
9 resort to the Buffalo City Code?

10 MR. LEE: I - - - I don't think that it - - -
11 that it - - - that it can, Your Honor, only because my
12 understanding of - - - of the posture here is that this is
13 - - - this is an Article 78 proceeding. It is an arbitrary
14 and capricious standard, and I think that directly stems
15 from the - - - the city code.

16 JUDGE STEIN: And both sides have proceeded under
17 that - - -

18 MR. LEE: Yes, that - - - that is - - - that is
19 not been an issue thus - - - thus far.

20 CHIEF JUDGE DIFIORE: Thank you, Counsel.

21 MR. LEE: Okay, thank you.

22 CHIEF JUDGE DIFIORE: Counsel?

23 MR. HAYES: May it please the court, my name is
24 Ian Hayes. I represent the petitioner, Corey Krug.

25 Chief Judge, I'd just like to answer a question



1 that you brought up, because I think it's the most
2 important thing that just came up. The - - - I - - -
3 there's no dispute in the record that the corporation
4 counsel made the decision not to defend and indemnify
5 Officer Krug, based only on the existence of the indictment
6 and the twenty-eight-second video.

7 The - - - there's nothing in the record
8 indicating that they made the decision based on the filing
9 of disciplinary charges. I don't think there's anything in
10 the record even showing when charges were filed, so I
11 believe the appropriate analysis is whether the city had a
12 rational basis, based on the indictment and the twenty-
13 eight-second video.

14 JUDGE RIVERA: So he argues that - - -

15 CHIEF JUDGE DIFIORE: Yeah, but what about - - -
16 excuse me. What about your colleague's question that the
17 videotape was lined up squarely with the allegations that
18 you make, and that's what their determination was made.
19 They really don't need any more.

20 MR. HAYES: Just so I understand, the - - - that
21 the video was lined up squarely with what - - -

22 CHIEF JUDGE DIFIORE: With - - -

23 MR. HAYES: - - - Ford alleges, right?

24 CHIEF JUDGE DIFIORE: Um-hum.

25 MR. HAYES: I - - - I don't think that answers



1 the issue here, because the video still doesn't show the
2 beginning of the encounter, the end of the encounter, what
3 led up to it or what happened after it. All of that - - -

4 JUDGE STEIN: But can you point to any cases - -
5 - I - - - I haven't found any - - - maybe - - - maybe there
6 are - - - where - - - where we've held that something was
7 arbitrary and capricious because there wasn't additional
8 investigation or because there was conflicting evidence.

9 It seems to me that the - - - the mere fact that
10 we're talking about conflicting evidence means that there
11 are two reasonable views of what it is. And - - - and - -
12 - and it's basic administrative law that says that that's
13 not arbitrary and capricious, as long as there's some basis
14 there, some factual basis. And it seems to me that - - -
15 that this video provides that.

16 MR. HAYES: Right. Well, with respect, Your
17 Honor, I don't think that that is quite the question here.
18 I think it's a very close one. It's - - - the question is
19 whether - - - not - - - you know, the - - - not whether the
20 corporation counsel made the proper decision in January
21 2016 when it decided to deny Officer Krug's request. It's
22 whether it had enough information to make that decision in
23 the first place.

24 So I - - - I have been - - -

25 JUDGE FAHEY: So what information would he have



1 had to have other than the video?

2 MR. HAYES: I - - - I don't have a concrete and
3 complete answer to that, Your Honor. I think any sort of -
4 - -

5 JUDGE FAHEY: Did you make a record below of
6 information that should have been considered that you'd
7 encourage us to look at to consider in contrast to the
8 video?

9 MR. HAYES: I - - - it - - - what - - - the
10 question is, is there anything in the record?

11 JUDGE FAHEY: Yeah, yeah.

12 MR. HAYES: No, Your Honor, because the - - - the
13 record proceeded in a very simple and straightforward way.

14 JUDGE FAHEY: Usually in these situations,
15 there'd be affidavits from other police officers, people
16 who had been at the bars before. There'd be some kind of -
17 - - something like that.

18 MR. HAYES: Right. There - - - there's no
19 dispute that the city did no investigation before it made
20 its decision. And that's a crucial part of why - - -

21 JUDGE FAHEY: So when you went before Judge
22 Dillon, did you offer any affidavits like that to say that
23 that - - - that - - - that this was clearly arbitrary,
24 because it was such a short snippet of time, and here's
25 this other proof.



1 MR. HAYES: I understand. The - - - the answer
2 is no, Your Honor, because I thought it was sufficient just
3 to point out that - - - you know, there was no argument
4 over how the corporation counsel made its decision. And we
5 proceeded on - - - just based on the argument that that was
6 not enough - - -

7 JUDGE RIVERA: But - - -

8 MR. HAYES: - - - in itself, so we - - -

9 JUDGE RIVERA: But I thought really what your - -
10 - your argument is that just watching the actual fight or
11 the actual beating, let me just call it that, doesn't
12 explain why the officer acted in this way.

13 MR. HAYES: Correct, Your Honor.

14 JUDGE RIVERA: And - - - and that that's what
15 they should have investigated, even if one looks at the
16 video and says, that's excessive force; you can't do that.
17 Did the officer have some reason to explain why he took
18 this particular type of violent action?

19 MR. HAYES: Abs - - -

20 JUDGE RIVERA: So that they could then decide
21 whether or not, even taking that into account, it still
22 falls outside the scope of his employment?

23 MR. HAYES: Absolutely, Your Honor. That's been
24 our position all along. And the reason for that - - -

25 JUDGE RIVERA: Okay, so then what - - - what's



1 the story? What does - - -

2 MR. HAYES: What - - - what's the story of what -
3 - -

4 JUDGE RIVERA: Yes, what does your client say is
5 what would - - -

6 MR. HAYES: Well - - -

7 JUDGE RIVERA: - - - allow him to conduct himself
8 this way?

9 MR. HAYES: Right, so even though there isn't
10 much in the - - - in our record in this case about that,
11 there was, of course, a robust record in federal court when
12 these criminal charges were tried. And what came out from
13 that, if I may, even though it's not in the record here, is
14 that Ford and his friends got kicked out of a bar for
15 fighting. They were fighting in the street. Buffalo
16 police officers had to break them up using pepper spray,
17 and explicitly told them to, you know, leave the area and
18 stop fighting.

19 Ford and his friends again started fighting, and
20 again had to be broken up. After the video it happened
21 again, at - - - at least one other time. And by the way,
22 this is not based on testimony. This is based on video
23 from the same news crew that shot the short video on
24 Officer Krug.

25 JUDGE RIVERA: So - - - so your position is



1 there's case law that would say a provocation of an officer
2 in a way you have identified it, would mean that, despite
3 the video showing heinous violence, that it still falls
4 within the scope of employment?

5 MR. HAYES: Your Honor, we didn't brief whether
6 there's, like, criminal case law on that point, so I don't
7 want to say definitively yes or no to that, but - - -

8 JUDGE RIVERA: Well, wouldn't that be what they'd
9 have to take into consideration?

10 MR. HAYES: I - - - I believe so.

11 JUDGE RIVERA: Is there going to be an argument
12 for this conduct falling within the scope of employment?
13 So what's the legal case law that supports that either way?

14 MR. HAYES: I believe so, Your Honor, because
15 that's the nature of police work, that police officers had
16 - - - have very broad discretion in what they do, and they
17 have a wide range of responsibilities. And one single act
18 can be act within the scope of the - - -

19 JUDGE RIVERA: Well, you agree if it's
20 unprovoked, or is it your position that - - - I shouldn't
21 say that.

22 MR. HAYES: No, Your Honor, I can't agree with
23 that, based on the information that I personally know about
24 from the criminal trial.

25 JUDGE RIVERA: So what is your understanding of



1 the case law that - - - about what would have happened
2 before the violent response that would bring the officer's
3 actions within the scope of his emplacement?

4 MR. HAYES: My understating is that Ford was
5 directly ordered not to fight with people in the street,
6 and dis - - - physically, and by his actions, disobeyed
7 that police order.

8 JUDGE STEIN: So - - - so to take it just to the
9 next step, what you're saying is, that even though this
10 video clip showed him sitting on the hood of a car, and
11 then being - - - not apparently fighting with anybody at
12 that second in time, right, and then pushed to the ground
13 and, you know, pretty violently assaulted at that moment.
14 That would have been okay, if he had been fighting a couple
15 of minutes earlier?

16 MR. HAYES: I think it's - - - I - - - I think,
17 Your Honor, that the answer is that it could,
18 theoretically, be because of the nature of the - - -

19 JUDGE GARCIA: Is this a scope of employment
20 determination? Is that what we're talking about here?

21 MR. HAYES: Yes, I think, all - - -

22 JUDGE GARCIA: So - - -

23 MR. HAYES: - - - all of these questions go to
24 that.

25 JUDGE GARCIA: - - - would this be analogous to



1 the difference between, coincidentally, a prison situation,
2 where you have a fight between inmates, and a guard rushes
3 in to break it up, and uses excessive force. Not that
4 that's okay, not that that's a good thing, but that that
5 might be within the scope of employment, as opposed to, a
6 guard just gratuitously goes into a prisoner's cell and
7 beats a prisoner for personal - - - you know, personal
8 vendetta.

9 Is that kind of the difference we're talking
10 about?

11 MR. HAYES: Ab - - - absolutely, Your Honor.

12 JUDGE GARCIA: And is your point that what led up
13 to it doesn't justify excessive force necessarily, assuming
14 even this is the case, but that it creates a situation
15 where the excessive force resulted from a scope of the
16 employment activity?

17 MR. HAYES: More or less, Your Honor. I think we
18 don't have to even answer the question - - - nobody in this
19 room has to answer the question of whether Officer Krug did
20 his job properly or well. It's - - - the question is, did
21 the corporation counsel have the information to answer that
22 question itself in January 2016.

23 JUDGE RIVERA: Did - - - did they know at that
24 time that the victim was not charged?

25 MR. HAYES: I - - - I don't know, Your Honor,



1 because - - -

2 JUDGE RIVERA: But that is correct?

3 MR. HAYES: That the victim - - -

4 JUDGE RIVERA: The victim was not charged - - -

5 MR. HAYES: Charged - - - oh - - -

6 JUDGE RIVERA: He was not charged - - -

7 MR. HAYES: That's correct, Your Honor.

8 JUDGE RIVERA: - - - as a result of whatever may
9 have happened that evening.

10 MR. HAYES: Right.

11 JUDGE RIVERA: Let's just put it that way.

12 MR. HAYES: But as - - - as you heard though - -
13 -

14 JUDGE RIVERA: Would that change the calculation
15 if they did take that into consideration? If they knew
16 that in advance?

17 MR. HAYES: Would that change the - - - the
18 analysis in this case, you're asking?

19 JUDGE RIVERA: Yes, yes. I'm sorry.

20 MR. HAYES: It - - - it could because it would be
21 a step towards taking some investigation into what
22 happened, rather than just relying on a video and an
23 indictment. It would be more information and provide
24 slightly more context. Personally, I don't - - -

25 JUDGE STEIN: How much - - - how much information



1 is necessary? They have to do a full investigation of the
2 case or - - - you know, where - - - where - - - where
3 should we draw that line if we agree with you?

4 MR. HAYES: Right, I - - - I understand, Your
5 Honor. I think that's a difficult question. I think this
6 - - - in this case, it clearly wasn't enough, but the rule
7 also doesn't - - -

8 JUDGE STEIN: We'll know it when we see it?

9 MR. HAYES: - - - have to be - - - you have to
10 investigate everything. I think the rule is you have to
11 have - - - you have to investigate enough to have an
12 adequate understanding of the context of the allegations
13 that are being made.

14 JUDGE FEINMAN: So - - - so let me ask you this.
15 If - - - if they had provided him with a defense, and in
16 the meantime, the criminal case is going on - - - you're
17 doing discovery in the civil case, and assuming you're not
18 staying the discovery to see the outcome of the criminal
19 case, and he's convicted in the criminal case. At that
20 point, can the city come in and say, you know what? We're
21 not going to defend you any further, and you're stuck with
22 however we ran the discovery proceedings up until then.

23 I mean, you know, and - - - and what's motivating
24 this question is my experience in the city court down in
25 New York City, where sometimes you'd be two or three years



1 into the case - - - and yes, cases unfortunately took that
2 long sometimes - - - and then the city would disclaim or
3 you know, send a notice to the police officer saying, we're
4 not going to defend you.

5 MR. HAYES: Yeah, that - - - that's a very
6 interesting scenario. Obviously, it's not before us here,
7 but - - -

8 JUDGE FEINMAN: Well, I - - - I understand it's
9 not the case before us, but you can understand that there's
10 a benefit to having that early assessment so that if your
11 client's going to end up with no coverage, at least he can
12 control who he hires, who he gets to - - - to control the
13 discovery process.

14 MR. HAYES: Yes, Your Honor, and I agree. I - -
15 - I think if the city had proceeded in that way that you
16 just described, in that sequence, then they would have had
17 a much stronger argument that the decision not - - - you
18 know, at that point, not to defend or indemnify Officer
19 Krug had a rational basis, unlike here.

20 CHIEF JUDGE DIFIORE: Thank you, Mr. Hayes.

21 MR. HAYES: Thank you.

22 CHIEF JUDGE DIFIORE: Counsel?

23 MR. LEE: Yes, I'd like to close on this point.
24 There seems to be this issue about, well, what happened
25 before the video? Not enough context. Well, let me just



1 draw a hypothetical for the court, if I may. Imagine you
2 have a police officer who has a legitimate law enforcement
3 reason to make an arrest. And everything's fine at that
4 point. But then let's say, this particular suspect is in
5 handcuffs, maybe he's put in the back of the police car,
6 and then he gets punched in the face.

7 Now, would anyone say, that the punching is
8 within the scope of employment, even though - - -

9 JUDGE WILSON: But it's your position that
10 excessive force is always outside the scope of employment
11 as a matter of law?

12 MR. LEE: No, Judge, it's not.

13 JUDGE GARCIA: Okay, so isn't that really a
14 question in your hypothetical, though, that's extenuated
15 here. But we don't know what happened right before this,
16 and if, for example, this was this altercation, the police
17 go in, they're pulling these people over, and then this
18 happens right away after that as part of this kind of
19 disrupting this melee.

20 Why - - - wouldn't you need to know that to look
21 at this video to make a determination of whether this is in
22 the scope of employment? Not whether or not it's excessive
23 force, because this is what I want to recover, right, but
24 whether or not it's scope of employment. Because we have
25 those cases that say if this is part of the job, and then



1 it escalates into excessive force, scope of employment.

2 MR. LEE: But I guess you have to look at what
3 are the allegations actually in Ford's civil complaint.

4 JUDGE GARCIA: But he's going to allege - - -

5 MR. LEE: Because they have no - - -

6 JUDGE GARCIA: - - - excessive force, right?

7 MR. LEE: But they have - - - but what - - - yes,
8 but they also had nothing to do with what the initial - - -
9 Krug's initial response was, which was again, maybe Krug
10 had a legitimate law enforcement reason in the beginning to
11 actually intervene between Mr. Ford and whoever this other
12 guy in the street is, but then he totally crossed the line,
13 and - - -

14 JUDGE GARCIA: But it seems like - - - and I've
15 been looking at it this way too, I think, that it seems
16 like that's merging excessive force allegations with scope
17 of employment, because use of excessive force can be within
18 the scope of employment. It's just a liability issue,
19 right? It's not was this good or not. So, of course, in
20 the complaint you're going to get allegations of this is
21 excessive force. Why would they be doing anything else
22 there? But in this context, you need to look at what's the
23 liability issue for the city, so you need to know, was that
24 a result of the scope of duty, excessive force, or was it
25 gratuitous, let's call it, right?



1 MR. LEE: Yeah, exactly, I think that's why I
2 tried - - - with my example, I tried to - - - sure, that's
3 probably an even more extreme example with the handcuffing,
4 back door to the police car, punch; that's totally
5 gratuitous. That would be outside the scope of employment.
6 I'm saying this situation is not far off. And maybe Krug
7 had a legitimate reason to intervene to begin with, but - -
8 -

9 JUDGE GARCIA: But how do you know that, because
10 there's no - - - it could be two seconds before this video
11 what happened. You - - - you don't know that. You never
12 looked at it.

13 MR. LEE: I - - - I guess what I'm - - - what I'm
14 saying, Your Honor, is I - - - I would even assume for
15 purpose of your question that that Officer Krug did have a
16 legitimate reason to become involved in whatever was going
17 on, and - - - between Devin Ford and the other individual
18 in the street. But that - - - then he totally crossed the
19 line.

20 I think he stepped outside the scope of his
21 employment, just as a police officer who hit - - - hits a
22 handcuffed suspect would. That - - - that's not proper - -
23 - that's not a proper discharge of your duties. That is
24 totally crossing the line. And that officer should not
25 expect the corp - - - the taxpayers to pay for his defense.



1 JUDGE RIVERA: Counsel, your red light is off, so
2 I just have two quick questions. One is, did corp counsel
3 know that the charges - - - that no charges had been filed
4 against the victim, Mr. Ford?

5 MR. LEE: Well, I would - - - I would - - - I
6 would say that - - - this, Your Honor. In - - - in the
7 video, Ford, when he's hitting - - - I'm sorry - - - Mr.
8 Krug, when he's hitting Ford and saying, get up, get up.
9 And then you do see Ford - - -

10 JUDGE RIVERA: Walk away?

11 MR. LEE: - - - walk away.

12 JUDGE RIVERA: Okay, but - - - so you're not - -
13 - but you're not able to answer my question. Is that - - -

14 MR. LEE: Well, I guess my other response would
15 be also that when the decision was made from the
16 corporation counsel to not defend Krug, there was some time
17 that had passed between the incident and - - -

18 JUDGE RIVERA: Okay. And then, the other
19 question is, generally these scope of employment decisions
20 are very - - - or determinations are very much fact driven.
21 If - - - if it's really just a question of fact as to what
22 happened in advance, what the reaction is, not what's on
23 the video - - - the video speaks for itself, as they say -
24 - - but what might have a - - - or what occurred before the
25 video and how one might view that. If it's a fact



1 question, does that change the analysis in terms of what
2 counsel has to do when they're determining whether or not
3 they'll provide the defense?

4 MR. LEE: I - - - I - - - I don't think so,
5 Judge. I think that - - - and I think you're probably
6 right, that there's always going to be different
7 interpretations that a video is - - - is subject to. So
8 someone might look at a video and see one thing, and
9 someone might look and see another thing, but this is an -
10 - - an Article 78 proceeding, and as long as the
11 corporation counsel's interpretation of the video is not
12 totally irrational, which I would submit to this court,
13 it's not, then I think that the - - - the court order of
14 the Fourth Department should be reversed.

15 CHIEF JUDGE DIFIORE: Thank you, Counsel.

16 MR. LEE: Thank you.

17 CHIEF JUDGE DIFIORE: You're welcome.

18 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Corey Krug v. City of Buffalo, No. 91 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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