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Short Form Order/Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

FILED & RECORDED

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

DEC 13 2013

**COUNTY CLERK
QUEENS COUNTY**

**In the Matter of the Application of
PAUL BERGER and THE JEWISH DAILY
FORWARD**

Petitioners,

Index No.: 7618/13

Mot. Date: 7/12/13

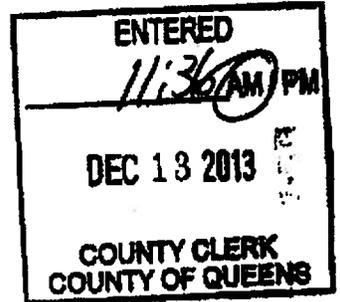
-against-

Mot. Cal. No. 15

Mot. Seq. 1

**THE NEW YORK CITY DEPARTMENT OF
HEALTH AND MENTAL HYGIENE,**

Respondent.



The following papers numbered 1 to 16 read on this motion by petitioners for a judgment vacating the determination of respondent The New York City Department of Health and Mental Hygiene (DOHMH), dated February 22, 2013, that denied the petitioners' appeal of its Freedom of Information Law (FOIL) request, directing the respondent to comply with their FOIL request and awarding them attorney's fees and costs pursuant to Public Officers Law §89.

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OPINION OF THE COURT

Upon the foregoing papers, it is ordered that the petition is denied in all respects, and the petition is dismissed, as set forth below.

In this Article 78 proceeding, petitioners Paul Berger and The Jewish Daily Forward seek a judgment vacating the determination of the respondent DOHMH, dated February 22, 2013, that denied the petitioners' appeal of its FOIL. The request sought the name of the Mohel, who infected an infant with herpes during the Orthodox Jewish practice of Metzizah B'Peh (MBP), on December 12, 2012. The petitioners also seek to have this Court direct the respondent to comply with their FOIL request and to award them attorneys' fees and costs, pursuant to Public Officers' Law §89.

The Facts

Petitioner Paul Berger is a journalist with The Jewish Daily Forward, a non-profit newspaper, that serves New York City's Jewish and Yiddish speaking communities. On January 25, 2013, Mr. Berger filed a FOIL request with the DOHMH requesting the following information: "[p]lease provide the name of the Mohel who infected an infant with HSV-1 during ritual circumcision in [sic] December 12, 2012. The Mohel was acting in a business/professional capacity, therefore it cannot justifiably be contended that disclosure would constitute an unwarranted invasion of privacy".

By way of background, in September, 2012, New York City's Board of Health mandated informed consent for the ritual in which a Mohel or circumciser uses his mouth to draw away blood after the surgical removal of the foreskin, to "cleanse" the circumcision (see 24 RCNY §181.21¹). The parents' consent acknowledges the dangers

¹ §118.21 provides:

- (a) Direct oral suction means contact between the mouth of a person performing or assisting in the performance of a circumcision and an infant's circumcised penis.
- (b) Written consent required. A person may not perform a circumcision that involves direct oral suction on an infant under one year of age, without obtaining, prior to the circumcision, the written signed and dated consent of a parent or legal guardian of the infant being circumcised using a form provided by the Department or a form which shall be labeled "Consent to perform oral suction during circumcision," and which at a minimum shall include the infant's date of

of MBP before it is performed².

DOHMH's Associate General Counsel/Public Records Officer, in an e-mail on January 28, 2013, denied the FOIL request, "under FOIL §87(2)(a) and NYC Health Code §11.11(a), which provides that:

Epidemiological³ and surveillance reports and records of cases, contacts,

birth, the full printed name of the infant's parent(s), the name of the individual performing the circumcision and the following statement: "I understand that direct oral suction will be performed on my child and that the New York City Department of Health and Mental Hygiene advises parents that direct oral suction should not be performed because it exposes an infant to the risk of transmission of herpes simplex virus infection, which may result in brain damage or death."

(c) Retention of consent forms. The person performing the circumcision must give the parent or legal guardian a copy of the signed consent form and retain the original for one year from the date of the circumcision, making it available for inspection if requested by the Department.

§181.21 was added to Article 181 by resolution adopted September 13, 2012 to require that persons who perform circumcisions on infants under one year of age that include the application of direct oral suction obtain the written consent of a parent prior to performance of the circumcision and warn the parent of the Department's concerns about the risks of infection posed by direct oral suction.

² Jewish groups and rabbis argue the city's requirements constitute a violation of religious freedoms guaranteed under the First Amendment. (See e.g. http://www.nytimes.com/2012/09/13/nyregion/regulation-of-circumcision-method-divides-some-jews-in-new-york.html?_r=0 [Nov. 13, 2013])

³ Epidemiology is the branch of medical science that deals with the incidence, distribution, and control of disease in a population. (<http://www.merriam-webster.com/dictionary/epidemiology> [Nov. 27, 2013]). The highest priority of the NYC HIV Epidemiology Program is to maintain the confidentiality of all persons reported with HIV/AIDS, including their names and other identifying information. This information is protected by adhering to the New York State Public Health Law, the New York City Health Code, HIPAA and other federal legislation and the HIV Epidemiology Program confidentiality protocols. (<http://www.nyc.gov/html/doh/html/data/bcpreporting-conreg.shtml> [Nov. 27, 2013]).

carriers, suspect cases or suspect contacts of diseases and conditions of public health interest that are reported to the Department, including but not limited to additional information it may obtain, develop or prepare in the course of an epidemiological investigation, shall be confidential and shall not be subject to inspection by persons other than authorized personnel or agents of the Department or by the State Department of Health pursuant to the State Sanitary Code. The disclosure of such reports, records or information shall not be compelled. No individual's medical or individually identifiable information shall be disclosed from any epidemiological report or record, and no disclosure thereof may be compelled, regarding any individual who is the subject of, or identified in, such a report, or regarding an individual or entity that has made such a report".

Mr. Berger filed a timely appeal of the denial of his FOIL request. He stated that he had requested the name of a Mohel "who is believed to have infected an infant with herpes during the Orthodox Jewish practice of metzizah b'peh. The mohel was the subject of an epidemiological investigation case in December 2012 that resulted in the NYC Dept of Health and Mental Hygiene putting out an advisory in January 2013 that had discovered a new case of neonatal herpes following ritual Jewish circumcision." Mr. Berger argued that the record officer's response to his FOIL request was insufficient and inadequate under FOIL, that Section 87(2)(b) of FOIL does not apply to a person acting in the performance of his or her official duties. He also claimed that the "mohel was acting in a professional capacity as a Jewish ritual circumciser when he infected the infant with herpes and therefore privacy provisions of FOIL law do not apply." In his appeal, Mr. Berger cited to advisory opinions issued by the New York State Commission on Open Government.

DOHMH's appeals officer, in a letter dated February 22, 2013, denied Mr. Berger's appeal, stating that:

"Pursuant to the exemption under FOIL §87(2)(b), an agency may withhold records that, if released, would constitute an unwarranted invasion of personal privacy. Records relating to an individual's medical condition are clearly within this exemption (as you point out in your appeal); see also FOIL §89(2)(b). Moreover, pursuant to Public Health Law (PHL) §18, access to an individual's medical records or "patient information" is restricted to a "qualified person" as defined by that statute. Journalists are

not included in such definition, see PHL §18. Finally, the individual whose name is being requested was (as you point out) the subject of an epidemiological investigation under NYC Health Code §11.11(a) and is therefore protected from disclosure under the same. The NYS Committee on Open Government advisory opinions excerpted and attached to your appeal do not address the issues specific to your request and are therefore irrelevant. In those opinions, the individuals whose identities were being sought were all public employees performing their public duties (f10800;f12186); and/or included a known complainant employed by a public employees union whose complaint was being sought (f8596). Mohels are neither public employees nor are they licensed by any public agency to perform any specific religious practice".

The petitioners thereafter timely commenced the within Article 78 proceeding on April 18, 2013. They seek a judgment vacating the DOHMH determination of February 22, 2013, directing respondent to comply with their FOIL request and awarding attorney's fees and costs pursuant to Public Officers' Law §89. They claim that the respondent did not meet its burden to provide a specific and particularized justification for the withholding of the requested records from disclosure; and that the grounds stated by respondent did not constitute a reasonable basis for denying the FOIL request. They also aver that they wish to raise public awareness of this issue, and that there is a strong public interest in disclosing the name of the Mohel, as at least two infants have died since 2000 from herpes contracted during MBP and two other infants have suffered brain damage.

The respondent asserts that, pursuant to Public Officers Law §87(2)(b), a government agency may deny access to records or portions of records which "if disclosed would constitute an unwarranted invasion of personal privacy" under Public Officers Law §89(2). They argue that, pursuant to Public Officers Law §89(2)(b)(i), the "disclosure of . . . medical . . . histories . . ." constitutes an unwarranted invasion of personal privacy. There position is that the disclosure of the information sought falls squarely within the personal privacy exemption relating to medical information, since the petitioners' request presumes that the subject Mohel is infected with HSV-1. The disclosure of the identity of a person who transmitted an HSV-1 infection would necessarily identify that individual as a carrier of HSV-1, which constitutes protected medical information. The respondent also

asserts that it has a strong public interest in protecting the privacy of information protected under Section 11.11(a) of the New York City Health Code, so that persons and organizations will continue to report and cooperate with DOHMH in confidential matters involving health, with the full confidence that information that was reported will remain confidential in accordance with applicable laws.

Freedom Of Information Law (FOIL) Public Officers Law §§84-90

The statutorily stated policy behind FOIL is to promote "[the] people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations" (see Washington Post Co. v New York State Ins. Dep't, 61 NY2d 557, 564 [1984]; Public Officers Law, § 84). FOIL provides that government records are presumptively available for public inspection unless an enumerated exemption contained in Public Officers Law § 87(2) insulates them from disclosure. (see Matter of Gould v New York City Police Dep't, *supra*, 89 NY2d 267, 274-275 [1996]). Courts must narrowly construe FOIL exemptions, and the agency that seeks to prevent disclosure bears the burden of demonstrating that the requested material falls squarely within an exemption "by articulating a particularized and specific justification for denying access." (see Matter of Capital Newspapers Div. of Hearst Corp. v Burns, 67 NY2d 562 [1986].) Further, "the status, need, good faith or purpose of the applicant" is irrelevant to the availability of records under FOIL (see Matter of Scott, Sardano & Pomeranz v Records Access Officer, 65 NY2d 294, 296 [1985]).

The broad definition of "records" contained in FOIL intended to effectuate this mandate includes

any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes. [Emphasis added.]

(see Matter of Westchester Rockland Newspapers v Kimball, 50 NY2d 575, 580). FOIL is generally liberally construed and its exemptions narrowly interpreted so that the public

is granted maximum access to the records of government (see Matter of Fink v Lefkowitz, 47 NY2d 567, 571 [1979]).

Information which is exempt from disclosure is defined by Public Officers Law §87(2), which provides, in pertinent part, that:

Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:

- (a) are specifically exempted from disclosure by state or federal statute;
- (b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article;

At issue here is Title 24, Article 11, entitled "Reportable Diseases and Conditions" of the Health Code of the City of New York, specifically,

§11.11 *Confidentiality* of reports and records.

(a)(1) Epidemiological and surveillance reports and records of cases, contacts, carriers, suspect cases or suspect contacts of diseases and conditions of public health interest that are reported to the Department, including but not limited to additional information it may obtain, develop or prepare in the course of an epidemiological investigation, shall be confidential and shall not be subject to inspection by persons other than authorized personnel or agents of the Department or by the State Department of Health pursuant to the State Sanitary Code. *The disclosure of such reports, records or information shall not be compelled.* No individual's medical or individually identifiable information shall be disclosed from any epidemiological report or record, and no disclosure thereof may be compelled, regarding any individual who is the subject of, or identified in, such a report, or regarding an individual or entity that has made such a report. *[Emphasis added]*.

This Court finds that Section 11.11(a) of the New York City Health Code is not a state or federal statute, thus this exemption in Public Officers Law §87(2)(a) is inapplicable. The Court's analysis must now look to Public Officers Law §89(2) in order

to determine if the "personal privacy" exemption is applicable.

Public Officers Law § 89(2) specifically provides for the protection of personal privacy within the general disclosure scheme of the Freedom of Information Law as follows:

2. (a) The committee on public access to records may promulgate guidelines regarding deletion of identifying details or withholding of records otherwise available under this article to prevent unwarranted invasions of personal privacy. In the absence of such guidelines, an agency may delete identifying details when it makes records available.

(b) An unwarranted invasion of personal privacy includes, but shall not be limited to:

i. disclosure of employment, medical or credit histories or personal references of applicants for employment;

ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility;

iii. sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes;

iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it; or

v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency.

(c) Unless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision:

i. *when identifying details are deleted;*

ii. when the person to whom a record pertains consents in writing to disclosure;

iii. when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him. (See also, § 89 [2-a].) [*Emphasis added*].

Thus, Public Officers Law §89(2)(c) itself provides that there is no unwanted invasion of personal privacy when identifying details (i.e. the individual's name) are deleted. "What is intended and accomplished by subdivision 2 of section 89 is provision of a means by which the single obstacle to disclosure – may be overcome, i.e., by deleting identifying details" (see Matter of Short v Board of Managers of the Nassau Cnty. Medical Center, 57 NY2d 399, 405 [1982]).

Where none of the specific categories set forth in Public Officers Law §89(2) are applicable, a court "must decide whether any invasion of privacy ... is 'unwarranted' by balancing the privacy interests at stake against the public interest in disclosure of the information" (see Matter of New York Times Co. v City of NY Fire Dept., 4 NY3d 477, 485 [2005]).

Section 11.03 of the Health Code of the City of New York (24 RCNY §11.03) requires that "(a) Cases and carriers affected with" Herpes simplex virus, neonatal infections (in infants 60 days or younger) "shall be reported to the Department as specified in this article." Section 11.05 of the Code requires that "when no physician or other person specified in subdivision (a) is in attendance, it shall be the duty of the head of a private household or of the person in charge of any institution, including but not limited to a day care or other congregate care setting with children under the age of six, school, college, university, hotel, shelter, correctional facility or camp, having knowledge of an individual likely to be affected with a disease or condition reportable under §11.03 of this Code, to report the name and address of such individual to the Department."

The Court finds that the purposes of all of these codes would be negated and seriously undermined if the names of persons reported under these sections were revealed to the public. Individuals would be dissuaded from complying with the reporting requirements if their anonymity was compromised.

This Court has not found binding precedential case law authority on this precise issue. Therefore, in conducting the above balancing analysis to determine whether an

invasion of privacy would be "unwarranted," the Court has scrutinized other cases involving the release of identifying information in records requested by FOIL applications. The Court's research indicates that, which inclined to mandate disclosure, courts have scrupulously protected the identities of individuals by redaction of the records to remove identifying information such as names where disclosure would cause a reasonable person to suffer an embarrassing invasion of privacy.

For instance, in Scott, Sardano & Pomeranz v Records Access Officer, 65 NY2d 294, 298 (1985), the Court of Appeals held that while the petitioner, a law firm was entitled to access accident reports to a law firm, but ordered the deletion of the accident victims names and addresses to prevent an unwarranted invasion of personal privacy .

In the Matter of Porco v Fleischer, 100 AD3d 639, 640 (2d Dept. 2012), the Second Department permitted disclosure of E-Z Pass information, since the petitioner was not seeking any identifying details, so the privacy interests of E-ZPass customers were not implicated (see Public Officers Law 89[2] [c], [I]; see also Fappiano v NY City Police Dept. 95 NY2d 738 [2001]).

In the Matter of Schenectady County Socy. for the Prevention of Cruelty to Animals, Inc. v Mills, 18 NY3d 42 (2011), the Court of Appeals required production of agency records consisting of business addresses of veterinarians licensed by the Education Department in Schenectady County, but held that they should be redacted to remove exempt private information, namely their home addresses. Were the petitioners seeking records only, with redaction of identifying information, the foregoing authority would mandate disclosure. However, the petition seeks the identifying information itself, along with disclosure of the medical condition. Hence, this Court is disinclined to grant disclosure.

In the Matter of Harbatkin v New York City Dept. of Records & Info. Servs., 19 NY3d 373, 380 (2012), a rare case in which the names of suspected Communist Party collaborators were allowed to be disclosed, the Court of Appeals held:

We conclude that today, more than half a century after the interviews took place, the disclosure of the deleted information would not be an unwarranted invasion of personal privacy. Certainly, this was not always true. At the time of the investigations, and for some years thereafter, public

knowledge that people were named as present or former Communists would have subjected them to enormous embarrassment, or worse. But that embarrassment would be much diminished today--both because the activity of which they were accused took place so long ago, and because the label "Communist" carries far less emotional power than it did in the 1950s.

Unlike Harbatkin, it cannot be gainsaid that the disclosure by the New York City Health Department of the names of individuals infected with herpes would not bring with it the stigma of "embarrassment or worse." In analyzing the release of this type of information, any distinction between "personal" privacy and "professional" privacy, is a hollow differentiation. A person with herpes or any similar communicable disease suffers the same privacy concerns whether or not his business or personal life is concerned. In either instance, their personal privacy concerns are implicated irrespective of their vocational situation. The fact that an infected individual is a Mohel, a sous chef, or a police officer, no less implicates their personal privacy interests, or diminishes the need to keep their health status confidential.

This Court finds that, while not a state or federal statute, New York City Health Code 11.11, which is not insignificantly entitled "*§11.11 Confidentiality of reports and records*," on its face provides that "no individual's medical or individually identifiable information shall be disclosed from any epidemiological report or record, and no disclosure thereof may be compelled, regarding any individual who is the subject of, or identified in, such a report, or regarding an individual or entity that has made such a report." Despite the fact that no medical records are being provided, a person's name is "individually identifiable information" as contemplated within the law. The purpose of this and like legislation is to encourage the reporting of information under Section 11.11(a) of the New York City Health Code, so that persons and organizations will continue to cooperate with DOHMH in matters involving public health⁴. While no

⁴ The Introductory Notes to the New York City Health Code (24 RCNY §11) state that Article 11 was amended by resolution adopted September 13, 2012 to add a new §11.10 that requires physicians and other health care providers to obtain specimens from vesicular skin lesions on infants suspected of having neonatal herpes simplex virus at or before starting anti-viral treatment to enable prompt and accurate diagnosis, and submit the specimens to the

promise of confidentiality is explicitly given to each reporting individual, it is understood by the very terms of the provision that the individual may report his or her condition with the full confidence that their identity will remain exempt from public disclosure. That purpose must be weighed against the public interest in disclosure, which in this case is manifested by the petitioners' vague and nonspecific claim that it wishes to use the name of the Mohel to "raise public awareness." The Court finds that "public awareness" of the potential dangers alleged to be inherent in the practice of MBP, can be effectuated without compromising the name of the individual or individuals who are infected, and thereby abrogating their personal privacy interests. Indeed several articles published by the petitioners whose intention is just that - to raise public awareness- have been found by this Court in its research. (See e.g. Berkman, Seth, Are New York Hospitals Hiding Herpes From Metzitzah B'Peh Circumcision Rite?, The Jewish Daily Forward, April 1, 2013; Berkman, Seth, Second Jewish Infant Contracts Herpes From Controversial Circumcision Rite, The Jewish Daily Forward, April 12, 2013; Josh Nathan-Kazis, Orthodox Mobilize To Defend Circumcision Rite, The Jewish Daily Forward, August 24, 2012; Berkman, Seth, Orthodox Rabbis Vow To Resist Consent Forms for Controversial Circumcision Rite, The Jewish Daily Forward, February 8, 2013; Berkman, Seth, U. Penn Researchers: Orthodox Groups Distorted Our Report on Circumcision Rite, The Jewish Daily Forward, April 15, 2013). The petitioners have not identified any further or particularized public interest that would be served by disclosing the name of the individual or individuals that are or were the subject of the Department of Health epidemiology reports. The court finds that the disclosure of the names of the reported persons would likely subject the named individuals to vilification in the press, as well as embarrassment and shame in both their business and private life, in addition to possible

New York State Department of Health for testing.

As part of a comprehensive review of the Health Code to provide adequate legal tools to address the City's public health needs, Article 11, which covers the subject matter of diseases and conditions in humans and diseases in animals that are communicable to humans, was repealed and reenacted on September 17, 2008 to improve the reporting and control of communicable diseases and other conditions of public health interest that may affect the public health of the City. To that end, Article 11 has been revised to recognize and reflect changes and advancements in science and technology, emerging pathogens and contemporary concepts in public health."

sanctions for violations of the NYC Health Code if they infected others. The Court is also aware of the difficulties encountered by the New York City Department of Health in obtaining the cooperation of infected persons or members of religious orders in reporting conditions involving the spread of contagion (see e.g. FailedMessiah.com, Don't Let Gentiles Or Average Jews Know We Do Controversial Circumcision Sucking Rite, Chabad Rabbi Says,

http://failedmessiah.typepad.com/failed_messiahcom/2013/05/don-t-let-gentiles-know-we-do-controversial-circumcision-sucking-rite-chabad-rabbi-says-234.html [Nov. 27, 2013]; Maimon, Debbie, Behind The Campaign Against Metzitzah B'peh, Yated Newspaper, <http://www.yated.com/behind-the-campaign-against-metzitzah-b-39-peh.0-686-0-.html> [Nov. 27, 2013]).

Judicial review of the determination of a body or officer is limited to whether the determination was made "in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803[3]). Thus, a court may not substitute its judgment for that of an administrative agency when there is a rational basis for the agency's determination (see Matter of Nehorayoff v Mills, 95 NY2d 671 [2001]). Moreover, it is well settled that the interpretation given a statute by the agency charged with its enforcement will be respected by the courts if not irrational or unreasonable (see Matter of Raritan Dev. Corp. v Silva, 91 NY2d 98 [1997]; Matter of Fineway Supermarkets, Inc. v State Liquor Authority, 48 NY2d 464 [1979]). The Court finds that the petitioners have not satisfied these standards for judicial review. Hence, the petition must be denied, and dismissed.

In closing, the Court is not insensitive to the plight of infants that may become infected by the practice of MBP. Nor does it seek to shirk its obligation to act in loco parentis in the best interests of children to protect their health and welfare. However, this Court cannot circumvent New York City Health Codes mandating confidentiality of reporting communicable diseases in epidemiological reports intended to protect the safety and health of the general public. The petitioners have other means of raising public awareness of prospective health risks which do not involve the disclosure of the names of infected persons, or compromise their right to privacy. To simply ignore the New York

City Health Codes and the purposes behind them would be tantamount to ignoring the essential epidemiological purposes served by the anonymous reporting of diseases. In this instance, "open government" must yield to matters of public safety and individual privacy. If exemptions to disclosure of identifying information are desired, the New York City Council or state legislature must ratify them. This Court cannot legislate by judicial revision.

Accordingly, based on the foregoing, it is,

ORDERED and **ADJUDGED**, that the petitioners' request to vacate the respondent's determination of February 22, 2013 is denied, and the petition is dismissed; and it is further,

ORDERED and **ADJUDGED**, that the petitioners' request for attorneys' fees and costs, is also denied.

This constitutes the opinion, decision, order and judgment of the Court.

Dated: December 2, 2103

ENTERED 11:36 AM/PM
DEC 13 2013
COUNTY CLERK COUNTY OF QUEENS

FD
TIMOTHY J. DUFFICY, J.S.C.
Audrey S. Phaffer
J. Clerk
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