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TO BE PUBLISHED

Supreme Court of Kentucky

2023-SC-0173-DG

COMMONWEALTH OF KENTUCKY, TRANSPORTATION CABINET, DEPARTMENT OF HIGHWAYS — APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
NO. 2021-CA-1461
FLOYD CIRCUIT COURT NO. 13-CI-00788

LEAH ATKINSON; FRED B. ANDERSON; ALLEN BARRE A/K/A ALLEN M. BARR; ELIZABETH LYNNE BARRE A/K/A ELIZABETH LYNN BARR; EDWARD BILLIPS; TERESA BILLIPS; LORA CHAFFINS (LONG); JOAN CHAFFINS; LISA RENEE CHAFFINS; BRENDA G. COOK; WALLACE G. COOK; SKYE GOODMAN CRAMER A/K/A SKYE WEBER; CHAD DUNLAPP; TODD DUNLAPP; FLOYD COUNTY RESOURCES, INC.; CASSIE FRIEND; KAREN GESWEIN (A/K/A KAREN M. LOVE); ANITA GIBSON; ANTHONY GIBSON; DAVID GIBSON; DAVID BRIAN GIBSON; PETE GRISBY, II; ELHANAN PETE GRISBY; GERI E. GRISBY; MACHELE PETE GRISBY; KENNETH HENRY; PRISCILLA HENRY; JOYCE TURNER HOWELL; RICK JONAS; LEE MAJAKEY; MELINDA GAYE MAJAKEY; SAM MARTIN, III; CHERYL RAY MARTIN; DEMORIS MARTIN; DONNIE RAY MARTIN; JENNIFER MARTIN; JULIUS MARTIN; MARGARITE MARTIN; MARY ROSE MARTIN; PHYLLIS MARTIN; TERESA MARTIN; TIM MARTIN; TIMMY MARTIN; WILMA FAYE MARTIN; CLAUDE JUNE MCKENZIE, JR.; MARTHA JUNE MCKENZIE; ROSE MARY RICE; DAVID RICH; NORA LOU RICH; VIRGINIA ELIZABETH ROWE; SAS RESOURCES, — APPELLEES

INC.; SANDRA SUE SLONE MARTIN; TIMOTHY K. STEPHENS; ARNOLD TURNER, JR.; ALICE TURNER; ALLEN VAN TURNER; ARNOLD BRENT TURNER; DOUG TURNER; ELIZABETH TURNER; EUGENE TURNER; JAMES R. TURNER; JEWELL TURNER; JOE TURNER; JORDAN TURNER; JOSEPH R. TURNER; KARENLYNN VAN TURNER; NORMA TURNER; RALPH TURNER; TED TURNER; TERRY TURNER; UNKNOWN RESPONDENTS, BEING THE UNKNOWN OWNERS, IF ANY, HEIRS AT LAW, GRANTEES, DEVISEES, SUCCESSORS, AND/OR ASSIGNS, IF ANY; BEING ANY AND ALL UNKNOWN PERSONS, SPOUSES AND/OR ENTITIES, IF ANY, ENTITLED TO AND/OR CLAIMING AN INTEREST IN AND/OR TITLE TO; JAMES E. WALTER; LOUISE MARIE WALTER; HENRY WRIGHT; MAYTIFERN WRIGHT

OPINION OF THE COURT BY JUSTICE KELLER

AFFIRMING

The Commonwealth of Kentucky, Transportation Cabinet, Department of Highways ("Cabinet") appeals from an unfavorable decision of the Court of Appeals which affirmed a Floyd Circuit Court order awarding a group of mineral parcel owners ("Owners") $550,000 as just compensation for the Cabinet's condemnation of their real property. The Cabinet now asks this Court to consider whether a property owner may prove a condemned mineral parcel's fair market value by introducing evidence of prospective "royalty" income the property owner could expect to receive from the minerals' eventual extraction and sale. We hold that the Floyd Circuit Court did not abuse its discretion by denying the Cabinet's motion to exclude appraisal evidence that accounted for

the Owners' anticipated royalty income or the "royalty rate" established in their coal lease. Accordingly, we now affirm the Court of Appeals.

I. FACTS AND BACKGROUND

On September 9, 2013, the Cabinet, pursuant to its eminent domain power, filed a Petition to condemn the fee simple title to a 30.366-acre tract of land containing subsurface coal near Boy Hollow in Floyd County. According to the Cabinet, the condemnation was necessary to complete its decades-long construction of a permanent highway connecting the eastern Kentucky communities of Harold and Minnie ("KY 680"). The record on appeal suggests that the 30.366-acre tract of land the Cabinet sought to condemn was only a portion of a much larger mineral parcel collectively owned by several property Owners.

Of the several Owners who held property interests in the mineral parcel targeted by the Cabinet, Leah Atkinson owned a majority share. Relevant to this appeal, Atkinson and the parcel's other Owners had previously entered into a "coal lease" with SAS Resources, LLC, ("SAS Resources") granting it the right to mine their property's subsurface coal in exchange for royalty payments. SAS Resources, however, had yet to begin mining the Owners' property at the time the Cabinet filed its condemnation Petition.

Shortly after the Cabinet filed its Petition, the Floyd Circuit Court appointed three commissioners, pursuant to KRS 416.580, responsible for determining the fair market value of the parcel to be condemned. Relevantly, when the Commonwealth exercises its eminent domain power to condemn or "take" private property for public use, the Constitution requires that the

government fairly compensate the property owner. KY. CONST. § 13. This Court has previously stated that "just compensation" is calculated as the difference between the fair market value of the owner's property immediately before the taking and the fair market value of the remainder immediately afterwards. *Commonwealth v. R.J. Corman R.R. Co./Memphis Line*, 116 S.W.3d 488, 491 (Ky. 2003); *see also* KRS 416.660(1).

On November 15, 2013, the appointed commissioners issued an Amended Report[1] concluding that the Owners' property had a fair market value of $500 both before *and* after the Cabinet's condemnation, thus indicating that the condemnation had no effect on the value of the Owners' property. On March 25, 2014, the Floyd Circuit Court thereafter issued an Interlocutory Order and Judgment adopting the commissioners' award and ruling that the Cabinet was entitled to condemn the fee simple title to a portion of the Owners' property. After several Owners filed statements of exceptions challenging the commissioners' award as inadequate, the parties proceeded to trial to determine the issue of just compensation. *See* KRS 416.620.

Prior to trial, however, the Cabinet filed a motion in limine seeking to exclude any and all evidence utilizing a "royalty rate" as a measure of damages to prove the condemned mineral parcel's fair market value. In the context of mineral leases, a "royalty" is "a share of the product or profit from real property, reserved by the grantor of a mineral lease, in exchange for the lessee's right to mine or drill on the land[.]" *Royalty*, BLACK'S LAW DICTIONARY

[1] The commissioners' first report contained a clerical error.

(12th ed. 2024). Mineral leases often provide a minimum royalty amount to be paid to the lessor landowner when "no mining is done or the royalty at the agreed rate on what is actually mined is less than the minimum." 58 C.J.S. *Mines and Minerals* § 277.

In its motion in limine, the Cabinet specifically argued that Atkinson's expert appraisal witness, Sam Johnson, had improperly calculated the condemned parcel's fair market value by considering the unrealized, prospective royalty income the Owners' could expect to receive from the extraction and sale of the parcel's subsurface coal. The Cabinet argued that Johnson's testimony would be inadmissible because the "fair market value of the minerals should be valued as they existed immediately before and immediately after the taking, which is in the ground[.]" The Floyd Circuit Court, however, denied the Cabinet's motion and the parties proceeded to trial on July 6, 2021. The ensuing trial would largely hinge on which method of valuation the jury believed most accurately proved the fair market value of the condemned property—the "comparable sales approach" offered by the Cabinet, or the "income capitalization approach" offered by Atkinson.

At trial, the Cabinet's expert appraisal witness, Dixon Nunnery, testified that he had prepared an appraisal report estimating the fair market value of the Owners' condemned property, which relied upon coal reserve data produced by the Cabinet's expert engineering witness Lisa Townes. Nunnery conducted his appraisal of the condemned mineral parcel under the premise

that the Cabinet had acquired 193,975 tons of recoverable coal[2] reserves during its condemnation of the Owners' property, and that the remainder of the Owners' property contained only 313,503 tons of recoverable coal. Using these figures, Nunnery then researched "comparable sales" of similar properties to estimate the fair market value of the condemned parcel. According to Nunnery, the Owners' property had a pre-taking fair market value of $380,600 and a post-taking fair market value of $235,000. Nunnery, therefore, concluded that the condemned mineral parcel had a fair market value of $145,600.

Atkinson's expert appraisal witness, Sam Johnson, conversely testified that Nunnery's comparable sales approach was not the most accurate measure of the condemned mineral parcel's fair market value. Rather, Johnson's appraisal utilized the "income capitalization approach" and considered the condemned parcel's capacity to produce future income for the Owners—via the extraction and sale of its subsurface coal—as the best measure of estimating the parcel's fair market value at the date of condemnation.[3]

Relying on coal reserve data and mining plans produced by Atkinson's engineering expert, Gary Ousley, Johnson conducted his appraisal under the premise that the Owners' property contained 609,643 tons of recoverable coal prior to condemnation, and that only roughly 21,200 tons of recoverable coal

[2] The term "recoverable coal" represents the amount of coal that can be feasibly or practically mined during a mining operation, as opposed to the total amount of coal "in place" or in the ground.

[3] It bears noting that the Cabinet objected to the admission of Johnson's testimony twice throughout trial, and echoed the arguments it had raised in its motion in limine. The trial court, consistent with its ruling on the Cabinet's motion in limine, overruled the Cabinet's objections.

were left on the property after the Cabinet's condemnation. Ousley, a professional engineer with extensive experience in developing mining plans, had previously testified that the Cabinet's condemnation of the Owners' property had "sterilized" some of the coal seams on the remaining property, thus rendering them incapable of being mined in the future. Both Ousley and Johnson concurred that it was unlikely anyone would choose to mine the remaining 21,200 tons of recoverable coal on the Owners' property because it would not be profitable. Accordingly, Johnson testified that the Owners' property had a pre-condemnation fair market value of roughly $2.1 million and was virtually worthless after the Cabinet's condemnation. Johnson's appraisal thus indicated that the Owners would be fairly compensated by an award in excess of $2 million.

The jury, however, was not entirely convinced by either of the parties' two expert appraisal witnesses. Rather, the jury found that the Owners' property had a pre-taking fair market value of $1,083,000 and a post-taking fair market value of $533,000. The jury accordingly awarded the Owners $550,000 as "just compensation."

The Cabinet then promptly appealed and argued that the Floyd Circuit Court had abused its discretion in admitting Sam Johnson's appraisal testimony, which considered the condemned property's capacity to produce royalty income as affecting its fair market value. The Court of Appeals affirmed the judgment of the circuit court and held that Johnson's testimony was admissible because he had permissibly employed the income capitalization approach to property valuation as sanctioned in *Big Rivers Elec. Corp. v.*

Barnes, 147 S.W.3d 753 (Ky. App. 2004). This Court thereafter granted the Cabinet's motion for discretionary review.

II. STANDARD OF REVIEW

A trial court's decision to admit evidence is reviewed for an abuse of discretion. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). A trial court abuses its discretion when its decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000) (citing *English*, 993 S.W.2d at 945).

III. ANALYSIS

"Sections 13 and 242 of the Kentucky Constitution and the Fifth Amendment of the United States Constitution permit the taking of private property for public use, but not 'without just compensation.'" *Baston v. Cnty. of Kenton ex rel. Kenton Cnty. Airport Bd.*, 319 S.W.3d 401, 406 (Ky. 2010). Just compensation is statutorily established as "such a sum as will fairly represent the difference between the fair market value of the entire tract, all or a portion of which is sought to be condemned, immediately before the taking and the fair market value of the remainder thereof immediately after the taking[.]" KRS 416.660(1). In turn, a property's fair market value is "the price that a willing seller will take and a willing buyer will pay for property, neither being under any compulsion to sell or buy and both being in possession of all relevant information regarding the property." *R.J. Corman*, 116 S.W.3d at 491 (quoting *Wilhite v. Rockwell Int'l Corp.*, 83 S.W.3d 516, 519 n. 6 (2002)).

Because property values are not ordinarily susceptible to exact measurement, parties to condemnation proceedings may appropriately resort to opinion evidence to prove a property's fair market value. *Commonwealth, Dep't of Highways v. Tyree*, 365 S.W.2d 472, 475 (Ky. 1963). And generally, any fact that a willing buyer or seller would deem material to a negotiation is relevant to prove the condemned property's fair market value. *Baston*, 319 S.W.3d at 406. For instance, the presence of valuable minerals underneath a condemned property may be considered as affecting the property's fair market value. *Gulf Interstate Gas Co. v. Garvin*, 368 S.W.2d 309, 311 (Ky. 1963) ("*Garvin II*"); *Commonwealth, Dep't of Highways v. Gearhart*, 383 S.W.2d 922, 925–26 (Ky. 1964). Further, a condemned property's fair market value is not restricted by its use at the time of condemnation, because a willing buyer would appropriately consider all of the uses for which the condemned property is reasonably suitable, including its "highest and most profitable use." *Baston*, 319 S.W.3d at 406. The highest and best use rule, however, "is subject to the qualification that if the land is reasonably adaptable to another [more profitable] use, there must be an expectation or probability in the near future that it can or will be so used." *Gearhart*, 383 S.W.2d at 926. Here, both parties' experts agreed that the highest and best use of the Owners' property prior to condemnation was for coal mining. The experts disagreed, however, on how to *value* the Owners' property as a coal mining operation.

There are three favored methods to valuing real property seized via eminent domain: the comparable sales approach, the income capitalization approach, and the cost approach. *R.J. Corman*, 116 S.W.3d at 495.

Pursuant to the comparable sales approach, evidence pertaining to sales of other real property may be admitted to prove the fair market value of the condemned property, "where the conditions with respect to the other property and the sale thereof are similar to those involved in the case." 27 AM. JUR. 2D *Eminent Domain* § 537. This Commonwealth's approach "has been to liberally allow the admission of evidence of other sales 'where there are any reasonable elements of comparability[.]'" *Paducah Indep. Sch. Dist. v. Putnam & Sons, LLC*, 520 S.W.3d 367, 379 (Ky. 2017) (quoting *Commonwealth, Dep't of Highways v. Whitledge*, 406 S.W.2d 833, 836 (Ky. 1966)). Expert witnesses have considerable leeway "'to exercise their own skilled judgment in deciding' what those elements of comparability might be." *Id.* (quoting *Hatfield v. Commonwealth, Dep't of Transp.*, 626 S.W.2d 213, 214 (Ky. 1982)).

In other jurisdictions, it has been said that the comparable sales approach is the preferred method of valuing condemned property, or that the existence of comparable sales evidence thus precludes the use of other valuation methods. *See, e.g.*, *United States v. 103.38 Acres of Land*, 660 F.2d 208, 211 (6th Cir. 1981); *State v. Luby's Fuddruckers Rests., LLC*, 531 S.W.3d 810, 815–16 (Tex. App. 2017); *Sweet v. Town of West Warwick*, 844 A.2d 94, 98 (R.I. 2004). But in this Commonwealth we have stated that while "[c]omparable sales are helpful in determining value . . . other methods may be used." *Commonwealth, Dep't of Highways v. Sellers*, 421 S.W.2d 581, 584 (Ky. 1967).

Despite the Cabinet's arguments to the contrary, a property's capacity to produce future income for its owner can be appropriately considered as affecting its fair market value, as long as that income is "derived from the

intrinsic nature of the real estate itself, as distinguished from the profits derived from a business operated on the land." *R.J. Corman*, 116 S.W.3d at 495–96; *see also Commonwealth, Dep't of Highways v. Tanner*, 424 S.W.2d 384 (Ky. 1968); *Commonwealth, Dep't of Highways v. Whipple*, 392 S.W.2d 81 (Ky. 1965). Any estimation of income expected to be produced by the condemned property can then "be capitalized to give some fair indication of what an investor would pay [at the time of condemnation] for the privilege of receiving that income over some foreseeable period of time." 29A C.J.S. *Eminent Domain* § 185. The income capitalization approach is particularly well-suited to valuing real property that contains valuable minerals, because the "value of minerals under land . . . usually lies not in their value in the ground but in the future income to be gained by their eventual extraction and sale." 29A C.J.S. *Eminent Domain* § 144.

As with all valuation methods, however, an expert witness employing the income capitalization approach cannot rely on "irrelevant or non-compensable" factors in his or her valuation calculus. *R.J. Corman*, 116 S.W.3d at 496. The income capitalization approach is not above judicial scrutiny, because it is the trial court's responsibility to "gauge the competency of witnesses and the relevancy of testimony." *Id.* at 496 (citing *Tyree*, 365 S.W.2d at 476–477). This Court's predecessor relevantly disavowed the practice of proving a condemned property's fair market value by simply estimating the quantity of minerals in the ground and multiplying that figure by the market price of the mineral to calculate a gross income to be derived from the condemned property. *Gulf Interstate Gas Co. v. Garvin*, 303 S.W.2d 260, 263 (Ky. 1957) ("*Garvin I*");

Garvin II, 368 S.W.2d at 310. A valuation based on such an elementary "price per unit" calculation is irrelevant and inadmissible because it fails to account for the "contingencies and uncertainties of business." *Garvin I*, 303 S.W.2d at 263. Conversely, a more robust application of the income capitalization approach might consider how the costs of mining, risks associated with the coal market, or inflation affect the fair market value of the condemned property.

On appeal, the Cabinet argues that Johnson's evaluation of the condemned parcel's fair market value was too speculative. However, a thorough review of the record reveals that Johnson's appraisal did not employ the kind of simplistic price per unit calculation that has been disallowed.

As previously stated, Johnson adopted the coal reserve calculations and mining plan produced by Atkinson's engineering expert, Gary Ousley. Ousley's mining plan suggested that the Owners could successfully mine the entirety of their property's recoverable coal in a span of three years. Accordingly, to determine the yearly revenue to be derived from such a coal mining operation, Johnson first multiplied the quantity of recoverable coal that could be feasibly mined in each year by a forecasted market price of coal for that year. For instance, Johnson's expert appraisal report indicates that the Owners could have expected to mine 419,643 tons of recoverable coal from their property in 2016 to be sold at roughly $49 per ton, therefore producing $20,667,418 in gross revenue. However, consistent with their coal lease, Johnson submitted that the Owners could only expect to receive a ten percent royalty from the total revenue to be derived from the sale of their property's subsurface coal.

Johnson also testified that the Owners' coal lease guaranteed that SAS Resources would pay the Owners a minimum royalty of $4.50 per ton of coal sold if their ten percent royalty amounted to less than this minimum. While Johnson's appraisal did apply the "royalty rate" stipulated in the Owners' lease with SAS Resources, Johnson also testified that this was a "reasonable" rate within the industry. Johnson then reduced or "discounted" the Owners' expected royalty income to address the effects of inflation and arrive at a "net present value" of that income. Johnson specifically testified that he applied an industry standard ten percent "discount rate" to his royalty income projections, which also accounted for the risks of coal mining. From these calculations, Johnson ultimately deduced that the Owners' property had a fair market value of $2.1 million.

From our review of the record, Johnson's testimony does not run afoul of the prohibition on "price per unit" evidence. Rather, Johnson's testimony makes clear that he appropriately endeavored to consider the "contingencies and uncertainties of business" while estimating the fair market value of the Owners' property. *Garvin I*, 303 S.W.2d at 263. Johnson's appraisal of the Owners' property contemplated that not all of the property's subsurface coal could be feasibly mined and sold; only a portion of the property's minerals were "recoverable." Further, Johnson's consideration of the property's capacity to specifically produce "royalty" income tacitly accounts for the expenses associated with mining the property's coal and reflects the reality that mineral lease agreements are a common method of doing business in the mining industry. Finally, Johnson's appraisal accounted for risk and inflation to

calculate a "net present value" of the Owners' expected income stream. In these respects, Johnson's testimony rose above a simple price per unit calculus and surpassed the low threshold for relevancy. Accordingly, we cannot say that the trial court abused its discretion in admitting Johnson's testimony; the trial court's decision was not "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire & Rubber Co.*, 11 S.W.3d at 581 (Ky. 2000) (citing *English*, 993 S.W.2d at 945).

Determining the value of condemned real property is not a science, *Paducah Indep. Sch. Dist.*, 520 S.W.3d at 374 (quoting *Portland Nat. Gas Transmission Sys. v. 19.2 Acres of Land*, 318 F.3d 279, 281 (1st Cir. 2003)), and such an endeavor necessarily requires some degree of speculation. Whatever aspects of Johnson's testimony the Cabinet deems too speculative could have been appropriately challenged at trial through the crucible of cross-examination. Condemnation proceedings are after all "truly a battle of experts." *R.J. Corman*, 116 S.W.3d at 499 (Wintersheimer, J., dissenting).

IV. CONCLUSION

For the foregoing reasons, this Court affirms the Court of Appeals.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Stacy D. Elliott
Staff Attorney, District 12
KYTC Department of Highways

COUNSEL FOR APPELLEES, LEAH ATKINSON AND SAS RESOURCES, INC.:

John Michael Williams
Melanie Jane Kilpatrick
Williams Kilpatrick, PLLC

COUNSEL FOR APPELLEES, ALLEN BARRE A/K/A ALLEN M. BARR; ELIZABETH LYNNE BARRE A/K/A ELIZABETH LYNN BARR; LORA CHAFFINS; JOAN CHAFFINS; LISA RENEE CHAFFINS; ANITA GIBSON; ANTHONY GIBSON; DAVID GIBSON; DAVID BRIAN GIBSON; SAM MARTIN, III; JULIUS MARTIN; MARGARITE MARTIN; MARY ROSE MARTIN; PHYLLIS MARTIN; DAVID RICH; NORA LOU RICH; VIRGINIA ELIZABETH ROWE; ARNOLD TURNER, JR.; ARNOLD BRENT TURNER; ELIZABETH TURNER; JAMES R. TURNER; JEWELL TURNER; JOE TURNER; JORDAN TURNER; JOSEPH R. TURNER; AND RALPH TURNER:

Robert Allen Rowe, Jr.
Jarrod Owen Bentley
Bobby Rowe Law Offices

COUNSEL FOR APPELLEE, SANDRA SUE SLONE MARTIN:

Gregory Arthur Isaac
Isaac Law Office, PLLC

APPELLEES, FRED B. ANDERSON; EDWARD BILLIPS; TERESA BILLIPS; BRENDA G. COOK; WALLACE G. COOK; SKYE GOODMAN CRAMER A/K/A SKYE WEBER; CHAD DUNLAPP; TODD DUNLAPP; CASSIE FRIEND; KAREN GESWEIN (A/K/A KAREN M. LOVE); PETE GRISBY, II; ELHANAN PETE GRISBY; GERI E. GRISBY; MACHELE PETE GRISBY; KENNETH HENRY; PRISCILLA HENRY; JOYCE TURNER HOWELL; RICK JONAS; LEE MAJAKEY; MELINDA GAYE MAJAKEY; CHERYL RAY MARTIN; DEMORIS MARTIN; DONNIE RAY MARTIN; JENNIFER MARTIN; TERESA MARTIN; TIM MARTIN; TIMMY MARTIN; WILMA FAYE MARTIN; CLAUDE JUNE MCKENZIE, JR.; MARTHA JUNE MCKENZIE; ROSE MARY RICE; TIMOTHY K. STEPHENS; ALICE TURNER; ALLEN VAN TURNER; DOUG TURNER; EUGENE TURNER; KARENLYNN VAN TURNER; NORMA TURNER; TED TURNER; TERRY TURNER; JAMES E. WALTER; LOUISE MARIE WALTER; HENRY WRIGHT; AND MAYTIFERN WRIGHT:

Pro Se

APPELLEE, FLOYD COUNTY RESOURCES, INC.:

No Counsel listed

APPELLEE, UNKNOWN RESPONDENTS, BEING THE UNKNOWN OWNERS, IF ANY, HEIRS AT LAW, GRANTEES, DEVISEES, SUCCESSORS, AND/OR ASSIGNS, IF ANY, BEING ANY AND ALL UNKNOWN PERSONS, SPOUSES AND/OR ENTITIES, IF ANY, ENTITLED TO AND/OR CLAIMING AN INTEREST IN AND/OR TITLE TO:

No Counsel listed