

ELECTRONICALLY FILED

**COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
FOURTH DIVISION
CIVIL ACTION NO. 20-CI-00332**

HAYNES PROPERTIES, LLC, et al.

PLAINTIFFS

v. **RENOTICE OF GRADDY CR 59 MOTION TO ALTER, AMEND OR VACATE
THIS COURT'S ORDER OF APRIL 5, 2023**

BURLEY TOBACCO GROWERS COOPERATIVE ASSOC., et al.

DEFENDANTS

* * * * *

Comes now W. H. Graddy & Associates (“Graddy”), the Counsel for the Objectors, Roger Quarles, et al., and RENOTICES their CR 59 Motion to Alter, Amend or Vacate this Court’s Order of April 5, 2023, previously noticed to be heard on April 28, 2023, as follows:

Where Graddy previously noticed the April 17, 2023, CR 59 Motion to Alter, Amend or Vacate this Court’s Order of April 5, 2023 but failed to give notice to the unrepresented objectors, and where Graddy requested the Court to pass the motion one week to allow Graddy to mail written notice to the unrepresented objectors as per the court order of April 18, 2023.

The parties will take notice that Graddy and these Objectors will bring the attached Graddy CR 59 Motion on for hearing, in the Fayette Circuit Courthouse, Fourth Division, Lexington, Kentucky, **on May 5, 2023, at the hour of 10:00 a.m.** or as soon thereafter as counsel may be heard.

Respectfully submitted,

/s/ W. Henry Graddy, IV

W. Henry Graddy, IV

Dorothy T. Rush

W. H. Graddy & Associates

137 N. Main Street
Versailles, KY 40383
(859) 879-0020
(855) 398 4562 - facsimile
hgraddy@graddylaw.com

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate of the foregoing was served via us Postal Service mail on the unrepresented objectors listed below and via E-Mail, on this the 1st day of May, 2023 on the following:

Hon. Kevin G. Henry
Hon. Charles D. Cole
Sturgill, Turner, Barker & Maloney PLLC
333 W. Vine Street, Suite 1500
Lexington, KY 40507
khenry@sturgillturner.com
ccole@sturgillturner.com

Hon. Robert E. Maclin, III
Hon. Jaron P. Blandford
Hon. Jason R. Hollon
Hon. Katie Yunker
McBrayer, PLLC
201 E. Main Street, Suite 900
Lexington, KY 40507
remaclin@mcbayerfirm.com
jblandford@mcbayerfirm.com
jhollon@mcbayerfirm.com
kyunker@mcbayerfirm.com

Hon. D. Gaines Penn
ENGLISH, LUCAS, PRIEST & OWSLEY, LLP
1101 College Street
PO Box 770
Bowling Green, KY 42102-0770
gpenn@elpolaw.com

and via first-class U.S. Mail, postage prepaid, on unrepresented objectors listed on Schedule A of the Opinion and Order entered June 11, 2021, at addresses given in their respective objections:

J.B. Amburgey, David Barnes, Jacob Barnes, Robert E. Barton, Ben Clifford, Lincoln Clifford, Wayne Cropper, Josh Curtis, George M. Darnell, Jennifer Darnell, Brent Dunaway, Michael

Furnish, William David Furnish, Leonard Edwin (Eddie) Gilkison, Bill G. Hall, Dudley Wayne Hatcher, Steve Lang, Berkley Marks, Bruce Quarles, Travis Quarles, Steven Quarles, Danny Townsend, Jerry Rankin, Richard Sparks, Jarrod Stephens, Addison Thomson, William A. Whomson, Judy Townsend.

/s/ W. Henry Graddy, IV
W. Henry Graddy, IV

ELECTRONICALLY FILED

**COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
FOURTH DIVISION
CIVIL ACTION NO. 20-CI-00332**

HAYNES PROPERTIES, LLC, et al.

PLAINTIFFS

v. **GRADDY CR 59 MOTION TO ALTER, AMEND OR VACATE
THIS COURT’S ORDER OF APRIL 5, 2023**

BURLEY TOBACCO GROWERS COOPERATIVE ASSOC., et al.

DEFENDANTS

* * * * *

Comes now W. H. Graddy & Associates (“Graddy”), the Counsel for the Objectors, Roger Quarles, et al., and MOVES this Court to Alter, Amend or Vacate this Court’s Order of April 5, 2023, denying Graddy’s Renewed Motion for Award of Attorney’s Fees.

Graddy’s Renewed Motion for an Award of Attorney’s Fees was heard on March 24, 2023. Graddy argued to the Court that he was renewing his motion for attorney’s fees where his direct representation of the objectors Roger Quarles, Ian Horn, Rick Horn, Campbell Graddy, David Lloyd and Gary Wilson (Graddy, Lloyd and Wilson have been determined to be excluded from Class Members) and his indirect representation of forty four (44) additional objectors to one specific aspect of the Settlement Agreement – the award by the Burley Coop Board of Directors of a gift of \$1.5 million of Burley Coop assets to a new tobacco nonprofit helped to create a benefit to all Class Members. The Settlement Agreement as tendered did not give the Class Members any control over this gift.

At the March 24, 2023 argument, Graddy tendered his earlier pleadings filed on May 14, 2021 objecting to the proposed ruling on pending motions tendered by Class Counsel, and asked

the Court to find that such gift was illegal and to restore/retain these funds in the settlement funds to be distributed to the Class Members. Graddy then argued in the alternative as follows:

Alternatively, in the event the Court does not have the authority to strike a provision as contrary to statute, these Objectors ask the Court to express its opinion that the \$1.5 million is the property of the Class Members and cannot be taken from these Class Members without their consent.

This alternative would require that Class Members would have to consent to such gift. This alternative was what the Court ordered in the June 11, 2021 order approving and was what the Court ordered in the July 26, 2021 amended order approving. Graddy helped to create a \$1.325 million fund previously unavailable to Class Members that is now available to all Class Members. In fact, the Court has found that Graddy's efforts were beneficial to the Class Members. In its August 20, 21, 2021 analysis, the Court stated that, "Therefore, while he [Graddy] was certainly an effective attorney for the sake of his clients, his role was largely tied to the desires of his clients – even if those desires were beneficial to the class." Graddy reminded the Court of this language in its prior orders that Graddy intended to benefit his clients but also provided a benefit to the class. Video at 10:48:50.

On April 1, 2023, each Class Member was mailed a ballot and given a vote on whether to receive his or her proportionate share of the \$1.325 million or gift his or her share to the new tobacco nonprofit, the Burley and Dark Fired Tobacco Producers Association.

Graddy was the only attorney who asked the Court to approve this benefit to every Class Member, and Graddy's advocacy was either opposed by all other attorneys or they took no position.

Graddy argued on March 24, 2023, that each Class Member can now vote on the distribution of his or her proportionate share to retain for the member or give to the new entity.

Video at 10:48:00. Graddy was concerned that this wording indicated that his representation benefitted his clients in a different way than class, as a whole, benefitted. Video at 10:49:50. Graddy argued that this was not the case. Video at 10:50:40. Graddy further asked the Court to reconsider its position that the common fund did not change, only the distribution of certain assets. Graddy argued that this was objectionable where previously the \$1.5 million would go entirely to the new entity, not the BGTCA members. BGTCA members did not have a say in that distribution. Video at 10:52:10. Graddy called into question this Court's assertion that his advocacy "alone" was the cause of the change in distribution of the \$1.5 million. Graddy argued that was not the standard for awarding of attorney's fees. Video at 11:03:23.

This Court ruled on this matter orally on March 24, 2023. The Court recited that this matter came to the Court as a settlement class; that Haynes Properties, representing the putative class members had reached a settlement with BGTCA. The Court in determining the fees, looked closely at CR 23.08 in determining the reasonableness of fees. When looking at CR 23.08, the Court looked at the language "by the parties agreement." Nothing in the agreement agreed to grant attorney's fees to anyone other than those specifically referenced therein. The Court found no legal grounds to change its original decision to deny Graddy attorney's fees based on the clear language of CR 23.08. Because this matter came as a settlement class with a settlement agreement, the Court stated that it was constrained by that agreement. Video at 11:19:35-11:23:40.

I. THIS COURT INCORRECTLY FOUND THAT CR 23.08 COMPELLED A DENIAL OF ATTORNEY'S FEES IF SUCH FEES WERE NOT PART OF AN AGREEMENT.

CR 23.08 clearly states "[i]n a certified class action the court shall approve or award reasonable attorney's fees and nontaxable costs that **are authorized by law** or by the parties' agreement." (emphasis added).

CR 23.08 governs the award of attorney's fees in a class action providing that, "[i]n a certified class action the court shall approve or award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." CR 23.08. This rule was introduced into the Kentucky Civil Rules of Procedure in 2010, to be effective in 2011 and, to date, only one unpublished opinion has discussed the requirements in any length. In *College Retirement Equities Fund, Corp. v. Rink*, No. 2012-CA-002050-MR, 2015 WL 226112 (Ky. App. Jan. 16, 2015), the Kentucky Court of Appeals examined an award of attorney's fees pursuant to CR 23.08. The *Rink* Court noted that "no Kentucky appellate court has addressed how a trial court is to determine a reasonable fee under CR 23.08" and it relied upon the federal courts' interpretation of the analogous Fed. R. Civ. P. 23(h). An award of a reasonable attorney's fees in this case is authorized by Kentucky law relating to common-fund recoveries. The common fund doctrine recognizes that a "lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

The Notes of Advisory Committee on 2003 amendments to Fed.R. Civ. P. 23, state that "[s]ubdivision (h) applies to 'an action certified as a class action.' This includes cases in which there is a simultaneous proposal for class certification and settlement. . ." "In some situations, there may be a basis for making an award to other counsel whose work produced a beneficial result for the class, such as attorneys who acted for the class before certification but were not appointed class counsel, or **attorneys who represented objectors to a proposed settlement** under Rule 23(e) or to the fee motion of class counsel." (emphasis added).

This Court's finding that it was constrained by the settlement agreement reached between Haynes Properties and BGTCa conflicts with these Notes. Objectors and their counsel provide a

benefit for the class, as a whole, when they advocate against the stated terms of the agreement and then successfully have the objectionable terms amended or removed. This Court agreed in its August 24, 2021 Order stating “while he was certainly an effective attorney for the sake of his clients, his role in this case was largely tied to the desires of his clients – even if those desire were **beneficial to the class.**” (emphasis added).

The Court is requested to reconsider the analysis it stated on March 24, 2023, and recognize that Graddy application for a fee award was not governed by the proposed Settlement Agreement and that he relies upon the “are authorized by law” language in Civil Rule 23.08.

II. UNDER THIS COURT’S ANALYSIS, NO COUNSEL FOR OBJECTORS WILL BE GRANTED ATTORNEY’S FEES.

This Court’s finding that it was constrained by the settlement agreement regarding attorney’s fees would preclude counsel for any objector receiving attorney’s fees as, by definition, there can be no objector to the settlement agreement until the settlement agreement had been reached and presented to the court for approval in a settlement class action. Objectors would not have representation as parties to the settlement agreement until after an agreement has been reached, thus said counsel would not have a fee award provision contained in the settlement agreement.

This undermines the incentive contained in Rule 23 for attorney’s fees to “attract competent counsel” *Rink, supra*, at 10.

III. GRADDY REQUESTS THE LEAVE OF THIS COURT TO SEEK AN AGREEMENT WITH OPPOSING COUNSEL REGARDING TO ATTORNEY’S FEES.

If this Court is unpersuaded by Graddy’s above argument, Graddy requests leave of this Court to attempt to reach an agreement with Class Counsel and the attorneys of record regarding

attorney's fees. If an agreement is reached, Graddy requests that the Court consider the agreement and submit the matter to a fairness hearing.

NOTICE

The parties will take notice that the Objectors will bring the foregoing on for hearing, on April 28, 2023, at the hour of 10:00 a.m. or as soon thereafter as counsel may be heard.

Respectfully submitted,

/s/ W. Henry Graddy, IV

W. Henry Graddy, IV

Dorothy T. Rush

W. H. Graddy & Associates

137 N. Main Street

Versailles, KY 40383

(859) 879-0020

(855) 398 4562 - facsimile

hgraddy@graddylaw.com

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate of the foregoing was served via E-Mail, on this the 17th day of April, 2023 on the following:

Hon. Kevin G. Henry
 Hon. Charles D. Cole
 Sturgill, Turner, Barker & Maloney PLLC
 333 W. Vine Street, Suite 1500
 Lexington, KY 40507
 khenry@sturgillturner.com
 ccole@sturgillturner.com

Hon. Robert E. Maclin, III
 Hon. Jaron P. Blandford
 Hon. Jason R. Hollon
 Hon. Katie Yunker
 McBrayer, PLLC
 201 E. Main Street, Suite 900
 Lexington, KY 40507
 remaclin@mcbayerfirm.com
 jblandford@mcbayerfirm.com
 jhollon@mcbayerfirm.com

NOT ORIGINAL DOCUMENT

04/28/2023 07:05:24 AM

HGRADDY@GRADDYLAW.COM

kyunker@mcbayerfirm.com

Hon. D. Gaines Penn
ENGLISH, LUCAS, PRIEST & OWSLEY, LLP
1101 College Street
PO Box 770
Bowling Green, KY 42102-0770
gpenn@elpolaw.com

/s/ W. Henry Graddy, IV
W. Henry Graddy, IV

BE225719-1D12-49B2-8232-6C03B775805F : 000010 of 000011

APO : 000007 of 000007

J.B. Amburgey
P. O. Box 47
Means, KY 40346

David Barnes
768 Bowman Mill Road
Berry, KY 41003

Jarrod Stephens
504 Commonwealth Lane
Cynthiana KY 41031

Jacob Barnes
1088 Bowman Mill Road
Berry, KY 41003

Robert E. Barton
Barton Bros. Farm
4095 Huffman Mill Pike
Lexington, KY 40511

William A. Thomson
1809 Mt. Vernon Pike
Cynthiana, KY 40131

Ben Clifford
2459 Ky. Hwy. 1284 E
Cynthiana, KY 41031

Lincoln Clifford
Ky Hwy 1284 E
Cynthiana KY 41031

Danny Townsend
Judy Townsend
11620 Main St.
Jeffersonville, KY 40337

Wayne Cropper
5350 Raymond Road
Mayslick, KY 41055

Josh Curtis
1402 KY Hwy 1940
Cynthiana, KY 41031

Jerry Rankin
4540 Perryville Road
Danville, KY 40422

George Darnell
1593 Grays Run Pike
Cynthiana, KY 41031

Jennifer Darnell
248 Gray Lane
Cynthiana, KY 41031

Addison Thomson
224 Mt. Vernon Park
Cynthiana, KY 41031

Brent Dunaway
1547 KY Highway 1054 N
Berry KY 41003

Michael Furnish
750 Smith Martin Ln.
Cynthiana, KY 41031-6997

William David Furnish
1320 Highway 982
Cynthiana, KY 41031

Leonard Edwin (Eddie) Gilkison
345 Calloway White Road
Winchester, KY 40391

Bill Hall
P. O. Box 117
Means, KY 40346

Dudley Wayne Hatcher
648 Hood Rd.
Morgantown, KY 42261

Steve Lang
703 Gray Lane
Cynthiana, KY 41031

Berkley Marks
5399 Paris Pike
Mt. Sterling KY 40353

Bruce Quarles
Travis Quarles
Steven Quarles
10570 Owenton Road
Frankfort, KY 40601

Richard Sparks
1499 Thatchers Mill
Paris, KY 40361

Michael Furnish
750 Smith Martin Ln.
Cynthiana, KY 41031-6997