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Supreme Court of Kentucky

No. 2023-SC-0039

DIANNA LYNN DAVENPORT, in her capacity as Representative of the ESTATE OF PENNY ANN SIMMONS — *Appellant*

v.

Jefferson Circuit Court, No. 19-CI-5790
Court of Appeals, No. 21-CA-0974

KINDRED HOSPITALS LIMITED PARTNERSHIP D/B/A KINDRED HOSPITAL – LOUISVILLE, *et al.* — *Appellees*

A

BRIEF FOR THE COMMONWEALTH OF KENTUCKY

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Certificate of Service

I certify that a copy of this brief was served by U.S. mail on October 12, 2023 on Harry B. O'Donnell IV, Watterson West Office Building, 1941 Bishop Lane, Suite 706, Louisville, Kentucky 40218; Paul A. Dzenitis, Emily W. Newman, and Megan P. Keane, Dzenitis Newman PLLC, 8006 Lyndon Centre Way, Louisville, Kentucky 40222; Kate Morgan, Clerk, Kentucky Court of Appeals, 669 Chamberlin Avenue, Suite B, Frankfort, Kentucky 40601; Honorable Annie O'Connell, Circuit Judge, Jefferson Circuit Court, 700 West Jefferson Street, Louisville, Kentucky 40202. I further certify that the record on appeal was not withdrawn in preparing this brief.

Matthew F. Kuhn

INTRODUCTION

The Court of Appeals upheld the dismissal of Diana Davenport's medical-malpractice action for failure to file within the statute of limitations. In seeking reversal, Davenport makes two arguments. First, she argues that the Court of Appeals cannot issue published precedent. Second, she contends that the statute that makes her suit untimely is an unconstitutional encroachment on this Court's prerogative to regulate procedure.

The Court of Appeals should be affirmed on both points. Davenport's argument about Court of Appeals precedent cannot be correct. And the challenged statute is constitutional because it is part of a special statutory proceeding, which this Court's procedural rules allow the General Assembly to regulate.

STATEMENT CONCERNING ORAL ARGUMENT

In granting discretionary review, the Court indicated that oral argument will be held. The Commonwealth looks forward to addressing the Court at that time.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE[1]

Davenport was appointed as the personal representative for the Estate of Penny Ann Simmons on September 11, 2018. Order 1, R. 188 (July 20, 2021). The appointment order was entered ten days later, on September 21, 2018. *Id.* Davenport then filed this medical-malpractice case against Kindred Hospitals on September 20, 2019. *Id.*; Compl., R. 1 (Sept. 20, 2019).

Because Davenport did not file the statutorily required certificate of merit with her complaint, Kindred Hospitals moved to dismiss. *Id.*; Mot. to Dismiss, R. 11–12 (Oct. 11, 2019); *see generally* KRS 411.167. Davenport responded that the certificate-of-merit statute is unconstitutional, and she served her response on the Attorney General under KRS 418.075. Resp. to Mot. to Dismiss, 2 n.1, R. 19 (Nov. 25, 2019). The Attorney General intervened to defend the statute, Order Granting Mot. to Intervene 1, R. 28 (Feb. 10, 2020), and filed a brief supporting its constitutionality, KRS 411.167 Mem., R. 56–73.

While Davenport's motion to dismiss was pending, Kindred Hospitals discovered what it believed to be another basis for judgment in its favor: that Davenport filed this suit outside the one-year statute of limitations. Mot. for Summary J., R. 95 (Aug. 14, 2020). It moved for summary judgment on this

[1] The Commonwealth disputes Davenport's statement of the case. *See* RAP 32(B)(3).

ground. *Id.*

In response, Davenport argued that the order appointing her as personal representative took effect when it was entered, not when it was signed by the judge. Resp. to Mot. for Summary J. 3–5, R. 111–12 (Sept. 23, 2020). As to KRS 395.105, which directs that an order appointing a personal representative is effective when signed, Davenport claimed that the statute is an unconstitutional encroachment on the judiciary's prerogative. Mot. on KRS 395.105 2–3, R. 177–78 (Feb. 9, 2021). The Attorney General defended the constitutionality of this statute too. KRS 395.105 Mem., R. 180–83 (Feb. 11, 2021).

The circuit court granted summary judgment to Kindred Hospitals on the basis that the statute of limitations had expired. Order 1, R. 187. The circuit court reasoned that although the Rules of Civil Procedure generally govern procedure, statutes can set procedural requirements in special statutory proceedings. *Id.* at 4, R. 190 (citing CR 1(2)). In so holding, the circuit court relied on published precedent from the Court of Appeals holding that CR 1 requires the application of KRS 395.105. *Id.* (citing *Batts v. Ill. Cent. R.R.*, 217 S.W.3d 881, 884 (Ky. App. 2007)). For this reason, the circuit court granted summary judgment to Kindred Hospitals without addressing Davenport's failure to include a certificate of merit with her complaint. *See id.* at 5, R. 191. Davenport then appealed. Notice of Appeal, R. 194–95 (Aug. 18, 2021).

The Court of Appeals affirmed. *Davenport v. Kindred Hosps. Ltd. P'Ship*, No.

2021-CA-0974, 2022 WL 17839580 (Ky. App. Dec. 22, 2022) (unpublished). It held that KRS 395.105 is constitutional because *Batts* already held that the statute, not the Rules of Civil Procedure, controls for purposes of the statute of limitations. *Davenport*, 2022 WL 17839580, at *4–5. The Court of Appeals, however, urged this Court to review whether *Batts* should be overruled or whether the Rules of Civil Procedure should be amended. *Id.* at *5.

Davenport then sought discretionary review, which this Court granted.

ARGUMENT

This case is a clear-cut affirm. Allowing the Court of Appeals to ignore its published precedent whenever it wishes would make litigation unnecessarily unpredictable. Such a rule would cause settled law to "change erratically" instead of "develop[ing] in a principled and intelligible fashion." *See Vasquez v. Hilery*, 474 U.S. 254, 265 (1986). On the merits, this Court's procedural rules require applying KRS 395.105 to this situation. *Batts* was correctly decided and should be upheld.

I. The Court of Appeals is bound by its published precedent.

Davenport's lead argument is that a three-judge panel of the Court of Appeals can overrule a prior panel anytime it wants. Br. 3–11. A legal system in which a three-judge panel of the Court of Appeals cannot bind future three-judge panels would introduce uncertainty and unpredictability into Kentucky's legal system. Davenport's explanation of how Kentucky's court system should operate

cannot be correct. To adopt her understanding would be unprecedented. And it would be a sea change to a long-settled status quo.

The Court of Appeals has been consistent about two relevant points. First, it has repeatedly held that published Court of Appeals decisions are binding on later panels of that court. *Commonwealth v. Maynard*, 294 S.W.3d 43, 47 (Ky. App. 2009) ("Nevertheless, we are bound by prior Supreme Court case law, including case law set forth by prior panels of this Court in the absence of an *en banc* sitting. SCR 1.030."); *Frizzell v. Commonwealth*, No. 2018-CA-1679, 2020 WL 6689561, at *3 (Ky. App. Nov. 13, 2020) (nonbinding) ("[That case] is a published decision of this Court . . . . [t]hus, [it] is a binding precedent."); *Metcalf v. Commonwealth*, No. 2008-CA-2381, 2009 WL 3151140, at *3 (Ky. App. Oct. 2, 2009) (nonbinding) (explaining that the first sentence of SCR 1.030(7)(d) makes published Court of Appeals decisions binding precedent in the absence of binding precedent from this Court).[2] And second, the Court of Appeals has consistently determined that it must go en banc to overrule published precedent issued by a prior three-judge panel. *Taylor v. King*, 345 S.W.3d 237, 242 (Ky. App. 2010) ("But in order to overrule *Jackson*, this Court would have to go *en banc*. SCR 1.030(7)(d)."); *Maynard*,

[2] This Court's case law is of a piece. *Est. of Wittich v. Flick*, 519 S.W.3d 774, 779 (Ky. 2017) (discussing that a Court of Appeals opinion that had been published but was unpublished after this Court granted discretionary review was no longer binding precedent).

294 S.W.3d at 47; *Huiett v. Commonwealth*, No. 2012-CA-1824, 2014 WL 1268695, at *10 (Ky. App. Mar. 28, 2014) (nonbinding) ("First, to overrule the holding in *Virgil*, this Court would have to go *en banc*." (citations omitted)). As a result, prior to Davenport's novel arguments here, the Court of Appeals had a settled understanding about its ability both to issue binding precedent and to change that binding precedent.

This Court's rules support the Court of Appeals' understanding on both points. Rule of Appellate Procedure (RAP) 41(A) states that unpublished opinions of the Court of Appeals "are not binding precedent." The only possible implication is that published opinions from the Court of Appeals are in fact binding on later panels of that court. Indeed, RAP 40(D)(1) expressly empowers the Court of Appeals to issue published precedent. *Id.* ("Each opinion rendered by the Supreme Court and the Court of Appeals must show on its face whether it is 'To be Published' or 'Not to be Published.'"). Supreme Court Rule (SCR) 1.040(5) is of accord. It says:

> On all questions of law the circuit and district courts are bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court and, when there are no such precedents, *those established in the opinions of the Court of Appeals*.

Id. (emphasis added). Here again, the only possible interpretation of this rule is that the Court of Appeals can issue precedent that binds lower courts. This Court's practice of denying discretionary review while ordering the underlying

opinion to be unpublished further supports this view. RAP 40(D)(2). This practice shows that this Court itself recognizes the Court of Appeals' authority to publish binding precedent, subject to this Court's review.

This Court's rules regarding the Court of Appeals' en banc procedure confirm this point. SCR 1.030(7)(d) provides that a decision "of a majority of the judges of a panel shall constitute the decision of the Court of Appeals." So any panel decision is as if the full Court of Appeals decided it. The rule then goes on to explain what happens if a panel reaches a decision contrary to prior precedent: "If prior to the time the decision of a panel is announced it appears that the proposed decision is in conflict with the decision of another panel on the same question, the chief judge may reassign the case to the entire court." SCR 1.030(7)(d). This rule can only mean that the Court of Appeals may go en banc and overturn prior binding precedent if two conditions are met: (i) a three-judge panel desires to reach a decision contrary to that precedent; and (ii) the Chief Judge decides to take the case en banc. *See id.* So in this case, the panel below could have decided that *Batts* was wrongly decided and then the Chief Judge could have reassigned the case to the entire Court of Appeals. *See id.* Neither of these things happened.

The applicable rules, it should be noted, do not say that en banc review can only be initiated sua sponte by a panel. RAP 7(A) broadly allows a party to file a motion to seek relief. Nothing in this rule, or any other court rule, prevented

Davenport from seeking relief from *Batts* by asking the panel to pursue en banc hearing with the Chief Judge's agreement to overrule the decision. On top of that procedural route, RAP 17(A) allows a party to file a motion to transfer a case from the Court of Appeals to the Supreme Court, allowing a party to bypass the Court of Appeals. This was another way Davenport could have sought to overturn *Batts*, but she did not.

The repercussions of diluting all published panel opinions from the Court of Appeals of their precedential value would undermine much of the stability the Court of Justice provides. Imagine the paradigm Davenport asks the Court to impose: She wants a system in which, instead of knowing that the Court of Appeals will follow its published precedent, every single case in the Court of Appeals could be decided differently. Under the same set of facts, Davenport believes that the law could be applied inconsistently to each case depending on which judges sit on the panel. This undermines stare decisis and reduces "stability in the law." *See Hughes v. Scholl*, 900 S.W.2d 606, 608 (Ky. 1995). The end result would be unpredictable chaos—good for Davenport in this instance, but bad for every other litigant in every other case. The Court should decline Davenport's invitation to allow the Court of Appeals to overturn its own precedent anytime it wants.[3]

[3] Even if this Court disagrees, the proper way to make this change is by amending the Court's rules and the RAPs. SCR 10.000; RAP 1(C)(1); *see Cates v. Kroger*, 627

II. KRS 395.105 is in keeping with the separation of powers.

The Court of Appeals correctly upheld KRS 395.105 under the separation of powers. Under KRS 395.105, the appointment of a personal representative becomes effective "with the signing of an order by the judge." Davenport argues that the statute is unconstitutional because it infringes on the judicial power.[4] Br. 17–18. Her theory is that KRS 395.105 conflicts with CR 58(1), which says that judgments and orders are effective upon entry by the clerk. This argument has an easy answer. Although the power to promulgate rules of practice and procedure rests with this Court under Section 116 of the Constitution, the Court has adopted a procedural rule—CR 1(2)—that allows CR 58(1) to coexist with KRS 395.105. For this simple reason, KRS 395.105 is constitutional, consistent with the Court of Appeals' holding in *Batts*.

It's important to remember that Davenport's constitutional challenge faces an uphill battle. A statute expresses the public policy of the Commonwealth, as determined by the people's representatives in the Kentucky General

S.W.3d 864, 876–77 (Ky. 2021) (Nickell, J., concurring in part and dissenting in part) (explaining that if the Court does not wish to follow a procedural rule, "there are established procedures to change [that rule] which do not include amendment by judicial fiat").

[4] Davenport also makes several record-based arguments. Br. 11–12. The Commonwealth focuses only on KRS 395.105.

Assembly. Just like judges, legislators swear an oath to support Kentucky's Constitution. Ky. Const. § 228. For this reason, and because the General Assembly is a co-equal branch of government, a statute comes to court with a "strong presumption of constitutionality." *See Wynn v. Ibold, Inc.*, 969 S.W.2d 695, 696 (Ky. 1998). This means that a "violation of the Constitution must be clear, complete and unmistakable" in order to find the law unconstitutional. *Ky. Indus. Util. Customers, Inc. v. Ky. Utils. Co.*, 983 S.W.2d 493, 499 (Ky. 1998).

Judged by this standard, Davenport's challenge to KRS 395.105 is bound to fail. There is no dispute that under the separation of powers, this Court gets to "prescribe" "rules of practice and procedure for the Court of Justice." Ky. Const. § 116. The Court has exercised that duty by promulgating the Kentucky Rules of Civil Procedure. The very first of those procedural rules says that they shall "govern procedure and practice in all actions of a civil nature in the Court of Justice" with one exception. CR 1(2). That exception is in "special statutory proceedings."[5] *Id.* In such proceedings, "the procedural requirements of the statute shall prevail over any inconsistent procedures set forth in the Rules." *Id.* So this Court has exercised its Section 116 prerogative to allow the General Assembly to pass statutes establishing the applicable procedures only in special statutory proceedings.

[5] The RAPs contain an analogous exception. RAP 1(A).

The Court has done so because the Civil Rules "may not be the best approach to some types of cases." *C.C. v. Cabinet for Health & Fam. Servs.*, 330 S.W.3d 83, 86 (Ky. 2011). It follows that such statutes do not intrude on the Court's rulemaking authority. *See McCann v. Sullivan Univ. Sys., Inc.*, 528 S.W.3d 331, 333 (Ky. 2017) (holding that CR 1 is itself an exercise of the Court's Section 116 authority). Instead, this Court has exercised the judicial power to adopt those statutes as the applicable procedure for special statutory proceedings.

The question thus becomes what constitutes a special statutory proceeding under CR 1(2). This Court's case law spells out the applicable inquiry. A special statutory proceeding is one that is "complete within itself having each procedural detail prescribed." *McCann*, 528 S.W.3d at 334 (citation omitted). Kentucky courts determine whether a special statutory proceeding exists "by evaluating whether the statute in question provides for a comprehensive, wholly self-contained process that prescribes each procedural detail of the cause of action." *Id.*

There are numerous special statutory proceedings across Kentucky law. A dependency, neglect, and abuse proceeding qualifies. *C.C.*, 330 S.W.3d at 87. As do election contests. *See Brock v. Saylor*, 189 S.W.2d 688, 689 (Ky. 1945). So too actions for forcible entry and detainer in the landlord-tenant context. *Shinkle v. Turner*, 496 S.W.3d 418, 420–21 (Ky. 2016). And "the most easily recognizable special statutory proceeding is one in which the adjudication begins with an

agency or commission, but provides for an appeal to the Court of Justice." *McCann*, 528 S.W.3d at 334.

A probate proceeding readily qualifies as a special statutory proceeding. Indeed, Davenport does not argue to the contrary, even though the Court of Appeals found against her on this very point. *Davenport*, 2022 WL 17839580, at *4 (recognizing that "our statutes provide a comprehensive process for probate"). Davenport's failure to contest this holding amounts to forfeiture. *Gasaway v. Commonwealth*, 671 S.W.3d 298, 314 (Ky. 2023).

Even if not, a probate matter is a special statutory proceeding because the statute "prescribes each procedural detail of the cause of action." *McCann*, 528 S.W.3d at 334. KRS Chapters 391 through 397 lay out the specifics for descent, wills, and administration of decedents' estates. This covers, among other things, who may be appointed as a fiduciary, who may settle estates, when and how actions may be commenced and concluded, and settlement procedures. And KRS Chapter 395 contains specific rules about, among other things, how to apply to be appointed a fiduciary, KRS 395.005, how personal representatives are appointed and when that appointment is effective, KRS 395.015, time for distribution of the estate, KRS 395.190, when actions may be brought or revived, KRS 395.270, 395.278, and when orders may be set aside, KRS 395.500. These are the

type of wholly self-contained procedural details that make probate proceedings special statutory proceedings. *See C.C.*, 330 S.W.3d at 87.

All these conclusions point to a straightforward resolution: There is no separation-of-powers problem with KRS 395.105 for the simple reason that, under CR 1(2), this Court has expressly authorized the statute.

Davenport's contrary arguments do not lay a glove on this reasoning. She first argues that the effective date of an order appointing a personal representative is matter of substance, not procedure. Br. 17. She cites no precedent drawing this alleged distinction in the context of a special statutory proceeding. Davenport thus seeks to introduce a wholly new concept into special statutory proceedings, which will only sow confusion in an area of law that is well-settled and well-understood.

Even if the Court were willing to entertain such a distinction, when a judicial order becomes effective is by definition a matter of procedure. Indeed, CR 58(1) is a rule of civil *procedure* that, outside of special statutory proceedings, establishes when an order or judgment becomes effective. If that is not a matter of procedure, Davenport's reasoning may well call into question whether CR 58(1)

is itself authorized, given that Section 116 only empowers the Court to regulate matters of "practice and procedure."[6]

Davenport's remaining arguments are unpersuasive. She goes to great lengths to argue that *Batts* is not "presently controlling precedent." Br. 17. At this late stage of the proceedings, the Commonwealth agrees. A decision of the Court of Appeals does not bind this Court as Kentucky's court of last resort. So *Batts* matters here only to the extent it is persuasive. Then-Judge, later-Justice Hughes's careful opinion in *Batts* is well-reasoned. As she explained for the Court of Appeals, KRS 395.105 "taken in combination with CR 1 which provides that 'procedural requirements' in a statute shall take precedence over a conflicting rule, leads us to the conclusion that [an] appointment as executrix . . . bec[o]m[es] effective upon the district judge's signing of the order . . . ."

[6] This conclusion is consistent with federal precedent. Under the Rules Enabling Act, the U.S. Supreme Court is authorized to promulgate rules of procedure. The rules of procedure "shall not abridge, enlarge or modify any substantive right." *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 406–07 (2010) (quotation marks omitted). The U.S. Supreme Court has elaborated as follows:

> [Procedural rules] must really regulate procedure[]—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them . . . . The test is not whether the rule affects a litigant's substantive rights; most procedural rules do. . . . What matters is what the rule itself regulates: If it governs only "the manner and the means" by which the litigants' rights are "enforced," it is valid; if it alters the "rules of decision by which the court will adjudicate those rights, it is not."

Id. at 407 (citations and brackets omitted).

217 S.W.3d at 884. And *Batts* is not the only Court of Appeals decision to so conclude. *Seabold v. Est. of Harbin ex rel. Pugh*, No. 2005-CA-0267, 2006 WL 954025, at *2 (Ky. App. Apr. 14, 2006) (nonbinding) (joined by VanMeter, J.).

Davenport quibbles that the facts in *Batts* were different. But they were very similar to those here. *See Batts*, 217 S.W.3d at 882–83. The Court of Appeals' reasoning on this point was spot on. *Davenport*, 2022 WL 17839580, at *3–5. And Davenport's contention that the discussion of KRS 395.105 in *Batts* is dicta fails because the court's discussion of prior precedent referred back to KRS 395.105 as the primary reason for its decision, not as an alternative holding. 217 S.W.3d at 884. And even if *Batts*'s discussion of KRS 395.105 is an alternative holding, that does not lessen its import. *Swiss Oil Corp. v. Shanks*, 270 S.W. 478, 479 (Ky. 1925); *see also Davenport*, 2022 WL 17839580, at *5 (holding as much).

The Court of Appeals voiced concern that applying KRS 395.105 is "intolerable and unjust." *Davenport*, 2022 WL 17839580, at *5. Davenport did not raise these policy issues in her brief, so they are forfeited here. *See Gasaway*, 671 S.W.3d at 314. Even still, the Court of Appeals implicitly acknowledged that there is a valid rationale for KRS 395.105, as it gives personal representatives "the authority to promptly make final arrangements for the decedent" and acts as "a defense for personal representatives accused of acting precipitously." *See Davenport*, 2022 WL 17839580, at *5. Following a loved one's death, it makes

sense that a personal representative would want to act as quickly as possible without waiting for administrative action by a clerk. More to the point, there is reason to think that CR 58(1)'s rule "may not be the best approach" in the probate context where speed can be necessary. *See C.C.*, 330 S.W.3d at 86. The Court of Appeals also worried that KRS 395.105 serves as a "trap for unwary practitioners." *Davenport*, 2022 WL 17839580, at *5. But there is no evidence of that. *Batts* has been on the books since 2007, and this case is the first reported appellate one since to again discuss the interplay between CR 1(2) and KRS 395.105. And KRS 395.105 is not a new statute; it has not been amended since 1976. The Commonwealth can find no evidence of confusion about this issue among the bench and bar outside of this case.[7]

Even if the Court shares the Court of Appeals' policy concerns, this appeal is not the place to address them. If the Court desires to amend CR 1(2) to supersede KRS 395.105, it should not do so in a judicial opinion. *See Cates*, 627 S.W.3d at 876–77 (Nickell, J., concurring in part and dissenting in part). Instead, it should

[7] The Court of Appeals also believed KRS 395.105 is an outlier. *Davenport*, 2022 WL 17839580, at *5 ("Our review has failed to disclose any other statute which makes a judge's order effective only with a judge's signature and without entry by the clerk."). But that is not the case. As the Court of Appeals has recognized, probation orders are another exception, given the need for an "'an exact starting date' for a probation sentence." *Gilmore v. Commonwealth*, No. 2015-CA-0130, 2017 WL 1548206, at *3 (Ky. App. Apr. 28, 2017) (nonbinding) (citation omitted); *see also Commonwealth v. Dulin*, 427 S.W.3d 170, 172 n.3 (Ky. 2014).

follow its established procedure for amending the civil rules. The Rules of Civil Procedure provide that, unless the Court orders otherwise, a "substantial" amendment will be published or mailed to all Kentucky Bar Association members "at least 60 days" before the change becomes effective. CR 87(2). Announcing an amendment 60 days before it would take effect allows interested parties to submit comments. The Court can then decide to stay the course and adopt the proposed change or even make edits to address any concerns raised. The Court should not short-circuit this deliberative process by amending CR 1(2) by judicial fiat. To do so would undercut the established notion that our procedural rules mark the "lights and buoys" of civil litigation. *Gasaway*, 671 S.W.3d at 314 (quoting *Brown v. Commonwealth*, 551 S.W.2d 557, 559 (Ky. 1977)).

CONCLUSION

The Court should affirm.[8]

[8] If the Court reverses, it should remand the case to the circuit court to address in the first instance Davenport's failure to file a certificate of merit with her complaint. There are two submitted cases pending in this Court that touch on this issue that may well guide the circuit court's decision. *McMillin v. Sanchez*, Nos. 2022-SC-0272, 2022-SC-0274 (Ky.); *McWhorter v. Baptist Healthcare Sys., Inc.*, No. 2022-SC-0354 (Ky.).

Respectfully submitted,

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WORD-COUNT CERTIFICATE

This brief complies with the word limit of RAP 31(G)(3)(a) because, excluding the parts of the brief exempted by RAP 15(D) and 31(G)(5), this brief contains 3,997 words.