
SC93915

IN THE SUPREME COURT
OF MISSOURI

FENIX CONSTRUCTION COMPANY OF ST. LOUIS and FIVE STAR
READY-MIX CONCRETE COMPANY and HORSTMAYER ENTERPRISES,
INC.,
Appellants (Petitioners below),

v.

DIRECTOR OF REVENUE,
Respondent (Respondent below).

From the Missouri Administrative Hearing Commission
The Honorable Sreenivasa Rao Dandamudi, Commissioner
No. 11-2454 RS

APPELLANTS' REPLY BRIEF

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ARGUMENT

Introduction

The Director of Revenue’s central argument, and the theme running throughout the length of its brief, is that the Section 144.054 materials exemption does not apply to construction or contracting materials. In attempting to prove his point, the Director looks beyond the plain language of the statute and beyond words with simple dictionary definitions, instead delving into language in other statutes and cases interpreting those *other* statutes.

Section 144.054.2 exempts from sales and use tax “materials used or consumed in the manufacturing, processing, compounding, mining, or producing of any product.” “Materials” used to “produce” a “product”—this is not a sequence of words that requires an investigation into legislative intent. Nonetheless, the Director strains to conclude that the General Assembly did not intend for Fenix’s wall panels to be exempt under Section 144.054.

The Director does not point the Court to any actual evidence of the General Assembly’s intent with respect to Section 144.054.2, but instead states that the inclusion of the words “contractor” and “construction” in a separate exemption statute—Section 144.030—somehow means that the General Assembly intentionally excluded contracting and construction from Section 144.054.2. Section 144.030, however, contains 52 subparts, describing all sorts of industries. Section 144.054 contains only four sections of clear language and fits on one page. The Section 144.054.2 exemption is not narrowed by its few, clear terms; it is broadened by them. This is made evident by the language of

the statute, which states that this exemption is “[i]n addition to all other exemptions granted under this chapter” and, more specifically, is “in addition to any state and local sales tax exemption provided in section 144.030.” Section 144.054.2.

Fenix “manufactures” or “produces” wall panels. These wall panels are discrete pieces of new tangible personal property whose market value is demonstrated by a bidding process and the price agreed upon with Fenix’s customers. In other words, they are products. And just like the countertops in *E & B Granite, Inc. v. Dir. of Revenue*, 331 S.W.3d 314 (Mo. 2011), the wall panels are “eventually affixed to customers’ real property.” *Id.* at 315.

Counsel for *E & B Granite* argued as follows: “after E & B manufactures a granite countertop, but before the countertop is installed and affixed to a customer’s real property, *what is it* if its not tangible personal property?” Respondent’s Brief, p. 11, *E & B Granite*, Case No. SC 91010 (available on CaseNet). Just as in *E & B Granite*, Fenix produces tangible personal property, *i.e.* a product, and thereafter attaches it to real estate.

That Fenix manufactures and produces a product *and* thereafter affixes the product to the customer’s real property appears to be the real issue of contention for the Director, as it was in *E & B Granite* when the Director complained that E & B Granite was escaping taxability. Appellant’s Brief, *E & B Granite*, p. 33 (the Director argued that as a result of the materials exemption and the lack of a sales tax on fixtures to real estate, “the purchases of granite slabs used by E & B as a construction contractor would escape taxation altogether”). In response to this argument, the Court issued the following

mandate that has particular application to the similar activities of Fenix: “[a]ny company may obtain this tax exemption on purchases of materials it uses to manufacture products if it is vertically integrated similarly to E & B.” *E & B Granite*, at 318.

The Director’s brief shies away from the issue the Administrative Hearing Commission decided the case upon: the idea that wall panels are custom items and thus not “outputs with market value.” Respondent’s Brief, pp. 26-28. That the Administrative Hearing Commission finding is given such little attention is appropriate given its lack of foundation in law and sound reasoning. Fenix’s wall panels are indeed custom-made products, just like custom windows, doors, cabinets, countertops and countless other custom products. The Director would have the Court create new law and rule that these items are not products because they are custom-made. In the past, however, the Court has ruled that granite countertops were products; countertops which were “custom-made to fit the very specific and precise dimensions of the customer,” and of which “[n]o two tops are manufactured to the same specifications and dimensions.” *E & B Granite, Inc. v. Dir. of Revenue*, Administrative Hearing Commission, Order, ¶ 10 (June 2, 2010). Neither the Director nor the Commissioner below addresses this inconsistency, nor do they address why producers of custom products should bear a more severe tax burden than producers of non-custom products.

Appellant Fenix Construction Company, in its manufacture and production of wall panels, fits squarely within the plain language of the Section 144.054 materials exemption, and the decision of the Administration Hearing Commission should be reversed.

**I. In Ascertaining The Intent Of The General Assembly Regarding
Section 144.054, There Is No Need To Look Beyond
The Plain Language Of The Statute**

The Director spends the majority of his brief arguing that Fenix operates as a construction contractor, and that the General Assembly did not intend for the materials exemption to apply to products that are used in or incorporated into construction. In making this argument, the Director strains and looks beyond the plain language of Section 144.054.

When construing a statute, the primary rule is to give effect to legislative intent as reflected in the plain language of the statute. *Brinker Missouri, Inc. v. Dir. of Revenue*, 319 S.W.3d 433, 437–38 (Mo. banc 2010). When the plain language of the statute is clear and unambiguous, we do not apply any other rule of construction. *Bosworth v. Sewell*, 918 S.W.2d 773, 777 (Mo. banc. 1996); *Gasconade Cnty. Counseling Servs. v. Mo. Dep’t of Mental Health*, 314 S.W.3d 368, 373 (Mo. App. E.D. 2010).

The language in Section 144.054.2 is plain and clear. Section 144.054.2 exempts from sales and use tax “materials used or consumed in the manufacturing, processing, compounding, mining, or producing of any product.”¹ “Materials” used to “manufacture”

¹ The Director relies heavily on *Aquila Foreign Qualifications Corp. v. Dir. of Revenue*, 362 S.W.3d 1 (Mo. banc 2012) and also cites *Union Elec. Co. v. Dir. of Revenue*, 425 S.W.3d 118 (Mo. 2014) and *AAA Laundry & Linen Supply Co. v. Dir. of Revenue*, 425 S.W.3d 126 (Mo. banc 2014) as controlling authority on Section 144.054.2. Each of

or “produce” a “product”—these terms do not require an investigation into legislative intent, at least not when their application to the activities of Fenix is so clear. Fenix uses “materials,” namely rebars, steel embeds, decorative facings and concrete to make its wall panels. Fenix takes those materials and alters or physically changes them into something new—wall panels—that have a different “use, identity, and value,” meaning it “manufactures.”² *Branson Properties USA v. Dir. of Revenue*, 110 S.W.3d 824, 826 (Mo. banc 2003). Finally, Fenix’s activities result in wall panels which are “output[s] with a market value,” *i.e.* “products.” *Mid-America Dairymen, Inc. v. Dir. of Revenue*, 924 S.W.2d 280, 283 (Mo banc 1996).

The Director states that Fenix is a construction contractor and neither “construction” nor “contractor” is found in the language of Section 144.054. This is a red herring. Regardless of whether Fenix operates within the construction industry, the question under the plain language of Section 144.054.2 is whether Fenix is a “manufacturer” or “producer” of a product. In its original brief, Fenix offered relevant

these cases dealt not with “manufacturing” or “producing,” like the case at bar, but “processing.” In *Aquila* it was food processing, in *Union Elec.* it was baking, and in *AAA* it was cleaning clothes. The Court found that “processing” was ambiguous and denied a broad application. These findings do not have any bearing on the case at bar.

² “Producing” is an even easier bar for Fenix to meet. To “produce” is defined by Black’s Law Dictionary as “to bring into existence; to create,” which Fenix certainly does with its wall panels. Black’s Law Dictionary (9th Ed. 2009).

case law and dictionary definitions of these terms, into which Fenix squarely fits, and the Director has made and can make no reasonable argument to the contrary.

It is similarly uncontroverted that Fenix “use[s] or consume[s]” “materials” to make its wall panels. The only disagreement is whether those wall panels are “output[s] with a market value,” *i.e.* products, given their custom-made nature. This issue is addressed in a separate section, *infra*. But on that issue, upon which the Administrative Hearing Commission decided the case, there is no argument from the Commission or the Director that the General Assembly intended Section 144.054.2 to apply its exemptions only to non-custom-made products.

II. A Further Investigation Into Legislative Intent, If Necessary, Favors Fenix

An investigation into whether the General Assembly intended or did not intend for products incorporated into the construction process is unnecessary, because the broadened language in Section 144.054.2—when compared to that of Section 144.030—has been interpreted to open the materials exemption to products affixed to real property. Although Section 144.030 exempts materials utilized in the manufacturing and production process, it is a narrow exemption premised on the idea that the products would be sold at retail and ultimately taxed at final purchase. The limited nature of Section 144.030, and what separates it from Section 144.054.2, is illustrated by *International Business Machines Corp. v. Dir. of Revenue*:

Section 144.030.2(5), however, does not exempt sales of machinery and equipment used directly to manufacture *any* product. That statute does not end with the word

‘product.’ Rather, Section 144.030.2(5) exempts sales of machinery and equipment used directly to manufacture a product ‘which is intended to be sold ultimately for final use or consumption.’

958 S.W.2d 554, 557 (Mo. 1997) (emphasis in original). The language in Section 144.030.2 that qualifies the word “product” “requires a ‘sale’ of the new tangible personal property, within the meaning of the sales tax law.” *Ovid Bell Press, Inc. v. Dir. of Revenue*, 45 S.W.3d 880, 885 (Mo. 2001).

Fenix does not seek an exemption under Section 144.030.2, but instead looks to the more recent and broader Section 144.054.2 exemption. This section, in what appears to be a direct response by the legislature to the quoted passage above from *IBM*, applies to the manufacture, processing, or production of “any product.” Section 144.054.2. There is no requirement that the product be “intended to be sold ultimately for final use or consumption,” and in fact, there is no such qualifying language whatsoever under Section 144.054.2. *Id.* Section 144.054.2 expressly states that the exemptions therein are “in addition to all other exemptions granted under [chapter 144],” and even more specifically, “in addition to any state and local sales tax exemption provided in section 144.030.” *Id.* This statutory language clearly demonstrates the legislative intent to expand the materials exemption to manufacturing or producing of any product in Missouri.

LaSalle Iron Works v. Dir. of Revenue, No. 07-0493 RS (Mo. AHC, December 31, 2008), is also illustrative of the importance between the differences between Sections 144.030.2 and 144.054.2. Pursuant to Section 144.030.2, LaSalle claimed exemptions on

its purchases of steel which it used to make building components that it installed into customers' real property. *Id.* Citing *Blevins Asphalt Constr. Co. v. Dir. of Revenue*, 938 S.W.2d 899 (Mo. banc 1997), the Administrative Hearing Commission held that the Section 144.030 exemption did not apply because “[s]teel that LaSalle uses to make building components that LaSalle installs into the real property does not result in a product *intended to be sold ultimately for final use or consumption.*” *Id.* (emphasis added). Once again, this is the language which separates Section 144.030.2 and Section 144.054.2 and illustrates the narrow nature of the earlier materials exemption in Section 144.030.

Blevins involved a claim for exemption under 144.030.2 by an asphalt company that manufactured and installed asphalt and also sold some asphalt to customers at retail. The issue in *Blevins* was “whether Blevins manufactures ‘new personal property . . . intended to be sold ultimately for final use or consumption.’”³ *Id.* at 901. The Supreme Court found that because title passed from Blevins to its customers only upon installation of the asphalt, “Blevins created an improvement to real property which cannot be ‘new personal property . . . intended to be sold ultimately for final use or consumption’ within the meaning of the sales tax law.” *Id.*

³ The Administrative Hearing Commission’s decision, which the Missouri Supreme Court affirmed, was based upon same logic: “We find that Blevins has not carried its burden of proof to show that anyone resold the materials.” *Blevins Asphalt Constr. Co. v. Dir. of Revenue*, No. 94-002095RV (April 26, 1996).

Just as in *IBM* and *LaSalle*, the disallowance in *Blevins* regarding the materials exemption under Section 144.030.2 turned upon the narrow exemption language in that section. Whereas Section 144.030.2 requires that the manufacturing process result in a product or a component of personal property “which is intended to be sold ultimately for final use or consumption,” Section 144.054.2 provides a broader exemption for “materials used or consumed in the manufacturing, processing, compounding, mining, or producing of **any product**.” Section 144.030.2; Section 144.054.2 (emphasis added). The Director’s reliance on *Blevins*, a case that was decided more than ten years before Section 144.054 became law, and cases following the logic of *Blevins* is misplaced since Fenix is not claiming an exemption under Section 144.030.2.⁴

This string of Section 144.030 case law, in conjunction with the broad language of Section 144.054.2, makes the legislative intent clear, and the statutory development is described in this Court’s unanimous, *en banc* decision in *E & B Granite, Inc. v. Dir. of Revenue*, 331 S.W.3d 314 (Mo. 2011). The Director in *E & B Granite* made a similar argument to its construction contractor argument in the case at bar: “Expanding the manufacturing exemption provided by § 144.054.2 to cover the making of real property

⁴ The Court in *Blevins* referred to the applicant’s activities as “construction” throughout the opinion (the full name of the applicant, in fact, was “Blevins Asphalt Construction Company), yet that was a non-issue. The issue was that the applicant’s asphalt was installed into real property and not resold, something that is a requirement under Section 144.030 but not under Section 144.054.

improvements by a construction contractor would not further the purpose of manufacturing exemptions.” Appellant’s Brief, pp. 29-30, *E & B Granite*, Case No. SC 91010 (available on CaseNet). The Director continued: “If the legislature had so intended, it would have used specific language referring to installation or the making of real property improvements.” *Id.* at 33.

The Director elaborates on this argument in the case at bar, discussing at length the fact that Section 144.054 does not contain the terms “construction” or “contractor” while Section 144.030 does, meaning the legislature intentionally left those terms out of Section 144.054.⁵ Section 144.030—originally enacted over 70 years ago—contains 52 subparts, narrowly delineating its exemptions and stating its application to specific industries. The recently enacted Section 144.054, in contrast, contains only four sections, using broad exemption language. The title of the statute demonstrates its broad nature: “*Additional sales tax exemptions for various industries and political subdivisions.*” Section 144.054 (emphasis added). The independence of the materials exemption in Section 144.054.2 from that in Section 144.030 is noted in the opening phrase of the exemption: “*In addition to all other exemptions granted under this chapter, there is hereby specifically exempted . . .*” and in the closing phrase of the exemption: “. . . and

⁵ The analysis in this paragraph applies also to the Director’s citation of Section 144.062, an inapposite exemption that mentions “construction” in the context of tax-exempt projects such as certain school construction.

the provisions of this subsection *shall be in addition to any state and local sales tax exemption provided in section 144.030.*” Section 144.054.2 (emphasis added).

Still, in *E & B Granite*, as in the case at bar, the Director pointed to cases such as *Blevins* that interpreted the narrower, earlier exemption in Section 144.030.⁶ The Court disregarded reliance on Section 144.030 and its interpreting cases when looking at the effect of the new exemption statute, Section 144.054.

Appellate courts presume the legislature is aware of appellate interpretations of existing statutes and that by “enacting a new one on the same subject, it is ordinarily [the] intent of the legislature to effect some change in [the] existing law.” *Kilbane v. Dir. Of Revenue*, 544 S.W.2d 9, 11 (Mo. banc 1976). This Court assumes that the legislature does not intend to perform a useless act.

E & B Granite, at 317.

The Court found in *E & B Granite* two significant differences in Sections 144.054.2 and 144.030.2(2), namely two phrases in Section 144.030.2(2) that limit its exemption to items ultimately sold at retail instead of those that are affixed to real property:

In short, section 144.054.2 is broader than 144.030.2(2) and is not restricted by the phrases “personal property . . . sold ultimately for final consumption” and “tangible personal property.” This Court must give these statutory changes meaning. Section

⁶ In *E & B Granite*, the Director even attached a copy of Section 144.030 to its appellate brief. Appellant’s Brief, *E & B Granite*, Case No. SC 91010.

144.054.2 applies to products, whether or not they are eventually affixed to real property. Although E & B's granite countertops are eventually installed, they are "products" under section 144.054.2. . . . If the legislature creates a tax exempt situation for a business, this Court must enforce it.

E & B Granite, at 317-18.

The Director's argument about the construction industry and legislative intent has been previously made and rejected. The Director complains that different types of entities ("restaurants, "convenience stores," "grocery stores" and "now . . . construction companies") are trying to utilize the exemption in Section 144.054. Respondent's Brief, p. 10. This is not a problem: the exemption is there to be used, and "this Court must enforce it."⁷ *E & B Granite*, at 318.

And while Fenix readily admits that its wall panels do become part of the construction process, there is a difference between Fenix's wall panels and the

⁷ The Director attempts to use the Court's decisions in *Brinker Mo., Inc. v. Dir. of Revenue*, 319 S.W.3d 433 (Mo. banc 2010), *Aquila* and *Union Elec. Co.*, to show how taxpayers are trying to expand the exemption granted under Section 144.054 in unintended ways. The legislature seems to disagree; since those decisions, House Bill 1865 proposed an exemption similar to Section 144.054 that specifically exempts utilities used in food preparation and baking, while Senate Bill 612 proposed an amendment to Section 144.054 that exempts materials used in commercial cleaning. Both bills were vetoed by the Governor.

construction process in general: Fenix manufactures and/or produces tilt-up wall panels, new pieces of personal property that only after they are produced become part of the construction process and are affixed to real estate. Fenix must have the “products”—the tilt-up wall panels—whether it buys prefabricated ones from another source or produces them itself on site, before it can move the wall panels into position, tilt them up, and attach them to the building that is being constructed for the customer. Before the wall panels are attached to customers’ real property, Fenix produces new personal property, not unlike custom windows, doors, cabinets or granite countertops.

The Director in *E & B Granite* argued that “a carpenter could argue that the cutting and installation of lumber to build a house would be exempt from taxes.” Appellant’s Brief, p. 34, *E & B Granite*, Case No. SC 91010. However, a carpenter does not produce a new product; he simply alters a piece of lumber. The Director asks the Court to look beyond the plain language of Section 144.054 to restrict its effect, but the legislature imposed no such limitations.

The participation in “construction” by Section 144.054 exemption applicants has also not been determinative in the Director’s letter rulings. In Letter Ruling 6784, the inquiring company was in the “business of asphalt production, *construction*, and paving services” and used asphalt in its “construction operations.” L.R. 6784 (emphasis added). The company’s purchases of materials used to create asphalt that it installed to real property were deemed exempt from state sales and use tax and local use tax under Section 144.054. *Id.*

III. *E & B Granite* Is Not Only Relevant But Also Controlling

The Director argues that “The Decision in *E & B Granite, Inc.* is Inapplicable.” Respondent’s Brief, p. 29. In support of this argument, the Director claims that it did not make the arguments in *E & B Granite* that it makes now, namely that Fenix is not a manufacturer and its tilt-up wall panels are not products because the only value they have is to the person who contracted with Fenix to build them. *Id.* at 29-30 (“Unlike in this case, the Director was not contesting whether E & B was a manufacturer or whether it had manufactured a product”). It does not matter whether or not the Director made those same arguments in *E & B Granite*—what matters is what the Missouri Supreme Court found. *E & B Granite*, at 316-17. And if E & B was not a “manufacturer” or “producer,” and did not make “products,” then why did the Director enter into such a stipulation?

E & B Granite is clearly applicable to the case at bar. Like Fenix, E & B produced new custom products that, once they were finished, E & B installed onto its customers real property. The Court did not look outside the language of Section 144.054 to whether E & B took part in the construction process; the Court applied the statute and found an exemption.⁸ The Court heard the same types of construction contractor arguments in *E & B Granite* as it is hearing in this case and like Fenix, E & B Granite made and

⁸ Regardless of any stipulation entered into by the Director and E & B, the Court clearly made its own finding as to whether E & B’s countertops were products: “Although E & B’s granite countertops are eventually installed, they are ‘products’ under section 144.054.2.” *E & B Granite*, at 317.

attached to real property *custom* products. These are the issues before the Court, and the same result should be reached.

IV. The Director's Views On The Scope Of Section 144.054 Are Out Of Line With Case Law And The Director's Own Letter Rulings

The Director states that Section 144.054.2 “conjures up images of manufacturing facilities producing various items by means of mass production rather than skilled tradesmen laboring to construct a building at a construction site.” Respondent’s Brief, p. 26. Section 144.054 obviously conjures up different images for different people or entities, namely Fenix, the Director in this case, the Department of Revenue in its letter rulings, and the Supreme Court. In *E & B Granite*, the Court found that the exemption was certainly not limited to “manufacturing facilities producing various items by means of mass production,” as it applied the exemption to skilled laborers making custom countertops and thereafter affixing them to real estate. The Department of Revenue has routinely applied this exemption to craftsmen making custom cabinets and affixing them to real estate. Letter Rulings 4134, 6877, and 6717. These custom cabinets, like custom countertops, are certainly not the result of mass production in a manufacturing plant.⁹

⁹ The Director points to no law or statutory language stating that manufacturing, processing or producing under Section 144.054 has to be done in a plant; however, it is worth noting that Daniel Bumberry testified that Fenix’s on-site manufacturing process meets the American Concrete Institute’s requirements to be considered “manufactured under plant controlled conditions.” Hearing Transcript, p. 71, ln. 17 to p. 72, ln. 19.

V. Producers Of Custom Products Should Not Be Foreclosed

From The Exemption In Section 144.054

The Director spends very little time in his brief discussing the actual basis for the Administrative Hearing Commission's rejection of Fenix's refund claims. The Commissioner stated that the "issue before us . . . is whether the tilt-up wall panels are a product when they are useful to only the individual for whom they were specifically constructed," Amended Decision, p. 14, and then answered the question in the negative and ended his analysis.

Like the Commissioner, the Director makes no mention of the fact that, like Fenix, E & B made custom products. E & B Granite's countertops were "custom-made to fit the very specific and precise dimensions of the customer" and "[n]o two tops are manufactured to the same specifications and dimensions." *E & B Granite, Inc. v. Dir. of Revenue*, Administrative Hearing Commission, ¶ 10 (June 2, 2010). Despite being "useful to only the individual for whom they were specifically constructed," Amended Decision, p. 14, E & B Granite's countertops were deemed products. The Commission's findings were thus contrary to this Court's controlling precedent.

Nor do the Commission's findings make practical sense. Why should a manufacturer or producer of custom products bear a higher tax burden than other manufacturers and producers? If this were the intent of the General Assembly, it would certainly be set forth in the language of the statute. Custom products play a large role in the marketplace and with regard to improvements to real property, there are custom

windows, doors, countertops and countless other custom products. That these products are individually customized does not keep them from being products with market value.

The Director states that Fenix does not create products but performs “construction services” and operates not within a traditional market but within a “bid service market.” As an initial matter, even if Fenix were deemed a service-provider, a product can be “either tangible personal property or a service.” *International Business Machines Corp. v. Director of Revenue*, 958 S.W.2d 554, 557 (Mo. 1997). Beyond that, Fenix is not completely sure what the Director means by “bid service market.” There is no market for bids; the bidding process Fenix engages in demonstrates the market for its installed wall panels. *See E & B Granite*, AHC Decision, p. 5 (“The installed countertops are a product because they are an output with a market value.”). Just as a company providing custom countertops agrees to a price in advance, Fenix takes bids and agrees to a price for its wall panels in advance. Once Fenix’s wall panels are installed, it is true that they are useful only to that customer (and subsequent purchasers of the real estate). This does not mean that the custom wall panels are not products with value. If custom wall panels and other custom products did not have value there would not be a market for them and they would not exist.

That *E & B Granite* and the Department of Revenue’s letter rulings both apply the exemption in Section 144.054 to custom products obviously undermines the Director’s vision of Section 144.054 in this case and the argument that the tilt-up wall panels made by Fenix are not products because they are “made specifically for one customer” and “unmarketable.” Respondent’s Brief, p. 38. The “custom-made” aspect has not been a

point of distinction with the Department of Revenue before this case and certainly not with the Supreme Court as noted in *E & B Granite*.

CONCLUSION

For the foregoing reasons, the Administrative Hearing Commission's decision should be reversed and judgment entered in favor of the Appellants.

Respectfully submitted,

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Certificate of Service and Compliance with Rule 84.06(b)-(c)

The undersigned hereby certifies that on this 17th day of July, 2014, the foregoing brief was served via the Court's online filing system upon:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 4,049 words.

/s/ Lamar E. Ottsen