FILE

MAY 18, 2001

No. 01-0232

IN THE

SUPREME COURT

OF TEXAS

ROSEMARIE KLARA LENZ,

Petitioner,

v.

HEINRICH RUDOLPH LENZ,

Respondent.

REPLY TO RUDOLPH LENZ'S RESPONSE TO PETITION FOR REVIEW

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Petitioner, ROSEMARIE KLARA LENZ, files this Reply to RUDOLPH LENZ's Response to Petition for Review.

1. A Conflict Between Courts of Appeals Does Exist. In his Response (p. v) Rudolph argues that a conflict does not exist between the Court of Appeals' decision in this case and the decision in *T.A.B. v. W.L.B.*, 598 S.W.2d 936, 938 (Tex. Civ. App.--El Paso) (where Family Code makes verdict binding, trial court cannot grant j.n.o.v.), *writ ref'd n.r.e*, 606 S.W.2d 695 (Tex. 1980); *contra*, *In re Marriage of Robinson*, 16 S.W.3d 451, 454 (Tex. App.--Waco 2000, no pet.); *In the Interest of Soliz*, 671 S.W.2d 644, 648 (Tex. App.--Corpus Christi 1984, no writ); *Fambro v. Fambro*, 635 S.W.2d 945, 948 (Tex. App.--Fort Worth 1982, no writ). Rudolph reasons that this Court's per curiam opinion in *T.A.B.* reflected disapproval of the Court of Appeals' language, which deprives that case of its weight for jurisdiction purposes. This argument has no support in Texas jurisprudence, or even logic. This Court's per curiam opinion said that the Court was expressing no opinion on the issue in question. As noted in the Comment to that Section of the Family Code in Sampson & Tindall's TEXAS FAMILY CODE ANNOTATION at 372 (2000):

> For almost 25 years the rule has been that when a trial court disagrees with a jury verdict on custody the court cannot enter a judgment N.O.V. Rather, the court's power is limited to ordering a new trial.

The legal question in this case clearly involves a conflict in court of appeals' decisions.

2. The Trial Court Did <u>Not</u> Disregard the Jury's Verdict on "No Evidence" Grounds. Rudolph Lenz's Response suggests (p. 3) that the Trial Court disregarded the jury's answer

to Question One on "no evidence" grounds. This is inaccurate. The Trial Court's judgment reflects just the opposite. The specific language of the Court's final Order says the following:

> **Pursuant to the jury's verdict**, IT IS ORDERED, that the prior Order of this Court, as reflected in the Decree of Divorce entered in this cause on August 14, 1998, incorporating the stipulated Consent Decree of Legal Separation in the Superior Court of Arizona in and for the County of Maricopa in Case Number DR 97-90658, dated June 2, 1997, and its incorporated Joint Custody Agreement and Parenting Plan, is hereby incorporated into this Order Modifying Prior Order, save and except Article V of the Joint Custody Agreement and Parenting Plan entitled "Relocation", **which is hereby specifically modified** to read as follows. . . . [Emphasis added]

It can be seen from the foregoing language that the Trial Court granted a modification based upon the jury's verdict.

Additionally, the Trial Court issued detailed Rule 296 Findings of Fact and Conclusions of Law, pertaining to what the Court believed was in the best interest of the children. [2nd Supp. CR 4; see Appendix Tab C to Appellant's Brief] Findings of Fact and Conclusions of Law are not appropriate when a case is disposed of as a matter of law. *Dykes v. Houston*, 406 S.W.2d 176, 178 n. 1 (Tex. 1966); *accord*, *Linwood v. NCNB Texas*, 885 S.W.2d 102, 103 (Tex. 1994) (involving summary judgment proceedings). Findings and conclusions are not appropriate when a motion for judgment j.n.o.v. had been granted. *Fancher v. Caldwell*, 314 S.W.2d 820, 822 (Tex. 1958). The fact that the Trial Court signed Rule 296 Findings of Fact and Conclusions of Law reflects that the Trial Court was making a decision based upon weighing the evidence, and not as a matter of law. *See IKB Industries*

(Nigeria) Ltd. v. Pro-Line Corp., 938 S.W.2d 440, 443 (Tex. 1997) ("The trial court's extensive findings themselves indicate a resolution of disputed factual matters apart from the filings included in the transcript").

3. Rosemarie Had No Burden to Obtain a Ruling on Rudolph's Motion for JNOV. Rudolph argues in his Response (pp. 4, 10) that is was Rosemarie's duty, and not his, to obtain a ruling on Rudolph's motion for judgment n.o.v. Therefore, he reasons, the absence of a ruling on his motion constitutes a "waiver" by Rosemarie of her right to complain about the Court of Appeals' decision to premise its affirmance on the supposed "no evidence" ruling by the Trial Court. The very opposite is true. The Trial Court's ruling on a motion for judgment n.o.v. must be reflected in the record in order to preserve a "no evidence" contention on appeal. *Quintero v. Citizens & Southern Factors, Inc.*, 596 S.W.2d 277, 279 (Tex. Civ. App.--Houston [1st Dist.] 1980, no writ); *Commercial Standard Ins. Co. v. Southern Farm Bureau Casualty Ins. Co.*, 509 S.W.2d 387, 392 (Tex. Civ. App.–Corpus Christi 1974, writ ref'd n.r.e.). By failing to secure a ruling on his own motion for judgment n.o.v., Rudolph waived his "no evidence" complaint, and it cannot serve as a basis for a decision on appeal.

4. Rudolph's Response Disregards the Proper Standard of Appellate Review. In his Response (p. 3), Rudolph asserts that because Rosemarie failed to "establish her burden of proof to prove" that relocation would be in the children's best interest, the Trial Court was authorized to disregard the jury's answer to Question One. The only basis for disregarding

a jury's verdict is that the evidence is legally insufficient to support the jury's "yes" answer. *Dowling v. N.A.D.W. Marketing, Inc.*, 631 S.W.2d 726, 728 (Tex. 1982). It was not the Trial Court's prerogative to disregard the jury's verdict because Rosemarie failed to "meet her burden." If there was more than a scintilla of evidence to support the jury's verdict, then the Trial Court had no authority to disregard the verdict.

5. Rudolph Assumes the Proposition in Question: That the Jury's Verdict Was Merely Advisory.

In his Response (p. 5), Rudolph asserts that the jury's verdict was advisory. Rudolph provides no discussion or argument explaining why the jury's verdict, which by the terms of Family Code § 105.002 is made binding on the Trial Court, is merely advisory. Rudolph does not concede Rosemarie's point, but he offers no rationale in opposition to it.

6. Rudolph Claims Not a Scintilla of Evidence, But the Record Reflects Legally Sufficient Evidence.

Rudolph argues in his Response (pp. 6-10) that there is not a scintilla of evidence to show that relocating to Germany would be a positive improvement for the children. In his briefing, however, Rudolph disregards the standard of review on appeal, which requires the appellate court to view the evidence in a light that tends to support the finding of the disputed fact and disregard all evidence and inferences to the contrary. *Weirich v. Weirich*, 833 S.W.2d 942, 945 (Tex. 1992); *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965). This Court should ignore all of Rudolph's briefing that refers to evidence supporting Rudolph's position.

Rosemarie established that she has been the primary caretaker of the children since

their birth. The court-appointed psychologist, Dr. Murphey acknowledged that the boys' primary emotional bond was with their mother. [RR vol. 9, p. 127] Dr. Murphey also testified that, if Rosemarie is happier in Germany with her children, **there would be natural benefits flowing to the children**. [RR vol. 9, p. 123] The evidence showed that Rosemarie never expected to live in the United States forever. She came here on a temporary basis. [RR vol. 3, p. 34] Dr. Paredes testified that requiring Rosemarie to live in San Antonio and not be able to go back home with her children would be a very difficult adjustment for her to make. [RR vol. 6, p. 114] Forcing Rosemarie to live in Bexar County diminishes her happiness, which in turn negatively impacts the children. Courts in relocation cases have recognized that a child's best interests are closely interwoven with the well-being of the custodial parent, so that the custodial parent's interests must be considered. *Cooper v. Cooper* , 99 N.J. 42, 491 A.2d 606 (1984). Even Rudolph admitted on cross-examination that if Rosemarie was forced to live in Texas for 12 more years, it would affect her emotionally and that would have an effect on the children. [RR vol. 9, p. 22]

Also, having a family support network would be in the best interest of and a positive improvement for the children. All of the Lenz's extended family live in Germany, including the children's only living grandparents. [RR vol. 8, p. 160] The children are close to Rosemarie's sister and brother-in-law. [RR vol. 8, p. 160] They are also close to Harmut, Rosemarie's fiancé. [RR vol, 8, p. 160-161]

Finally, it must be remembered that the parties and the children are German. When

the parties moved from Germany to the United States, the oldest child spoke only German, not English. [RR vol. 2, p. 16] Dr. Paredes, a psychologist who testified at trial said that it is "terribly important for these children to maintain and benefit from their culture of origin, the German culture." [RR vol. 6, p. 112] There was testimony at trial that Rudolph talks to his boys in German. [RR vol. 4, p. 100] Rudolph makes frequent trips to Germany. From March of 1997 to October of 1998, Rudolph took 17 business trips to Germany, and 8 trips in the United States. [RR vol. 2, p. 63-64] This evidence establishes that if the children lived in Germany, they would still have frequent access to their father, plus their living collateral relatives. The children have friends in Germany whom they have known for years. [RR vol. 3, p. 57] Both children are well-equipped to go to school in Germany, and after hearing all the evidence, the jury found that Rosemarie and the children should be free to return there. The benefits to the children of growing up in their country of origin, with a contented custodial parent and an extended-family support network, are clearly in the best interest of and a positive improvement for these children. Plus, the record reflects that Rudolph can himself return to Germany, have a prestigious job and the family live in proximity. It is Rudolph's moving to Germany, not Rosemarie's living in Bexar County, that fosters the best interest of the children. This is the jury's decision, if it should be the Court's decree.

7. The Court of Appeals Could Not Find "No Evidence" When a "No Evidence" Complaint Was Not Preserved in the Trial Court.

Rudolph argues that the Court of Appeals could sustain a legal insufficiency challenge even

if the Trial Court could not grant a j.n.o.v. (p. 12) The Trial Court's ruling on a motion for judgment n.o.v. must be reflected in the record in order to preserve a "no evidence" contention on appeal. *Quintero v. Citizens & Southern Factors, Inc.*, 596 S.W.2d 277, 279 (Tex. Civ. App.--Houston [1st Dist.] 1980, no writ); *Commercial Standard Ins. Co. v. Southern Farm Bureau Casualty Ins. Co.*, 509 S.W.2d 387, 392 (Tex. Civ. App.–Corpus Christi 1974, writ ref'd n.r.e.). By failing to secure a ruling on his motion for judgment n.o.v., Rudolph waived his motion, and it cannot serve as a basis for decision on appeal.

8. The Binding Nature of the Verdict is Squarely Before This Court. The argument that the Trial Court j.n.o.v.'d on "no evidence" grounds is refuted by the record. Rudolph's "no evidence" contention was not preserved in the Trial Court, so the Court of Appeals improperly invoked that ground for affirming the judgment. The issues squarely before this Court beg to be answered: (1) is the jury's verdict regarding who has the right to choose primary residence of a child binding on the trial court; (2) can a trial court j.n.o.v. a verdict in a custody case, or only grant a new trial; (3) was there more than a scintilla of evidence to support the jury's verdict that allows this German mother to take her German children back to Germany; (4) if the Trial Court did have the power to limit the children's residence to Bexar County, did the Court abuse its discretion in doing so in this instance?

This Court should grant review and address these questions.

Respectfully submitted,

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By: _____
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ATTORNEY FOR PETITIONER,
ROSEMARIE KLARA LENZ

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served upon Ms. Jo Chris Lopez, The North Frost Center, 1250 N.E. Loop 410, Suite 725, San Antonio, Texas 78209, by certified mail, return receipt requested, on the 15 th day of May, 2001.

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RICHARD R. ORSINGER