

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2003 CA 1419

RHONDA F. HEHN

VERSUS

MIKEL S. HEHN

Judgment Rendered: MAY - 6 2005

On Appeal from the
21st Judicial District Court
In and for the Parish of Tangipahoa,
State of Louisiana
Trial Court No. 2002-004196

Honorable Robert H. Morrison, III

Zaren James
Hammond, LA

Attorney for Plaintiffs/Appellee,
Rhonda F. Hehn

Carol Parker
Ponchatoula, LA

Attorney for Defendant/Appellant,
Mikel S. Hehn

**BEFORE: CARTER, C.J., WHIPPLE, PARRO,
KUHNS, GUIDRY, PETTIGREW,
DOWNING, GAIDRY, McDONALD,
McCLENDON, HUGHES AND
WELCH, JJ.**

*Guidry, concurs and assigns reasons.
Parro, J., concurs for the reasons assigned by Judge
Guidry.*

GAIDRY, J.

Defendant/appellant has filed this application for rehearing seeking reinstatement of the instant appeal, which was dismissed pursuant to a notice of abandonment (NOA) under Rule 2-8.6 of the Uniform Rules of the Louisiana Courts of Appeal. For the reasons expressed below, we reinstate the appeal.

Rhonda Hehn filed a petition for a protective order under La. R.S. 46:2131 alleging that her husband, Mikel S. Hehn, shoved, stalked and threatened her. There is no pending divorce action. After a hearing, the trial court signed a protective order in favor of Mrs. Hehn. Mr. Hehn appealed.

On July 14, 2003, the appellate record was lodged with this court, and the clerk's office issued a "notice of lodging" stating that appellant's brief was due on or before August 8, 2003. Appellant failed to file his brief by that deadline. Accordingly, on August 15, 2003, we issued a "notice of abandonment" (NOA), notifying appellant that his appeal would be dismissed if a brief was not filed on or before September 14, 2003. (Because that date fell on a Sunday, appellant actually had until the following day, September 15, 2003, to timely file his brief.) On September 15, 2003, appellant mailed his brief to this court. The brief was not filed, however, but rather was returned to appellant as noncompliant due to its violation of Rule 2-12.2(2) of the Uniform Rules of the Louisiana Courts of Appeal (incorrect font, font or type size, or spacing). Consequently, on September 19, 2003, this court issued an "order of dismissal," notifying the parties that this appeal was being dismissed for appellant's failure to file his brief within thirty days after mailing of the NOA, as Rule 2-8.6 requires "shall" be done.

As noted, appellant has filed this timely application for rehearing seeking reinstatement of his appeal. Specifically, his attorney argues that she attempted to file the brief by the NOA deadline, but it was returned unfiled as the font or type was incorrect; she corrected the brief to comply with Rule 2-12.2(2) and resubmitted it by mail on September 19, 2003, but it was returned unfiled as it was submitted after the NOA deadline. Appellant's attorney explains that she was on medical leave and was unable to meet the first briefing deadline; that she attempted in good faith to meet the NOA deadline, but this was the first brief she had prepared since the new rules on size type became applicable and she was unaware that a particular size type and font were now required; and she noted that in all other respects the brief was in compliance with the court rules. Accordingly, she now requests on behalf of her client that the application for rehearing be granted and the appeal be reinstated.

In summary, the appellant initially attempted to file a timely but noncompliant brief; thereafter, the appellant attempted to file an untimely but compliant brief. Such actions clearly demonstrate appellant had no intent to abandon the appeal. Reading the language of Rules 2-8.6, 2-12.12, and 2-12.13 together, and harmonizing them in light of the discretionary nature of the sanctions authorized by the latter two rules, we conclude that the usual sanction of dismissal under Rule 2-8.6 is not mandated here. Appeals are favored in the law, and the appellate courts should be indulgent in maintaining appeals that are deficient in purely technical respects. We emphasize, however, that compliance with promulgated rules of court and uniformity in application of such rules are also favored precepts of our law. Our decision herein should not be interpreted as a deviation from our usual

policy of enforcement of Rule 2-8.6, but rather as a unique exception to the rule.

Accordingly, pursuant to our discretionary authority under La. C.C.P. art. 2164, given the peculiar facts of this case, we grant the application for rehearing and order appellant's appeal reinstated.

APPLICATION FOR REHEARING GRANTED; APPEAL REINSTATED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2003 CA 1419

RHONDA F. HEHN

VERSUS

MIKEL S. HEHN

 **GUIDRY, J., concurs and assigns reasons.**

GUIDRY, J., concurring.

Although I agree with the majority's decision to grant the application for rehearing and reinstate the appeal, I believe that in order to do so this Court must overrule the decision rendered in Lout v. Bootsy's Deli, 02-2703 (La. App. 1st Cir. 9/26/03), 868 So.2d 26, to the extent that it holds, in a similar case, such a dismissal caused the trial court's judgment to become final and definitive. A finding that the judgment was final and definitive would mean this court lacked jurisdiction to grant the application for rehearing and reinstate the appeal.

In Lout, the appellant failed to timely file a brief, the clerk's office issued a notice of abandonment (NOA), a brief was submitted prior to the NOA deadline, but was not filed and was returned as non-compliant, and, accordingly, the appeal was dismissed; appellant then filed an application for rehearing that was granted, and the appeal was reinstated. However, once the appeal was docketed, appellees filed a motion to dismiss, arguing the matter had become final when appellant failed to file a brief and the order of dismissal issued. The Court stated "[w]e agree" and further stated that

“[a]ppellant has failed to meet any of the deadlines set by this court. The appeal is dismissed.”

A judgment that determines the merits in whole or in part is a final judgment. La. C.C.P. art. 1841. An appeal may be taken from a final judgment (and from an interlocutory judgment which may cause irreparable injury). La. C.C.P. art. 2083. A judgment of the trial court becomes final and definitive when no timely appeal is taken. State In Interest of R.C., 00-2849 (La. 4/20/01), 786 So.2d 708. A judgment of the appellate court becomes final and definitive if neither an application for rehearing nor an application to the Louisiana Supreme Court for a writ of certiorari is timely filed. Girouard v. State ex rel. Department of Education, 00-2114 (La. App. 1st Cir. 11/9/01), 807 So.2d 279, writ denied, 01-3227 (La. 2/8/02), 809 So.2d 141; see also La. C.C.P. art. 2166(A).

In the instant case, although the judgment at issue is a final judgment, it has not become *definitive* in light of the timely appeal and the timely application for rehearing. Therefore, this Court has jurisdiction to grant the application for rehearing and entertain the appeal. Accordingly, I would overrule the decision in Lout holding that such an appeal be dismissed because, in essence, the underlying judgment has become final and definitive.

For these reasons, I concur with the majority’s decision to grant the application for rehearing and reinstate the appeal.