NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 CW 1145

DONNA L. MCGEE

VERSUS

KENYATTA CAMPBELL AND SAFEWAY INSURANCE COMPANY OF LOUISIANA

DATE OF JUDGMENT: March 26, 2008

ON SUPERVISORY WRITS FROM THE
NINETEENTH JUDICIAL DISTRICT COURT
(NUMBER 550,447, DIV. 8), PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE WILSON E. FIELDS, JUDGE

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Jeffrey N. Rabb Baton Rouge, Louisiana	Counsel for Plaintiff/Respondent Donna L. McGee
Keith M. Borne Lafayette, Louisiana	Counsel for Defendant/Relator Safeway Insurance Company of Louisiana

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BEFORE: PARRO, KUHN AND DOWNING, JJ.

Parro, J., concurs and assigns reasons.
Downing, J. concurs for the reasons assigned by Parro, J.

Disposition: REVERSED.

Kuhn, J.

The issues presented in this matter involve whether: 1) an insured made material misrepresentations with the intent to deceive; and 2) the insurance broker acted as an agent for the insurer when it assisted the insured in applying for insurance coverage. Finding that the record does not support the judgments of the city court and the district court, which were in favor of plaintiff, Donna L. McGee, and against defendant, Safeway Insurance Company of Louisiana ("Safeway"), we reverse the lower courts' judgments.

I. FACTUAL AND PROCEDURAL BACKGROUND

This litigation arises out of an October 11, 2003 automobile accident involving McGee, who was driving her own vehicle, and Kenyatta Campbell, who was driving her mother's 1995 Chevrolet Astro van. McGee filed suit, naming Kenyatta and Safeway as defendants. McGee alleged that Kenyatta was "a covered driver under the Safeway policy of insurance issued by [Safeway] to Martha Campbell [Kenyatta's mother]."[1]

At trial, the parties stipulated that Kenyatta caused the accident and McGee's resulting injuries and damages. The parties further stipulated that McGee was entitled to general damages in the amount of $10,000.00 and property damages and loss of use damages in the amount of $2,000.00 under the terms of the Safeway policy, unless the policy was determined to be null and void based on Safeway's

[1] The Safeway policy was issued to Martha for the policy period of April 19, 2003, to October 19, 2004.

material misrepresentation defense.[2]

During the July 2006 trial of this matter, several witnesses testified. Martha Campbell testified that since 1996, she had been a client of Flowers Insurance Agency ("Flowers"), the broker who assisted her in April 18, 2003, when she applied for insurance coverage for her van. She stated that when she paid her monthly premium for the Safeway insurance coverage in person at Flowers, she dealt with the same agent each time. Initially, Martha denied having talked to the agent about her family members, but when a prior inconsistent statement was read to her from her March 2005 deposition testimony, she testified that she had spoken with the Flowers' agent about her family and had mentioned at some point that Kenyatta lived in her house. Martha stated that the agent had told her that Kenyatta could not be listed on her policy because she was not a licensed driver.

Martha also testified that she and her husband, Emmit, and her other daughters and grandchildren resided at 2434 Cable Street in Baton Rouge, Louisiana. Martha stated that she had told the agent that she was married and that her husband had his own policy as an explanation for why she did not want him to be included on her policy.

While Martha admitted that her education consisted of high school and six months of trade school and that she could read and write, she also testified that she had a difficult time seeing the application when it was presented to her during the trial. Martha stated that the agent asked her questions, filled out the application

[2] McGee's counsel agreed that if Safeway established its defense of material misrepresentation, McGee would not be entitled to a judgment against anyone; McGee's counsel agreed to release both Kenyatta and Martha from any personal liability for the accident. Thus, the only issue in dispute was whether Safeway was liable under the terms of its policy.

form, and instructed her regarding where to sign it. Martha acknowledged, however, that the agent read over the application with her before she signed it.[3]

Martha admitted that when she signed the application, her adult children who were not licensed drivers, Kimelee and Kenyatta, were living with her and had lived with her their entire lives. Martha also acknowledged that Emmit, whom she had been married to for over thirty years, was also living with her. Martha also testified that she had several grandchildren who were living with her at that time. Martha denied trying to cheat, lie, or deceive Safeway, but the application she signed indicated that there were no other members in her household.[4] The application also indicated that she was single. Additionally, Martha testified that she was aware that Emmit owned and drove a Crown Victoria, but the application she signed indicated that there were no other "vehicles in the household that are not listed above" and "there are no individuals actually living in the same household as applicant, whether or not a licensed driver, other than those listed above." Martha conceded that the application listed only her name as applicant or operator and referenced only her van. Neither her husband, nor Kenyatta, nor any of the other children's names appeared on the application. Likewise, her husband's Crown Victoria was not referenced in the application.

Although Kenyatta was not a licensed driver, Martha testified that she allowed Kenyatta to drive her van, and Emmit allowed her to drive his car. Martha initially testified that she had allowed Kenyatta to drive her van while she was also

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[3] The application form refers to Martha's age as fifty-three years old.

[4] At one point in her testimony, Martha stated, "Why should I cheat the insurance? Why should I cheat just to get insurance to have for my vehicle you're suppose (sic) to have insurance for your vehicle. So, [n]o I'm not cheating on anything."

in the van; Martha explained that Kenyatta drove because she could not see well. She also admitted, however, that she was not always in the van when Kenyatta drove it. Martha admitted that she was fully aware of Kenyatta's operation of the van and her husband's car when she signed the insurance application that did not reflect that Kenyatta operated the van.

During her trial testimony, Martha initially stated that she had told the Flowers' agent that Kenyatta sometimes drove her van, but when she was questioned by Safeway's counsel regarding her contrary deposition testimony, Martha recanted and testified that she had never told the agent that Kenyatta drove her van. She also admitted that one of the reasons why she did not give the agent this information was because Kenyatta did not have a driver's license and she knew that unlicensed drivers could not obtain insurance. Additionally, when Safeway's counsel asked Martha whether she knew that if she told the agent about Kenyatta driving her van, it might prevent her from obtaining insurance, she initially denied this knowledge. But when she was confronted with an inconsistent answer in her deposition testimony, Martha admitted that she had known this information might affect her ability to obtain insurance.

At trial, Kenyatta confirmed that she resided with her family at the Cable Street address. At the time of the accident, Kenyatta was 20 years old and did not have a driver's license. She stated her mother was aware she did not have a license, but she had been driving her mother's van almost daily since she was seventeen or eighteen years old. She ran errands for her mother, but also used the van for her own personal errands and to travel around the city with her friends. She testified that her mother had told her that she was not insured when she drove the van. She

also stated that she had never accompanied her mother to the Flowers agency, and as far as Kenyatta knew, her mother went by herself to deal with the insurance.

Sharon Knighten, Flowers' customer service representative who assisted Martha in completing the April 2003 insurance application, described Flowers as an independent insurance agency that writes insurance coverage for several different insurance companies. Knighten, who was thirty-two years old at the time of the trial, had been working in the insurance industry for seven years. She described her duties as answering the telephone, accepting payments, and assisting customers in applying for automobile liability insurance policies. She stated she was not the agent and was not authorized to sign the applications, but she assisted the customers in completing them.

Knighten acknowledged assisting Martha with applications on several occasions, with the first instance being on March 18, 1998. Knighten testified that Martha had completed about five applications through the years, and on these applications, she had never disclosed that she was married, that there were other family members of driving age, or that there were others who operated her vehicle. Knighten also stated that Martha had never told her that she was married or that there were other people in her household, who were of driving age or who were operating her vehicle. Knighten explained that if Martha had told her she was married she would have required her to include her husband on the policy or sign a form excluding him from coverage. Knighten testified that she did not learn Martha was married until after the accident occurred.

Knighten also stated that she did not know Kenyatta, that Martha did not inform her that Kenyatta lived in her household, and that she (Knighten) knew of no

reason why she would not have required Martha to have executed an exclusion for Kenyatta had Knighten been aware that Kenyatta lived in the household.

Knighten indicated that the 2003 application listed Martha as single and as the only operator of the vehicle. It also did not list any other members of the household. Knighten acknowledged that she asked Martha the questions on the application and placed the check marks in the appropriate boxes that corresponded to her answers. Knighten testified that she had the application facing Martha as she read the questions off to her and that Martha had looked at the application as Knighten read it to her.

Lisa Guidry, an adjuster and litigation specialist supervisor for Safeway, testified that she had worked for Safeway for twelve years and was familiar with the company's underwriting guidelines and whether they accepted certain risks and required excluded driver endorsements on certain individuals.[5] During her work as an adjuster, she made coverage determinations based upon those underwriting guidelines. Guidry explained that if an unlicensed driver was living in the same household as an applicant, Safeway always excluded the unlicensed driver from coverage. She stated that if Safeway had known that Kenyatta was an operator of the van, it would not have accepted the risk of insuring Martha without excluding Kenyatta from the coverage. Had Safeway known about Martha's husband, it would have required more information to determine whether to accept the risk of insuring him.

[5] Guidry acknowledged that Safeway issued "minimal limits" policies to people who were looking for the minimal coverage required by the law.

The city court signed a judgment on September 22, 2006, in favor of McGee and against Safeway in the amount of $10,000.00 in general damages and $2,000.00 in "property damages/ loss of use," together with legal interest and costs. In written reasons for judgment, the city court stated:

> [Martha] did inform the [Flowers'] agent she was married and that [Kenyatta] lived in her household. The agent informed [Martha] that because she was married, [Safeway] required her husband to also be listed on the policy and without a driver's license her daughter could not be listed on the policy. The agent then proceeded to write the policy for [Martha] without listing her husband or daughter as either ... household members or excluded driver.
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> [Martha's] notice to the agent that her daughter lived in her home was notice to the insurance agency and was also notice to the insurer, which issued the policy. The agent's knowledge of [Martha's] daughter living in her home is deemed as the insurance company also having knowledge of the same. ... Likewise, the agent's misrepresentations are the misrepresentations of the insurer. ...
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> ... This Court also finds [Martha] made no material misrepresentation at the time of the application, but that she did inform the insurance agent [that Kenyatta] did live in her home. The information shared with the agent is imputed to [Flowers] as well as [Safeway]. Therefore, the Court finds, Safeway's claim the insurance policy should be cancelled is without merit.
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> (Citations omitted).

Safeway suspensively appealed the city court judgment to the district court pursuant to La. C.C.P. art. 5001.[6] On April 15, 2007, the district court affirmed the city court

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[6] Louisiana Code of Civil Procedure article 5001 states:

> A. Except as provided in Paragraph B of this Article, an appeal from a judgment rendered by a parish court or by a city court shall be taken to the court of appeal.
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> B. Appeal from a judgment rendered by a city court located in the Nineteenth Judicial District shall be taken to the district court of the parish in which the court of original jurisdiction is located.
>
> C. Appeal shall be on the record and shall be taken in the same manner as an appeal from the district court.

judgment and later granted Safeway a suspensive appeal to this court. Safeway asserts that both the city court and the district court erred in finding that Martha had not made material misrepresentations in connection with her insurance application and in failing to void the Safeway policy from its inception.

II. ANALYSIS

We first recognize that this court has no jurisdiction to hear this matter pursuant to its appellate jurisdiction because Safeway filed an appeal from the Nineteenth Judicial District Court's appellate review of a Baton Rouge City Court judgment. This court, however, has plenary power to exercise supervisory jurisdiction over trial court cases that arise within its circuit and may do so at any time, according to the discretion of the court. See La. Const. art. V, §§10(A) and 16;[7] ***Richard v. Swiber***, 98-1515, p. 3 (La. App. 1st Cir. 9/24/99), 760 So.2d 355, 358; *see also* ***Bradley v. Hostead***, 03-1256 (La. 9/5/03), 852 So.2d 1038, 1039, wherein relator sought review of a district court judgment that affirmed a Baton Rouge City Court judgment, and the Supreme Court granted a writ application for the sole purpose of transferring relator's application to this court for consideration pursuant to La. Const. art. V, §10(A). Accordingly, we convert Safeway's appeal

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[7] Louisiana Constitution Article V, § 10(A) provides:

> Except as otherwise provided by this constitution, a court of appeal has appellate jurisdiction of (1) all civil matters, including direct review of administrative agency determinations in worker's compensation matters as heretofore or hereafter provided by law, (2) all matters appealed from family and juvenile courts, and (3) all criminal cases triable by a jury, except as provided in Section 5, Paragraph (D)(2) of this Article. It has supervisory jurisdiction over cases, which arise within its circuit.

Louisiana Constitution Article V, § 16(B) provides:

> A district court shall have appellate jurisdiction as provided by law.

to an application for supervisory review and exercise our supervisory jurisdiction in this matter. Therefore, we review the record before us to determine whether it supports the lower courts' judgments.

A. Rescission of an Insurance Contract Based upon a Material Misrepresentation with the Intent to Deceive

Louisiana Revised Statues 22:619A, dealing with misrepresentations with the intent to deceive in applying for insurance policies, provides in pertinent part:

> [N]o oral or written misrepresentation or warranty made in the negotiation of an insurance contract, by the insured or in his behalf, shall be deemed material or defeat or void the contract or prevent it attaching, *unless* the misrepresentation or warranty is made with the intent to deceive.
>
> (Emphasis added.)

The insurer, who seeks to avoid coverage based on the defense of material misrepresentation, bears the burden of proving that the insured misrepresented a material fact and did so with the intent to deceive. See ***Cousin v. Page,*** 372 So.2d 1231, 1233 (La. 1979). In ***Darby v. Safeco Ins. Co. of America***, 545 So.2d 1022, 1026 (La. 1989), the supreme court noted that because of the difficulties inherent in proving that a person acted with the intent to deceive, the courts have lightened somewhat the insurer's burden by considering the surrounding circumstances in determining whether the insured knew that representations made to the insurer were false:

> Intent to deceive must be determined from surrounding circumstances indicating the insured's knowledge of the falsity of the representations made in the application and his recognition of the materiality of his misrepresentations, or from circumstances which create a reasonable assumption that the insured recognized the materiality [quoting ***Cousin***, 372 So.2d at 1233].

If the insurer meets this burden, the insurance contract will be rescinded. See ***Royal Maccabees Life Ins. Co. v. Montgomery***, 97-1434, p. 7 (La. App. 1st Cir. 6/29/98), 716 So.2d 921, 925, ***writ denied***, 98-2664 (La. 12/11/98), 730 So.2d 940. When a policy is rescinded, it is invalidated from its inception. ***Id.***, 97-1434 at p. 8, 716 So.2d at 925.

In the present case, Martha gave inconsistent testimony on many points and her testimony at trial often differed from her earlier deposition testimony. The evidence, however, establishes that she signed her name to an application that included significant misrepresentations regarding her marital status, the persons and vehicles associated with her household, and the operators of those vehicles. Although Martha testified during the trial that she had a difficult time seeing the application, she acknowledged that Knighten had read the application to her before she signed it. In addition to the misrepresentations set forth in the application, Martha's testimony establishes that she failed to disclose to Knighten that Kenyatta was operating her van. Martha testified she was fully aware that Kenyatta, although unlicensed, was regularly driving her vehicle. Martha admitted that one of the reasons she did not inform Knighten that Kenyatta drove her van was because she did not have a driver's license, and Martha knew that unlicensed drivers could not obtain insurance. Martha admitted that she knew this information might prevent her (Martha) from obtaining insurance. Thus, the record establishes that Martha knew the significance of disclosing this information to Knighten and chose not to. Guidry's testimony that Safeway would not have accepted the risk of insuring Martha without excluding Kenyatta from the coverage was not contradicted. Accordingly, the record reveals that there was a

misrepresentation with intent to deceive and that Martha recognized the materiality of this misrepresentation. The city court and the district court erred in finding otherwise.

B. Lack of Evidence Establishing Agency Relationship Between Safeway and Flowers

The city court found that Martha informed Knighten that Kenyatta lived in the household, and Knighten proceeded to write the policy for Martha without listing Kenyatta as an excluded driver. The city court concluded that Martha's notice to Knighten that Kenyatta lived in her home constituted notice to Flowers, which also constituted notice to Safeway. This conclusion is not supported by the law or the facts presented in the record.

The issue of whether Flowers is an agent of Safeway is a fact-based inquiry, and the existence of an agency relationship is not presumed.[8] Whether a broker in a particular transaction acts as the agent of the insured or of the insurer is a question of fact dependent on the particular circumstances of the case. ***Tiner* v. *Aetna Life Ins. Co.***, 291 So.2d 774, 778 (La. 1974). The facts must give rise to the reasonable inference that an agency relationship has been entered into.

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[8] In ***Tassin v. Golden Rule Ins. Co.***, 94-0362 (La. App. 1st Cir. 12/22/94), 649 So.2d 1050, 1054, this court explained the distinction between an insurance agent and an insurance broker:

> Insurance agents are persons employed by the insurance company to solicit risks and effect insurance. Insurance brokers solicit insurance from the public under no employment from any special company, placing the insurance with any company selected by the insured or, failing such selection, by the broker himself. The general distinction between them is that, in the absence of special circumstances, the broker is the agent of the insured in procuring the policy of insurance and does not represent the insurer. The acts of one procuring insurance as agent of the insurer are imputable to the insurer while those of one acting as agent of the insured, or as a broker, are not.
>
> (Citations omitted).

Smason v. Celtic Life Ins. Co., 615 So.2d 1079, 1084 (La. App. 4th Cir.), ***writ denied***, 618 So.2d 416 (La. 1993). A broker is generally considered the agent of the insured. ***Tassin v. Golden Rule Ins. Co.***, 94-0362 (La. App. 1st Cir. 12/22/94), 649 So.2d 1050, 1054. Whether a broker is also an agent for the insurer, however, depends largely on whether the insurer has control over the broker's actions. See ***Smason***, 615 So.2d at 1085.[9]

Agency relationships with the insurer were found in both ***Tassin*** and ***Tiner***. In ***Tassin***, the insurer provided the application forms used by the agent, listed the agent as its own, and paid the licensing fees for the agent. ***Tassin***, 649 So.2d at 1055. In ***Tiner***, the agent used application forms and rate books provided by the insurer, the forms and books were identical to those used by the insurer's own agents, and the application was processed in the same way as an application provided by an agent of the insurer. ***Tiner***, 291 So.2d at 776.

In the present case, the record reveals no information regarding the relationship between Flowers and Safeway. The record reveals only that Flowers was an independent agency that sold insurance for several different companies, including Safeway. The application listed Safeway as the purported carrier for the coverage that Martha sought, but it appears to be a generic application form generated on Flower's computer rather than a form supplied by Safeway; no Safeway logo appears on the application form. Further, there is no information establishing that Safeway exercised any control over Flowers' brokerage activities.

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[9] Other factors to consider in determining whether a broker is also an agent for the insurer are: (1) whether the broker had a direct relationship with the insurer; (2) whether the broker was the insurer's agent in fact; (3) whether there was an ongoing, prior relationship between the broker and the insurer; and (4) whether the insurer appointed the broker as its agent. See ***Smason***, 615 So.2d at 1084-85.

Accordingly, McGee failed to establish that an agency relationship existed between Flowers and Safeway. Thus, the information that Martha communicated to Knighten could not be attributed to Safeway. Again, the city court and the district court erred in concluding otherwise.

III. CONCLUSION

For these reasons, we find the record establishes that Martha made a material misrepresentation with the intent to deceive. Because McGee failed to establish that an agency relationship existed between Flowers and Safeway, Safeway was not bound by Knighten's knowledge. Thus, we conclude the Safeway policy was void from its inception, and we reverse the lower courts' judgments and dismiss McGee's suit against Safeway. The costs associated with this supervisory writ are assessed against McGee.

WRIT GRANTED; JUDGMENTS REVERSED; SUIT DISMISSED.

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 CW 1145

DONNA L. McGEE

VERSUS

KENYATTA CAMPBELL AND SAFEWAY INSURANCE COMPANY OF LOUISIANA

BEFORE: PARRO, KUHN, AND DOWNING, JJ.

PARRO, J., concurring.

Although I agree with the majority's resolution of the merits of this case, I question whether this court has authority under its supervisory jurisdiction to convert Donna L. McGee's petition for appeal to an application for a supervisory writ for the purpose of making a final determination of the merits of this case.

Concerning the jurisdiction of a court of appeal, LSA-Const. art. V, §10(A) provides, in pertinent part:

> Except as otherwise provided by this constitution, a court of appeal has **appellate jurisdiction** of (1) all civil matters ..., (2) all matters appealed from family and juvenile courts, and (3) all criminal cases triable by a jury .... It has **supervisory jurisdiction** over cases which arise within its circuit. [Emphasis added.]

However, a court of appeal's appellate jurisdiction may be limited "as otherwise provided" by the constitution, such as by LSA-Const. art. V, § 16(B), which provides that "[a] district court shall have appellate jurisdiction as provided by law." Pursuant to the authority of LSA-Const. art. V, §16(B), the legislature did provide by law, when it enacted 2001 La. Acts, No. 1134, §1, to further address the issue of appellate

jurisdiction in connection with appeals from city and parish courts. In particular, the legislature added paragraph B to LSA-C.C.P. art. 5001, as follows:

> Appeal from a judgment rendered by a city court located in the Nineteenth Judicial District shall be taken to the district court of the parish in which the court of original jurisdiction is located.

Therefore, appellate jurisdiction over an appeal from a judgment rendered by the City Court of Baton Rouge lies with the Nineteenth Judicial District Court, not the First Circuit Court of Appeal. Accordingly, I believe that the majority correctly recognizes that this court lacks appellate jurisdiction to consider this matter.

Although this court has supervisory jurisdiction over cases that arise within its circuit,[1] I do not believe this authority encompasses the right to review the substantive matter currently before it, as it affects the merits of a case over which it does not have appellate jurisdiction. A contrary finding results in an exercise of appellate jurisdiction, under the guise of supervisory jurisdiction, which violates the constitution.[2] Such an assertion of supervisory jurisdiction is distinguishable from that utilized in Foxy's Health and Racquet Club v. Allbritton, 03-1054 (La. App. 1st Cir. 8/15/03), 859 So.2d 151, and Richard v. Swiber, 98-1515 (La. App. 1st Cir. 9/24/99), 760 So.2d 355, 358. In Foxy's Health and Racquet Club, this court exercised its supervisory jurisdiction to consider a motion for extension of time to file a writ application relative to a decision of the Nineteenth Judicial District Court involving its review of a judgment by the City Court of Baton Rouge, noting that further substantive review of the City Court's judgment, as affirmed by the district court, could only be obtained if the Louisiana Supreme Court granted a timely-filed application for a writ of certiorari. Foxy's Health and Racquet Club, 859 So.2d at 153 n.2, citing LSA-Const. art. V, §5. On the other hand, Richard, 760 So.2d at 358, involved the exercise of our supervisory jurisdiction in aid of our appellate jurisdiction in the review of a denial of a motion for summary judgment by a district court, not the City Court of Baton Rouge.

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[1] LSA-Const. art. V, §10(A).

[2] I note that a different result would occur with respect to the Louisiana Supreme Court, in that LSA-Const. art. V, §5(F) provides that "the supreme court has **appellate** jurisdiction over all issues involved in a civil action properly before it." (Emphasis added.)

However, because my conclusion appears to conflict with the supreme court's action in Bradley v. Hostead, 03-1256 (La. 9/5/03), 852 So.2d 1038,[3] I feel constrained to concur in the majority opinion.

For these reasons, I respectfully concur.

[3] In Bradley, the plaintiffs applied for a supervisory writ with the Louisiana Supreme Court regarding a district court decision that affirmed a judgment of the City Court of Baton Rouge in a civil action for damages arising out of a car accident that occurred on July 1, 1998 (prior to the 2001 amendment to LSA-C.C.P. art. 5001). The supreme court granted the writ for the "sole purpose of transferring the application to the Court of Appeal for its consideration pursuant to La. Const. art. V, Section 10(A)," citing La. Sup. Ct. Rule X, Section 5(b)(b), thus implying that this court had jurisdiction to review the merits of the case. See Bradley, 852 So.2d at 1039.