

**SUPREME COURT OF NEW JERSEY**

JAMES G. LOWE, M.D.,

Plaintiff-Appellant,

v.

BERNARD AUDET, RICHARD LAVER,  
AND THE CREATIVE FINANCIAL  
GROUP, LTD.,

Defendants-Respondents.

Docket No.

CIVIL ACTION

On Motion for Leave to Appeal from  
an Interlocutory Unpublished Opinion  
of the Superior Court of New Jersey,  
Appellate Division

Law Division Docket No.: CAM-L-  
633-24

App. Div. Docket No.: A-4093-23

Sat Below:

Trial Court:

Hon. Steven J. Polansky, P.J.S.C.

Appellate Division:

Hon. Greta Gooden Brown, P.J.A.D.

Hon. Christine M. Vanek, J.A.D.

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**BRIEF ON BEHALF OF PLAINTIFF- APPELLANT JAMES G. LOWE,  
M.D., IN SUPPORT OF MOTION FOR LEAVE TO FILE AN  
INTERLOCUTORY APPEAL**

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## **PRELIMINARY STATEMENT**

This Honorable Court should resolve the split among the appellate panels as to what constitutes a “learned professional” under the Consumer Fraud Act (“CFA”). Plaintiff James G. Lowe, M.D. (“Plaintiff”) seeks leave to appeal the Appellate Division’s June 24, 2025 decision affirming the Law Division’s order dismissing with prejudice his claims against Defendants Richard Laver, Bernard Audet, and The Creative Financial Group, Ltd. (collectively “Defendants”), insurance agents, brokers and producers (“producers”), under the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 to -210 (“CFA”).

If left undisturbed, the Appellate Division’s unpublished opinion will compound the confusion surrounding the proper application of the judicially-created “learned professional” exemption to CFA liability. This confusion stems from two conflicting, published Appellate Division decisions: Plemmons v. Blue Chip Ins. Servs, Inc., 387 N.J. Super. 551 (App. Div. 2006), which held that insurance producers, as “semi-professionals,” are exempt from liability under the CFA, and Shaw v. Shand, 460 N.J. Super. 592 (App. Div. 2019) which found that Plemmons was overbroad, and that the judicially created exemption from CFA liability is properly limited to historically “learned professionals” like doctors and lawyers. The Appellate Division’s unpublished decision has added

to the conflicting judicial opinions related to the proper scope of the learned professional exemption to CFA liability in New Jersey.

Plaintiff respectfully submits that this case is one of the rare instances in which an appeal on an interlocutory basis is appropriate due to the conflicting appellate authority and the confusion it has caused. For these reasons, and for the reasons set forth more fully below, this Court should grant Plaintiff's motion for leave to appeal and reverse the Appellate Division's decision.

### **CONCISE STATEMENT OF RELEVANT FACTS**

Plaintiff, a neurosurgeon, filed this civil action against Defendants to recover damages suffered as the result of Defendants' willful misrepresentations, fraud, and breaches of duties in connection with the sales, marketing, and procurement of disability insurance coverage for him and his surgical practice. (Pa4-Pa52). Plaintiff was victimized by the conduct of Defendants, insurance producers, whom he trusted to procure certain insurance coverage as they represented, which would pay benefits in the event he became disabled. (Pa11-Pa30). Despite suffering a disability that Defendants promised would result in the payment of maximum benefits, Plaintiff has not received the benefits under the policies as represented by Defendants. (Pa7-Pa22). The fraudulent conduct and unconscionable commercial practices alleged in the Complaint are the precise type of conduct the CFA was promulgated to punish

and stop through enforcement actions by the Attorney General and by lawsuits of private litigants, like Plaintiff.

Defendants, in their capacity as Plaintiff's insurance producers, made willful misrepresentations and engaged in fraudulent conduct, which constituted unconscionable commercial practices in connection with the sales, marketing and procurement of disability insurance coverage for Plaintiff and his medical practice. (Pa5-Pa6, Pa11-Pa25, Pa34-Pa41). Defendants' unlawful acts and omissions caused Plaintiff to suffer significant economic damages, including the loss of disability insurance benefits, waiver of premiums and consequential damages. (Pa4-Pa47).

### **CONCISE PROCEDURAL HISTORY**

On February 27, 2024, Plaintiff filed a Complaint against Defendants asserting nine counts for relief, and seeking damages related to certain insurance policies which did not provide benefits as promised and represented by Defendants. (Pa4-Pa52). Count VII of the Complaint alleged claims against Defendants based on the CFA. (Pa39-Pa41). Defendants moved to dismiss certain Counts in the Complaint, pursuant to Rule 4:6-2(e) for failure to state a claim, including the CFA count. (Pa1-Pa3). The trial court granted Defendants' motions to dismiss the CFA claim in Count VII with prejudice. (Pa1-Pa3).

On August 7, 2025, Plaintiff filed a motion for leave to appeal the trial court's decision dismissing the CFA claim in Count VII. (Pa187-Pa188). The Appellate Division granted leave to appeal on August 27, 2024, and heard oral argument on February 4, 2025. (Pa102; Pa189). On June 24, 2025, the Appellate Division issued a per curiam opinion affirming the Law Division. (Pa189-Pa212). This motion follows.

### **LEGAL ARGUMENT**

#### **I. Plaintiff's Motion for Leave to Appeal Should be Granted to Resolve the Conflict Among the Appellate Panels and Clarify the Contours of the Learned Professional Exemption of the CFA.**

This Court may hear appeals from interlocutory orders of the Appellate Division “when necessary to prevent irreparable injury.” R. 2:2-2(a). Though there is little case law explaining what constitutes “irreparable injury,” this Court has noted that the Rule 2:2-2 standard is similar to the “in the interest of justice” standard of Rule 2:2-4. Brundage v. Est. of Carambio, 195 N.J. 575, 599 (2008). This Court has also repeatedly confirmed its willingness to grant leave to appeal in cases implicating significant issues of public interest. See Twp. of Chester v. Panicucci, 62 N.J. 94, 98 n. 3 (1973) (noting that “[b]ecause of the general public importance of the issue presented,” it would be appropriate to grant leave to appeal); State v. Marrero, 148 N.J. 469, 480-81 (1997) (explaining that in non-capital cases, even “[w]here irreparable harm cannot be

demonstrated,” a motion for leave to appeal pursuant to Rule 2:2-2 can be granted when “broad public policy issues [are] presented.”).

The conflicting decisions in Shaw and Plemmons have created significant confusion regarding the proper scope of the judicially-created learned professional exemption to the CFA. In Plemmons, the Appellate Division held that insurance producers, as “semi-professionals,” are exempt from liability under the CFA. 387 N.J. Super. at 556. Thirteen years later—this time armed with the benefit of hindsight and insights provided by the Attorney General’s amicus brief—the Appellate Division revisited the scope of the learned professional doctrine. Shaw, 460 N.J. Super. at 592. The Shaw Court reasoned that the learned professional doctrine “should be narrowly construed to include only those professions who have historically been recognized as ‘learned’ based on the requirements of extensive learning or erudition.” 460 N.J. Super. at 618-19 (emphasis added). The categories of professions historically recognized as learned are limited to legal, medical, and theological. Id. at 611 (citing Plaza Bottle Shop, Inc. v. Al Torstrick Ins. Agency, 712 S.W.2d 349, 351 (Ky. Ct. App. 1986)). The Shaw Court clearly stated its intention to depart from Plemmons: “[t]o the extent our prior decisions, including [Plemmons] have applied the learned professional exception to ‘semi-professionals’ who are regulated by a separate regulatory scheme, we are constrained, upon further

review, to depart from that reasoning as inconsistent with the Supreme Court’s decision in [Lemelledo].” Shaw, 460 N.J. Super. at 599 (emphasis added).

Judge Sabatino, who sat on both the Plemmons and Shaw panels, plainly stated in his concurring opinion in Shaw: “I recognize that thirteen years ago I served on the appellate panel in [Plemmons], which held that an insurance broker is a regulated ‘semi-professional’ who is excluded from liability under the CFA . . . . With all due respect, I’ve changed my mind.” Id. at 628 (Sabatino, J., concurring). Notably, Judge Sabatino also remarked that “this case may well present a suitable opportunity for the [Supreme] Court to provide helpful updated guidance on the contours of the learned professional doctrine.” Id. at 629 (Sabatino, J., concurring). Indeed, since the publication of Shaw, there have been inconsistencies in the application of the learned professional doctrine which could be resolved with the benefit of additional clarity regarding its proper scope from this Court. Where the Law Division and Appellate Division in this matter elected to apply Plemmons, the Court in Williams-Hopkins v. Medwell, LLC elected to follow Shaw’s more narrow interpretation of the learned professional exemption, noting that “[t]he types of professionals protected by the [learned professional] exception include doctors, and attorneys . . . . [and] semi-professionals are not encompassed in the learned professional

exemption simply because they are subject to regulation.” No. A-0273-21, 2024 N.J. Super. Unpub. LEXIS 569 (2024).

These conflicting interpretations of the learned professional exception highlight the wisdom in Judge Sabatino’s observation that it would be beneficial for this Court to provide additional clarity as to the proper scope of this exception. Shaw was never presented to the Supreme Court for review. This motion for leave to appeal affords the Court the opportunity to “provide helpful updated guidance on the contours of the learned professional doctrine.” Shaw, 460 N.J. Super. at 629 (Sabatino, J., concurring).

## **II. Standard of Review.**

The Supreme Court owes “no special deference to the legal determinations of the trial court or the Appellate Division.” AC Ocean Walk, LLC v. Am. Guar. & Liab. Ins. Co., 256 N.J. 294, 310 (2024) (citing Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021)). Therefore, this Court’s review of the decision of the Appellate Division in this matter is de novo.

## **III. The Appellate Division Erred in Finding Insurance Brokers are Learned Professionals.**

In affirming the Law Division’s finding that Defendants are not subject to liability under the CFA, the Appellate Division erroneously dismissed as dicta the Shaw Court’s clear departure from Plemmons. (Pa189-Pa212). The Appellate Division reasoned that because Shaw involved the applicability of the learned

professional doctrine to home inspectors (and not specifically to insurance brokers), Shaw's discussion of the applicability of the learned professional doctrine to any occupation aside from home inspectors was simply non-binding dicta. (Pa210-211). In doing so, the Appellate Division ignored Shaw's extensive analysis on the scope and application of the learned professional exception which found that Plemmons was overbroad, and that the judicially created exemption from CFA liability is properly limited to historically "learned professionals" like doctors and lawyers. Shaw, 460 N.J. Super. at 599-600; 618-19.

The Shaw analysis is not dicta. "The rule on dicta of our Supreme Court is clear . . . . Simply stated, 'matters in the opinion of a higher court which are not decisive of the primary issue presented but which are germane to that issue . . . are not dicta, but binding decisions of the [C]ourt.'" Marconi v. United Airlines, 460 N.J. Super. 330, 339 (App. Div. 2019) (quoting State v. Rose, 206 N.J. 141, 183 (2011) (internal citations omitted) (emphasis added)). While it is true that the Shaw court was focused on the applicability of the learned professional exception to home inspectors, its broader discussions of the scope and applicability of the learned professional exception—while "not decisive of the primary issue presented" to it—was "germane to that issue," and therefore not dicta. Therefore, the dismissal of the Shaw Court's findings limiting the scope of the learned professional exemption as dicta was in error.

**A. Defendants are Subject to the CFA as it Applies to the Marketing, Sale and Procurement of Insurance.**

“The CFA was enacted to ‘provide[ ] relief to consumers from “fraudulent practices in the market place.”’ Dugan v. TGI Fridays, Inc., 231 N.J. 24, 50 (2017) (alteration in original) (quoting Lee v. Carter-Reed Co., LLC, 203 N.J. 496, 521 (2010)). The CFA is “applied broadly in order to accomplish its remedial purpose, namely, to root out consumer fraud.” Manahawkin Convalescent v. O’Neill, 217 N.J. 99, 121 (2014) (quoting Gonzalez v. Wilshire Credit Corp., 207 N.J. 557, 576 (2011)). The New Jersey Supreme Court, in Lemelledo v. Beneficial Mgmt. Corp. of Am., held that the CFA “is ample enough to encompass the sale of insurance policies as goods and services that are marketed to consumers.” 150 N.J. 255, 265 (1997).

As alleged in the Complaint, Defendants engaged in unconscionable commercial practices, deception, fraud, false promises and omission of material facts in the marketing, sale and procurement of the disability insurance policies, and in the processing of claims made by Plaintiff, in violation of the CFA. (Pa4-Pa52). The acts and omissions alleged in the Complaint give rise to valid causes of action against the Defendants under the CFA. Blanket immunity for insurance producers from liability under the CFA cannot be reconciled with the Lemelledo’s confirmation that the sale of insurance policies falls within the scope of the CFA.

**B. The Judicially Created “Learned Professional” Exemption to CFA Liability Should Not Apply to Insurance Producers or Other Semi-Professionals.**

This Court should adopt Shaw’s interpretation of the learned professional exemption and find that insurance producers are not shielded from liability under the CFA. Shaw should be followed over Plemmons because it is consistent with the broad remedial purpose of the CFA to protect the public against fraudulent business practices and consistent with what has historically been deemed learned professionals.

In analyzing applicable exemptions to the CFA, and with the benefit of the Attorney General’s “special role” and insight as the enforcer of the CFA<sup>1</sup>, the Shaw Court correctly held that “there is nothing in the text or the purpose of the CFA that supports an exemption for fraudulent or unconscionable activities of semi-professionals such as home inspectors.” 460 N.J. Super. at 609 (emphasis added). The Court further reasoned that “the learned professional doctrine, as interpreted, threatens to become the exception that swallows the rule, in contravention of the canon of statutory interpretation that requires that exceptions to a remedial statute are to be narrowly construed” and posited that

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<sup>1</sup> As the Shaw Court appropriately recognized, the Attorney General’s interpretation of the CFA is “entitled to a degree of deference, in recognition of the Attorney General’s special role as the sole legal adviser to most agencies of State Government.” 460 N.J. Super. at 617 (quoting Quarto v. Adams, 35 N.J. Super. 502, 513 (App. Div. 2007)).

“to the extent the Supreme Court continues to recognize a ‘learned professional’ doctrine, ideally that doctrine should be narrowly construed to include only those professions who have historically been recognized as ‘learned . . . .’” Id. at 618-19.

In returning to the historically restricted definition of “learned professional” and rejecting the judicially created exemption for liability under the CFA for semi-professionals, the Shaw Court gave “due deference to the Attorney General’s concern that a wide-ranging interpretation of the learned profession exception would unfairly restrict the ability of private litigants and the Division to seek redress for fraudulent commercial practices . . . .” Shaw, 460 N.J. Super. at 619-20. The Court in Shaw adopted the Attorney General’s view on the appropriate scope of the “learned professional” exemption:

We agree with the Attorney General that the learned professional doctrine, as interpreted, threatens to become the exception that swallows the rule, in contravention of the canon of statutory interpretation that requires that exceptions to a remedial statute are to be narrowly construed. We also agree with the Attorney General’s argument that, to the extent the Supreme Court continues to recognize a “learned professional” doctrine, ideally that doctrine should be narrowly construed to include only those professions who have historically been recognized as “learned” based on the requirement of extensive learning or erudition. We are unpersuaded that the Legislature acquiesced in all semi-professional CFA immunity.

[Id. at 618-19.]

The Shaw Court logically found “that home inspectors and other licensed semi-professionals are not learned professionals simply because they are otherwise regulated.” Id. at 620 (emphasis added). This Court should adopt Shaw’s interpretation of the learned professional exemption as it is consistent with the CFA itself, as well as with the Attorney General’s position on the issue.

It is well established that “where the purpose of legislation is remedial and humanitarian, any exemption must be narrowly construed, giving due regard to the plain meaning of the language and the legislative intent.” Serv. Armament Co. v. Hyland, 70 N.J. 550, 559 (1976). As Shaw held:

[t]hus, broadly construing the reach of the CFA as a remedial statute, and narrowly construing any exceptions to the CFA, we agree with the Attorney General that there is nothing in the text or the purpose of the CFA that supports an exemption for fraudulent or unconscionable activities of semi-professionals such as home inspectors.

[460 N.J. Super. at 609.]

Therefore, Shaw was correct in its position that the “judicially created learned professional exception must be narrowly construed to exempt CFA liability only as to those professionals who have historically been recognized as ‘learned’ based on the requirement of extensive learning or erudition.” Id. at 599 (emphasis added).

“Originally, and historically, the word ‘profession’ was applied only to law, medicine and theology or divinity, and these were known as the three ‘learned professions,’ and it has frequently been said that formerly these three disciplines were known as ‘the professions.’” Shaw, 460 N.J. Super. at 611 (quoting Plaza Bottle Shop, Inc. v. Al Torstrick Ins. Agency, 712 S.W.2d 349, 351 (Ky. Ct. App. 1986)). In Macedo v. Dello Russo, the Supreme Court noted that only lawyers and doctors have been identified as learned professionals beyond the reach of the CFA so long as they are acting in their professional capacities. 178 N.J. 340, 344-46 (2004). “Macedo did not, however, extend the exception to semi-professionals or licensed professionals.” Shaw, 460 N.J. Super. at 615 n.13. To the extent that Plemmons offers any value to the analysis, it simply confirms that insurance producers, like Defendants, are semi-professionals and not learned professionals. 387 N.J. Super. at 564. Under the Shaw analysis, that is insufficient to qualify them for the exemption from liability under the CFA.

Defendants, as insurance producers, are regulated by the New Jersey Insurance Producers Licensing Act, N.J.S.A. 17:22A-26 to -48 (“NJIPL Act”) and the regulations promulgated thereunder. Based on the NJIPL Act and the regulations, there is no support for considering insurance producers, such as Defendants, as a “learned profession.” The NJIPL Act and the regulations

establish the requirements necessary to become a licensed insurance producer. The educational requirements associated with becoming a licensed insurance producer fall woefully short of the “extensive learning or erudition” necessary to be considered a “learned professional” like doctors or lawyers. The educational requirements for insurance producers are limited to completing a State-approved education course of 20 hours of education for each type of insurance license being sought. N.J.A.C. 11:17-3.4. They also have to pay a fee, pass a test for the lines of insurance (i.e., life, health, property, casualty and personal) for which they seek a license, complete an application and pass a background check. N.J.S.A. 17:22A-32. A review of the NJIPL Act and the regulations shows that there is no requirement for a high school diploma, a GED, or any level of formal education whatsoever in order to obtain an insurance producer license in New Jersey. The educational requirements for insurance producers are less than the requirements for the home inspector in Shaw, and far below the level of “extensive learning or erudition,” necessary to be considered a “learned professional” under New Jersey law. Shaw, 460 N.J. at 618-19.

For these reasons, this Court should adopt Shaw’s narrow interpretation of the judicially created exemption to liability under the CFA, and reverse the orders dismissing Appellate Division’s decision affirming the dismissal of Plaintiff’s CFA claim.

**CONCLUSION**

For the reasons set forth more fully above, Plaintiff requests the Court grant leave to appeal and reverse the Appellate Division's decision.

Respectfully submitted,  
**BROWN & CONNERY, LLP**

Dated: July 14, 2025

s/ Stephen J. DeFeo  
Stephen J. DeFeo