
Supreme Court of New Jersey

Docket No. 090940

JAMES G. LOWE, M.D.,	:	CIVIL ACTION
	:	
	:	ON GRANT OF MOTION FOR
	:	LEAVE TO APPEAL FROM AN
<i>Plaintiff-Appellant,</i>	:	INTERLOCUTORY OPINION
	:	OF THE SUPERIOR COURT
	:	OF NEW JERSEY,
vs.	:	APPELLATE DIVISION
	:	
	:	Docket No. A-4093-23
	:	
BERNARD AUDET, RICHARD	:	Sat Below:
LAVER and THE CREATIVE	:	
FINANCIAL GROUP, LTD.,	:	HON. GRETA GOODEN BROWN,
	:	P.J.A.D.
	:	HON. CHRISTINE M. VANEK,
<i>Defendants-Respondents.</i>	:	J.A.D.

SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS BERNARD AUDET AND THE CREATIVE FINANCIAL GROUP

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PRELIMINARY STATEMENT

Defendants Bernard Audet (“Audet”) and The Creative Financial Group i/p/a The Creative Financial Group, Ltd.’s (“Creative”) (collectively, “Defendants”) respectfully submit this supplemental brief to discuss an October 31, 2025, Appellate Division decision that applied the learned professional exception to the Consumer Fraud Act (“CFA”) to architects. See generally Borough of Caldwell v. Cozzarelli Cirminiello Architects, LLC, 482 N.J. Super. 492 (App. Div. 2025).

Central to Plaintiff James G. Lowe, M.D.’s (“Plaintiff”) appeal is his contention that there is a split among appellate panels as to who is a learned professional exempt from the Consumer Fraud Act, N.J.S.A., 56:8-1 to -210 (“CFA”). Plaintiff contends that the Appellate Division’s opinion in this matter compounds the confusion in answering this question. See Pl. Br. at 1. The Appellate Division’s recent opinion in Borough of Caldwell is the latest word on the professional exception to the CFA. That case held that “the CFA’s learned professionals exception applies to architects on the record before us.” Id. at 506. Borough of Caldwell was decided three months after Defendants’ opposition to Plaintiff’s motion for leave to appeal and thirteen days before this Court granted leave to appeal.

The Appellate Division’s opinions in this matter and Borough of Caldwell apply the CFA exemption to “non-historic” learned professionals and are more persuasive than the principal authority relied upon by Appellants: Shaw v. Shand, 460 N.J. Super. 592 (App. Div. 2019), which held that *home inspectors* are not learned professionals under the CFA.

The recent Appellate Division decisions in this case and Borough of Caldwell show that there is no confusion on the scope of the learned professional exception. Therefore, there is no reason for this Court to overturn decades of reliance on this exception to CFA liability, especially where, as here, Plaintiff affirmatively pleads a claim for *professional* negligence (Count I) and breach of the insurance *professional* special relationship (Count IX).

Accordingly, Defendants respectfully request that this Court affirm the Appellate Division’s opinion dismissing Plaintiff’s CFA claims against Defendants with prejudice.

PROCEDURAL HISTORY

Plaintiff’s Complaint was filed on February 27, 2024. (Pa004 – Pa052.) The Complaint alleges that “Defendants, financial advisors, *professional* insurance producers, brokers and agents, failed to properly procure disability insurance coverage for Dr. Lowe as he requested and as Defendants represented.” (Pa005.) The Complaint alleges that Audet “is a *professional*

insurance broker, producer and agent. . .” (Pa005.) The First Count alleges “*Professional Negligence*,” and claims that “[a]s a result of Defendants’ breaches of their *professional* duties and obligations, Dr. Lowe has been economically harmed and suffered economic losses. . .” (Pa031 – Pa032.)

The essential claim here is that the defendant-insurance agents negligently failed to obtain sufficient disability insurance for Plaintiff’s disability.

Defendants then filed pre-answer motions to dismiss pursuant to Rule 4:6-2(e) seeking dismissal, *inter alia*, of Count VII relative to claims under the CFA. (Pa001 – Pa003.) On July 19, 2024, following oral argument and a well-reasoned decision, the Hon. Steven J. Polansky, P.J.Cv., granted, in relevant part, Defendants’ motions on the CFA claims and dismissed Count VII with prejudice. (Pa001 – Pa003; Pa213 – Pa233.) The trial court did not dismiss the remaining counts, including negligence and negligent misrepresentation.

On August 7, 2024, Plaintiff filed a motion seeking interlocutory review only as to the dismissal of the CFA claims. (Pa187.) That same day, Audet and Creative filed their Answer and Affirmative Defenses, and started discovery on the eight other counts asserted in the Complaint. (Pa103 – Pa132.) The Appellate Division granted leave to appeal on August 27, 2024. (Pa102.) The parties proceeded with additional briefing and oral argument was held on February 4, 2025. (Pa189 – Pa212.)

On June 24, 2025, the Appellate Division affirmed *per curiam* the dismissal of Plaintiff's CFA claims. (Pa189 – Pa212.) Plaintiff filed a motion for leave to appeal with this Court on July 14, 2025. Audet and Creative filed their opposition on July 28, 2025.

On November 12, 2025, this Court granted Plaintiff's motion for leave to appeal.

FACTUAL BACKGROUND

For brevity, Audet and Creative respectfully refer to the Factual Background section of their Brief in Opposition to the Motion for Leave to Appeal, filed on July 28, 2025.

SUMMARY OF ARGUMENT

The Appellate Division's opinion in Borough of Caldwell, issued on October 31, 2025, is the latest word on the professional exemption to the CFA. That case shows that there is no confusion on the application of the learned professional exemption to the CFA and rejects the same arguments made by Plaintiff here. Borough of Caldwell echoes the Appellate Division's reasoning in this matter and Plemmons v. Blue Chip Ins. Servs., Inc., 387 N.J. Super. 551 (App. Div. 2006) (insurance agents are exempt from CFA as professionals). As such, there is little confusion as to the application of the exemption to the CFA for insurance producers – and other similarly situated professionals – acting in

their professional capacity. Accordingly, the lower courts' opinion should be affirmed and Plaintiff's CFA claims against Defendants should remain dismissed with prejudice.

ARGUMENT

I. The Learned Professional Exemption to the Consumer Fraud Act Should Apply Here Considering *Borough of Caldwell*

In Borough of Caldwell, a municipality sued its former architects for failure to produce products or perform contracted services. The architects moved to dismiss, in relevant part, the municipality's claim under the CFA as barred under the learned professional exception. 482 N.J. Super. at 497. The trial court denied the motion to dismiss, in part, because (a) it found no law specifically applying the learned professional exemption to architects, and (b) the architects failed to identify any "patent and sharp" conflict between the CFA and the scheme regulating architects, under Lemelledo v. Beneficial Mgmt. Corp. of Am., 150 N.J. 255, 270 (1997). Id. at 497-98.

The architects argued on appeal that they only provided licensed professional services without any ancillary non-professional services, and that the presence of a comprehensive regulatory scheme governing architects precluded liability under the CFA. Id. at 501. In response, the municipality made the same argument as Plaintiff makes here – that the Appellate Division's decision in Shaw "stands for the proposition that the learned professional

exemption applies only to historically recognized learned professions.” Id. at 501-02.

The appellate panel in Borough of Caldwell reiterated the learned professional exemption. The panel recognized this Court’s instruction on the scope of the professional exemption to the CFA:

Certainly no one would argue that a member of any of the learned professions is subject to the provisions of the [CFA] despite the fact that he [or she] renders “services” to the public. And although the literal language may be construed to include professional services, it would be ludicrous to construe the legislation with that broad a sweep in view of the fact that the nature of the services does not fall into the category of consumerism.

Id. at 503 (quoting Macedo v. Dello Russo, 178 N.J. 340, 344 (2004) (quoting Neveroski v. Blair, 141 N.J. Super. 365, 379 (App. Div. 1976))).

The Borough of Caldwell panel further relied on this Court’s decision in Lee v. First Union Nat’l Bank, 199 N.J. 251, 264 (2009). This Court explained in Lee that “[t]he rationale underlying the learned professional exception is that uniform regulation of an occupation, where such regulation exists, ‘could conflict’ with regulation under the CFA.” Id. at 503-04. Thus, the appellate panel considered the threshold question: “Do architects qualify as a learned

profession requiring extensive knowledge?” Id. at 504.¹ The Court answered that question “yes.” Id. at 504-06.

The Borough of Caldwell panel reasoned that architects in New Jersey are subject to licensing requirements, which require applicants to meet educational, experiential, and examinations standards, along with continuing education and competency requirements. Id. at 505. There was no dispute that the architects were operating within their professional capacity. Thus, the appellate panel “conclude[d] that where architects provide services consistent with the tenets of their profession and do not venture into unrelated endeavors outside of their field, they are exempt from liability under the CFA under the learned professional exception.” Id.

Second, the appellate panel concluded that the “patent and sharp” conflict analysis of Lemelledo was not required on the facts of that case. Id. at 505. Rather, as this Court ruled in Macedo, such an analysis “is entirely irrelevant to the threshold question of whether the CFA applies to learned professional in the first instance.” Id. at 506 (quoting Macedo, 178 N.J. at 345). Thus, the Lemelledo analysis is not needed to those considered learned professionals to

¹ Though the architects argued that Batterfein v. Larken Assocs., 323 N.J. Super. 167 (App. Div. 1999), recognized the exemption’s application to architects but did not apply it given the nature of the activities alleged, the appellate panel disagreed yet still took another look at the extension of the learned professional exception to architects. Id. at *6.

whom the CFA does not apply. Accordingly, the appellate panel applied the learned professional exception to the architects in Borough of Caldwell and reversed that portion of the trial court's order denying the architects' motion to dismiss.

In addition, Borough of Caldwell falls neatly within the cases addressing the learned professional exception. Like the Appellate Division decision here and in Plemmons v. Blue Chip Ins. Servs., Inc., 387 N.J. Super. 551, 564-65 (App. Div. 2006) (holding that CFA does not apply to insurance agents), the appellate panel in Borough of Caldwell reviewed the statutory and regulatory licensure requirements for the relevant professionals. 482 N.J. Super. at 505. Plemmons specifically applied the professional exemption to insurance agents. Both Borough of Caldwell and the Appellate Division's opinion here emphasize legislative inaction. In Borough of Caldwell, the Appellate Division noted, as did this Court in Macedo, 178 N.J. at 344-46, that the legislature never amended the CFA to expressly include professionals and abrogate the exemption. Here, the Appellate Division recognized that the legislature has not acted in the 19 years since the Plemmons holding in 2006. See Pa211 ("If the Legislature disagreed with this court's extension of the categorical exemption from CFA liability to insurance brokers, nineteen years was more than enough time for it to act.").

And this Court approvingly cited Plemmons 17 years ago in Lee v. First Union Nat'l Bank, 199 N.J. 251, 264 (2009):

Our holding renders unnecessary any consideration of the learned professionals exception that has been recognized in case law involving the CFA. That exception is a judicially crafted rule, whereby **certain transactions fall outside the CFA's purview because they involve services provided by learned professionals in their professional capacity.** See e.g., Macedo, supra, 178 N.J. at 346, 840 A.2d 238 (physicians' services insulated from CFA); **Plemmons v. Blue Chip Ins. Servs., Inc., 387 N.J. Super. 551, 556, 904 A.2d 825 (App. Div. 2006) (same for insurance brokers' services);** Vort v. Hollander, 257 N.J. Super. 56, 62, 607 A.2d 1339 (App. Div.) (same for attorneys' services), certif. denied, 130 N.J. 599, 617 A.2d 1221 (1992); Neveroski, supra, 141 N.J. Super. at 379, 358 A.2d 473 (“Certainly no one would argue that a member of any of the learned professions is subject to the provisions of the [CFA] despite the fact that he renders ‘services’ to the public.”).

(Emphasis added). Thus, this Court approved the professional exemption for insurance brokers.

Only Shaw attempts to constrict the learned professional exemption to the “historically learned professions” of law, medicine, or divinity/theology. In addition to this brightline rule rendering the “nature of the activity” analysis meaningless, such a pronouncement, if adopted by this Court, affects not only Defendants’ reliance upon this exemption since Plemmons in 2006, but to professionals other than doctors and lawyers since 1976. Neither Shaw nor

Plaintiff address the Legislature's acquiescence to this exemption or the ramifications of upending decades of Defendants and others' reliance.

In short, the opinion in Borough of Caldwell demonstrates no compounded confusion among appellate panels as to the application of the learned professional exemption to the CFA to insurance producers and other professionals sued for actions taken within their professional capacities.

This is especially the case here, where the Appellant alleges that the respondents are professionals who breached their professional duties and are liable for professional negligence. The First Count alleges "Professional Negligence," and claims that "[a]s a result of Defendants' breaches of their professional duties and obligations, Dr. Lowe has been economically harmed and suffered economic losses. . ." (Pa031 – Pa032.) The Plaintiff affirmatively pleads a claim for *professional* negligence (Count I) and breach of the insurance *professional* special relationship (Count IX).

But Plaintiff denies that Defendants are professionals in Count VII, under the CFA. It is anomalous for Plaintiff to allege that Defendants are professionals in Counts I and IX, but to deny them professional status in Court VII. In addition, Plaintiff produced an Affidavit of Merit pursuant to N.J.S.A. 2A:53A-27. (Pa050 – Pa052). The sworn certification from Plaintiff's proposed expert, who holds "widely recognized professional insurance designations," opines that

Defendants departed from the “professional standards or practices of the insurance industry” and echoes the allegations made in the Complaint that Defendants “deviated from the accepted professional standards or practices of the insurance industry.” (Id.)

Continuing to apply the exemption to insurance brokers makes sense as the Legislature has designated an insurance producer as a “licensed person” in the same classification as attorneys, architects, doctors, and other healthcare providers. See generally N.J.S.A. 2A:53A-26.

CONCLUSION

For the foregoing reasons, Audet and Creative respectfully request that the Court affirm the appellate and trial court decisions finding that the exemption to the CFA applies in this case and that Plaintiff’s claims under the CFA were properly dismissed with prejudice.

Respectfully submitted,

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