FILED, Clerk of the Supreme Court, 28 Jul 2025, **090940**

SUPREME COURT OF NEW JERSEY

JAMES G. LOWE, M.D., Plaintiff/Appellant, vs. BERNARD AUDET, RICHARD LAVER, and THE CREATIVE FINANCIAL GROUP, LTD., Defendants/Respondents.	Docket No.: 090940 CIVIL ACTION On Motion For Leave To Appeal From An Interlocutory Unpublished Opinion Of The Superior Court Of New Jersey, Appellate Division Appellate Division Docket No.: A-4093-23 *Appellate Division:* Hon. Greta Gooden Brown, P.J.A.D. Hon. Christine M. Vanek, J.A.D. Law Division Docket No.: CAM-L-0633-24 *Sat Below:* Hon. Steven J. Polansky, P.J.Cv. Submitted On: July 28, 2025

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DEFENDANT/RESPONDENT RICHARD LAVER'S BRIEF IN OPPOSITION TO PLAINTIFF JAMES G. LOWE'S MOTION FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL

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TABLE OF CONTENTS

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TABLE OF JUDGMENTS, ORDERS, AND RULINGS

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TABLE OF AUTHORITIES

CASES **PAGE NO.**

STATUTES **PAGE NO.**

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RULES **PAGE NO.**

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PRELIMINARY STATEMENT

Appellant's motion for leave to file an interlocutory appeal to the Supreme Court of New Jersey should be denied.

First, Appellant fails to sufficiently establish that irreparable injury, as required by Rule 2:2-2, would be suffered if this motion is denied. Plaintiff is merely seeking monetary loss in this case, nothing further. Appellant's claim that there is *"confusion"* based upon *conflicting appellate authorities* is neither accurate nor a proper/satisfactory basis for leave.

Second, Appellant's claims lack merit as he erroneously minimizes the only precedent considering the CFA's application as to insurance producers, set forth in Plemmons v. Blue Chip Ins. Servs., Inc, 387 N.J. Super. 551 (App Div. 2006). The Appellant fails to cite any Supreme Court decision and/or legislative action that has been issued in nearly nineteen years, post-Plemmons, that have *"overruled"* or *"superseded"* the established precedent.

Instead, Appellant asked the trial court, then asked the Appellate Division, and now asks the Supreme Court to inappropriately adopt and apply the holding in Shaw v. Shand, 460 N.J. Super. 592 (App. Div. 2019), a *concurrent* Appellate Division decision, which *only* considered whether "*home inspectors"* are exempt from liability under the CFA, to this case. As the Hon. Jack A. Sabatino, P.J.A.D. stated, Shaw and Plemmons are two distinctly different cases, "the licensure

requirements for insurance brokers – and their associated fiduciary duties – appear to me to be more stringent than those governing home inspectors." Shaw, 460 N.J. Super. at 628 *(Jack M. Sabatino, P.J.A.D., concurring opinion).*

The Appellate Division panel in the instant case echoed this sentiment, stating "[w]e reject plaintiff's contention that Shaw overruled Plemmons….Critically, Shaw did not involve a CFA claim against an insurance broken. The dispositive issue in Shaw was whether the judicially crafted exemption to CFA liability applied to home inspectors", not insurance producers or other professions.

Furthermore, the Appellant ignores that the New Jersey Legislature has already considered an insurance producer's classification, as N.J.S.A. 2A:53A-26(o) designates an insurance producer as a "*licensed person"*, classifying said profession in the same category as doctors, dentists, and engineers. Unlike a home inspector, to maintain a negligence claim against an insurance producer, a plaintiff needs an affidavit of merit from a similarly licensed person.

The Appellant acknowledged that an insurance producer is a learned professional as he identified this case as *"professional malpractice"* on his Case Information Statement, and, submitted an affidavit of merit from an insurance producer expert. Appellant even refers to Respondent, Richard Laver, as a *"professional"* and *"expert"* throughout his complaint.

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For the reasons set forth herein, the Appellant's motion for leave to file an interlocutory appeal to the Supreme Court of New Jersey, must be denied.

CONCISE STATEMENT OF RELEVANT FACTS

Appellant's professional malpractice complaint asserts that Respondents failed to properly assist him in procuring multiple disability insurance policies. *See* **Pa004, ¶1.**

Appellant's relationship with Defendants/Respondents, The Creative Financial Group ("CFG") and Bernard Audet ("Audet"), commenced on August 26, 2003, when Audet (who was working for CFG) assisted Appellant in obtaining MetLife Disability Income Policy 6421485, with an effective date of December 1, 2003. **Pa008, ¶14.** At that time, Appellant was employed as a neurosurgeon. **Pa005, ¶ 3, Pa007, ¶'s 11-12.**

On September 25, 2008, Audet assisted Appellant in obtaining Business Overhead Expense Policy 6547571, with an effective date of February 17, 2009. **Pa009, ¶19.** On the same date, Audet also assisted Appellant in obtaining MetLife Business Overhead Expense Policy 6547572, with an effective date of February 17, 2009. **Pa010, ¶21.** On May 26, 2016, Audet assisted Appellant in obtaining MetLife Disability Income Policy 6696493, with an effective date of June 1, 2016. **Pa008-9, ¶16.**

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In September, 2021, Appellant stopped performing neurosurgery due to a permanent vision condition. **Pa025, ¶88.**

From 2003, through 2021, Appellant claims that he met and/or spoke with Audet and other CFG representatives, at least 51 times, concerning the marketing, sale, procurement, and maintenance of the above-referenced disability insurance policies. **Pa012-13, ¶'s 36-37.** However, throughout that time, Appellant only met with Mr. Laver[1], *once*, on November 6, 2021, *subsequent* to the marketing, sale, procurement, and maintenance of the disability insurance policies in issue, and ***after*** Appellant's disability arose. **Pa021, ¶71.**

It is not specifically alleged that Mr. Laver had any involvement in the marketing, sale, procurement, or maintenance of the various disability insurance policies in issue. **Pa021-23, ¶'s 71-76.** Mr. Laver's only alleged role/involvement was limited to assisting Plaintiff/Appellant in filing a claim with Metlife, once again, *subsequent* to the marketing, sale, procurement, and maintenance of the disability insurance policies in issue, and *after* Appellant's disability arose. **Pa021-23, ¶'s 71-76.** Essentially, Mr. Laver's only specifically alleged involvement was pointing out

[1] Mr. Laver is a licensed insurance producer, and was referred to, numerous times, throughout the Complaint as an *"expert"* and *"professional"*. *See* **Da001 – NAIC, New Jersey Insurance Producer License, Website Print-Out** and **Pa004, 6, 11, 32, 44, ¶'s 2, 5, 29, 132, 202**.

to Appellant a potential mistake made by Mr. Audet and CFG with respect to the benefits to be received under the policies at issue. **Pa021-23, ¶'s 71-76.**

In December, 2021, Appellant filed a claim seeking benefits from his various disability insurance policies at issue. **Pa025, ¶90.** MetLife has only paid partial benefits to Appellant, which Appellant alleges was due to the alleged misrepresentations by Audet and CFG, during the marketing, sale, procurement, and maintenance of said policies. **Pa018-23, ¶'s 59-76.** Appellant alleges no damages stemming from the actual filing of the claim itself, allegedly assisted by Mr. Laver. Appellant is seeking the remaining MetLife benefits in this lawsuit, along with other damages.

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CONCISE PROCEDURAL HISTORY

Appellant filed his complaint on February 27, 2024. **Pa004-49 – Complaint, Dated February 27, 2024.** In Appellant's Case Information Statement, Plaintiff/Appellant indicated this matter asserts *"professional malpractice"* claims. To avoid dismissal, Appellant provided an *affidavit of merit* prepared by Charles W. Bowden, ChFC. **Pa050-52 – Affidavit of Merit, by Charles W. Bowden, ChFC, Dated February 16, 2024.**

On June 14, 2024, Mr. Laver filed a motion to dismiss counts: V) Common Law Fraud; VII) New Jersey Consumer Fraud Act; and IX) Breach of Contract, as well as Appellant's request for punitive damages, with prejudice. On July 9, 2024,

Appellant filed his brief in opposition to Mr. Laver's motion to dismiss. On July 15, 2024, Mr. Laver filed his reply brief in further support of the underlying motion to dismiss. After hearing oral argument, on July 19, 2024, the Hon. Steven J. Polansky, P.J.Cv., issued an order dismissing Count VII, *New Jersey Consumer Fraud Act*, with prejudice, and Count V, *Common Law Fraud*, and Count IX, *Breach of Contract*, without prejudice, with respect to Mr. Laver. **Pa001-Pa002 – Order By The Hon. Steven J. Polansky, P.J.Cv., Dated July 19, 2024.**

On August 7, 2025, Appellant filed a motion for leave to appeal the decision by the Hon. Steven J. Polansky, P.J.Cv. **Pa187-Pa188.** On August 27, 2024, the Appellate Division granted leave to appeal. **Pa102.** On February 4, 2025 the Appellate Division heard oral argument. **Pa189.** On June 24, 2025, the Appellate Division issued a decision affirming the decision by the Hon. Steven J. Polansky, P.J.Cv. **Pa189-Pa212.**

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LEGAL ARGUMENTS

I. STANDARD OF REVIEW ON A MOTION FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL TO THE SUPREME COURT OF NEW JERSEY

Appellant's moving papers gloss over the stringent standard of review on a motion to file an interlocutory appeal to the Supreme Court of New Jersey. The New Jersey Court Rules, R. 2:2-2, provides that, "[a]ppeals may be taken to the Supreme Court by its leave from interlocutory orders: (a) Of trial courts in cases where the

death penalty has been imposed; (b) Of the Appellate Division when necessary to prevent irreparable injury; or (c) On certification by the Supreme Court to the Appellate Division pursuant to R. 2:12-1." *See* Rule 2:2-2.

The Appellant cannot meet this standard, as there is no irreparable injury. Plaintiff is merely seeking monetary damages. *See* Crowe v. De Gioia, 90 N.J. 126, 132–33 (1982).

Instead, the Appellant attempts to expand the Appellate Division's decision's breath to establish "irreparable injury". Such an attempt should be disregarded.

The Appellate Division's unpublished decision here is narrowly tailored strictly to *"insurance producers"*, based upon the specific analysis and reasons outlined in Plemmons. Notably, this is not a determination on whether the *"learned professional"* exception applies to any and all professions. Therefore, any allegations regarding potential consequences and *"the exception swallowing the rule"* is overstated and completely theoretical.

Furthermore, R. 2:2-2, does not allow for leave to file an interlocutory appeal to the Supreme Court based upon alleged *"confusion"* and/or alleged *conflicting appellate authorities*. Regardless, despite Appellant's claims, there exists no *"conflicting appellate authority"* and/or any *"confusion"* with respect to the issue of whether an insurance producer is exempt from liability under the CFA.

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In 2006, Plemmons established a clear legal precedent, "insurance brokers … are exempt from liability under the CFA." Plemmons, 387 N.J. Super. at 564-65. The Legislature failed/refused to act with regard to this precedent for approximately nineteen years (and counting). Throughout that time, this precedent was followed by the New Jersey District Court in Ace Eur. Grp. v. Sappe, No. CIV.A. 08-412 JLL, 2012 WL 1994471, at *6 (D.N.J. June 1, 2012), and again in 2022 (post-Shaw) in McCray v. Sanders, No. CV2012370ZNQLHG, 2022 WL 3868058 (D.N.J. Jan. 21, 2022).[2] This precedent was followed by the Hon. Steven J. Polansky, P.J.Cv., in deciding the underlying motion, and said decision was affirmed by the Appellate Division, which clearly stated "for the purposes of the CFA, insurance brokers are categorically exempt from liability when performing brokerage services."

Appellant fails to cite to any Supreme Court decision and/or legislative action that has been issued in the almost nineteen years, post-Plemmons, that would have *"overruled"* or *"superseded"* the precedent established. Despite Appellant's claims, Shaw did not involve a CFA claim against an insurance producer. The dispositive

[2] Williams-Hopkins is cited by Appellant to show *"confusion"* on this issue; however, Williams-Hopkins was asked to determine whether services rendered by a *medical facility* (not insurance producers) were exempt from liability under the CFA, based upon the "learned professional" exemption (to which they held the trial court's decision was premature, *not incorrect*). Williams-Hopkins, No. A-0273-21, 2024 WL 1476821, at *16 (App. Div. 2024). As detailed above, each case decided subsequent to Plemmons, dealing specifically with insurance producers, followed the established precedent.

issue in Shaw was whether the judicially crafted exemption to CFA liability applied to home inspectors. This is clear in the concurrent opinion by the Hon. Jack A. Sabatino, P.J.A.D. in Shaw. Shaw, 460 N.J. Super. at 628 *(Jack M. Sabatino, P.J.A.D., concurring opinion).*

Finally, denial of leave to appeal is not the end of the road, but rather properly allowing the case to run its course, and allowing the Trial Court and Appellate Division its proper deference. This is just one out of nine counts originally alleged against Respondents.

For the reasons set forth above, Appellant's motion for leave to file an interlocutory appeal to the Supreme Court of New Jersey, must be denied.

II. THE TRIAL COURT PROPERLY DISMISSED AND THE APPELLATE DIVISION PROPERLY AFFIRMED THE DISMISSAL OF APPELLANT'S NEW JERSEY CONSUMER FRAUD ACT CLAIM, COUNT VII

Even if the Appellate met the stringent appeal standard - which he cannot - his claim that insurance producers should be subject to the Consumer Fraud Act lacks merit.

A. The Scope Of The New Jersey Consumer Fraud Act

The original purpose of the CFA is "to prevent deception, fraud, or falsity, whether by acts of commission or omission, in connection with the sale or advertisement of merchandise and real estate." Fenwick v. Kay American Jeep, Inc., 72 N.J. 372, 376-77 (1977). The Court has held, "[t]o constitute consumer fraud ...

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the business practice in question must be 'misleading' and stand outside the norm of reasonable business practice in that it will victimize the average consumer...." Turf Lawnmower Repair, Inc. v. Bergen Record Corp., 139 N.J. 392, 416 (1995). "The standard of conduct that the term 'unconscionable' implies is a lack of 'good faith, honesty in fact and observance of fair dealing.' Gennari v. Weichert Co. Realtors, 288 N.J. Super. 504, 533 (App. Div. 1996), *aff'd as modified*, 148 N.J. 582 (1997), *quoting* Kugler v. Romain, 58 N.J. 522, 544 (1971).

Courts have "recognized a need to place reasonable limits upon the operation of the [CFA] 'despite broad statutory language, so that its enforcement properly reflects legislative intent, however ascertained.'" DiBernardo v. Mosley, 206 N.J.Super. 371, 375 (App. Div.), *certif. denied*, 103 N.J. 503 (1986), *quoting* Jones v. Sportelli, 166 N.J.Super. 383, 388 (Law Div. 1979). The idea is that the "CFA's reach is not unbounded." Lee v. First Union Nat. Bank, 199 N.J. 251, 263 (2009). "[T]he CFA 'is not intended to cover every transaction that occurs in the marketplace.'"[3] Hoffman v. McGraw-Hill Financial, Inc., No. ESX-C-216-13, 2014

[3] In addition to the judicially crafted exception, discussed herein, the CFA also has been held inapplicable, in the following settings: claims under the Products Liability Act, N.J.S.A. 2A:58C–1 to –11, Sinclair v. Merck & Co., Inc., 195 N.J. 51 (2008); fraud on the market claims, Int'l Union of Operating Eng'rs v. Merk & Co., Inc.,192 N.J. 372 (2007); refusal to service domestically vehicles purchased abroad, Wilson v. General Motors Corp., 190 N.J. 336 (2007); sale of bulk tax sale certificates was not a per se violation of the CFA, Varsolona v. Breen Capital Servs. Corp., 180 N.J. 605 (2004); claims preempted by federal law, Glukowsky v. Equity One, Inc., 180

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WL 7639158, at *13 (N.J.Super.Ch. Dec. 31, 2014), *quoting* Cetel v. Kirwan Fin. Group, Inc., 460 F.3d 494, 514 (3d Cir. 2006); *see also* Arc Networks, Inc. v. Gold Phone Card Co., 333 N.J.Super. 587, 590 (Law Div. 2000).

B. The "Learned Professional" Exemption

The "learned professional" 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." Lee, 199 N.J. 251, 263.

Neveroski, which initially established the "learned professional" exemption, held:

> testing, licensing, regulations and penalties through other legislative provisions as well as the nature of [the]{his} activity [being]{is} recognized as something beyond the ordinary commercial seller of goods or services[,] whose professional activity, [a]lthough not on the same plane as other professionals such as lawyers, physicians, dentists, accountants or engineers, the nature of his activity is recognized as something beyond the ordinary commercial seller of goods or services- an activity beyond the pale of the act under consideration.

[Neveroski v. Blair, 141 N.J.Super. 365, 380-81 (1976)]

This idea was reenforced in Macedo,

> Certainly no one would argue that a member of any of the learned professions is subject to the provision of the Consumer Fraud Act

N.J. 49 (2004); claims subject to the filed rate doctrine, Smith v. SBC Communications, Inc., et. al., 178 N.J. 265 (2004); and, disclosure claims under the New Jersey Real Estate Residential Off–Site Conditions Disclosure Act, N.J.S.A. 46:3C–1 to –12, Nobrega v. Edison Glen Assoc., 167 N.J. 520 (2001).

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> despite the fact that he 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.

[Macedo v. Dello Russo, 178 N.J. 340, 344 (2004), *citing* Neveroski, 141 N.J. Super. 379]

Under this idea, numerous professions have been found to be exempt from CFA liability, under the "learned professional" exception. *See* Macedo v. Dell Russo, 178 N.J. 340 (2004) (holding that physicians providing services are exempt from CFA liability); *see also* Hampton Hosp. v. Bresan, 288 N.J.Super. 372, 383 (App. Div. 1996) (hospitals insulated from CFA liability), *certif. denied*, 144 N.J. 588 (1996); Vort v. Hollander, 257 N.J.Super. 56 (App. Div. 1992) (holding that attorneys providing services are exempt from CFA liability); Atl. Ambulance Corp. v. Cullum, 451 N.J. Super. 247, 257 (App. Div. 2017) (ambulance service providers are excluded from liability under the CFA); Manahawkin Convalescent, 426 N.J. Super. at 155–56 (nursing homes are insulated from CFA liability); Plemmons, 387 N.J. Super. at 564–65 (insurance producers are excluded from liability under the CFA); Wartsila NSD N. Am., Inc. v. Hill Int'l, Inc., No. CV 99-4565 (SSB), 2000 WL 36740984, at *6 (D.N.J. Sept. 29, 2000) (engineers are excluded from CFA liability).

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C. Insurance Producers

Whether an insurance producer is exempt from CFA liability under the "learned professional" exemption was considered and decided in Plemmons, which held:

> Under the Insurance Producer Licensing Act, N.J.S.A. 17:22A–26 to –48, a person "shall not sell, solicit or negotiate insurance in this State unless the person is licensed for that line of authority," N.J.S.A. 17:22A–29. A person obtains a license to "sell, solicit or negotiate insurance" by passing a written examination, N.J.S.A. 17:22A–31, and meeting the application requirements set forth in N.J.S.A. 17:22A–32. In addition, insurance brokers must comply with the Insurance Producer Standards of Conduct promulgated by the Department of Banking and Insurance. N.J.A.C. 11:17A–1.1 to 17D–2.8. These standards proscribe various "unfair trade practices," N.J.A.C. 11:17A–2.1 to –2.11, delineate an insurance producer's fiduciary duties to insureds, *see* N.J.A.C. 11:17A–4.1, –4.3, –4.5, –4.10, set forth requirements regarding commissions, N.J.A.C. 11:17B–2.1, fees, N.J.A.C. 11:17B–3.1 to –3.3, and management of funds, N.J.A.C. 11:17C–1.1 to –2.6, and provide penalties for violations, N.J.A.C. 11:17D–1.1 to –2.8. Therefore, insurance brokers are subject to testing, licensing and regulation comparable to real estate brokers, and thus are exempt from liability under the CFA for the reasons expressed by this court in Neveroski and reaffirmed by the Supreme Court in Macedo.

[Plemmons, 387 N.J. Super. at 564-65]

The New Jersey District Court adopted this view in Ace Eur. Grp., stating, "insofar as Third Party Respondents are licensed insurance brokers, the CFA does not apply to them." Ace Eur. Grp., 2012 WL 1994471, at *6; *see also* McCray, 2022 WL 3868058 (holding that "[t]o the extent Plaintiff complains of Defendant

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Sanders' conduct as an insurance agent, Plaintiff's consumer fraud claims fall squarely within the learned professional exemption").

Furthermore, in Lee, the Court noted "[o]ur 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); *264 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)". Lee, 199 N.J. 251, 263-64.

Other courts have opined upon the professional standards of insurance producers, when deciding unrelated issues. The Court in Morona S. Constr., LLC., opined that "insurance producers are subject to a highly-regulated statutory scheme." Morona S. Constr., LLC v. Diamond Agency, LLC, No. A-3918-21, 2023 WL 4540402, at *6 (N.J. Super. Ct. App. Div. July 14, 2023). The Court in Mizrahi opined the following when denying an individual from testifying as an insurance producer expert, citing the prior New Jersey Insurance Producer Licensing Act, under N.J.S.A. 17:22A,

> The Act's salutary intendment was to allow only those individuals possessing the necessary education, experience, fiscal responsibility, reputation, character, competence, trustworthiness and honesty to be engaged in the insurance industry in New Jersey. See, N.J.S.A.

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> 17:22A–4c, g, h, i; N.J.S.A. 17:22A–17a. The Act seeks to achieve these goals in a number of ways. First, the Act mandates the licensing of those persons who engage in a broad range of conduct in the insurance industry. Second, it sets specific qualifications for those who would be licensed. Third, it seeks to compel compliance with its licensing requirements by permitting the Commissioner to impose substantial fines, N.J.S.A. 17:22A–17b, and to refuse to issue or renew a license for any statutory violation, N.J.S.A. 17:22A–17a. Equally important, the Act seeks to foster the responsibility of practitioners in the insurance industry and their answerability to the public by enjoining unlicensed individuals from engaging in certain insurance-related activities. The extreme breadth of this prohibition can be found in the provisions of the Act that follow.

[Mizrahi v. Allstate Ins. Co., 276 N.J. Super. 112, 118–19 (Law. Div. 1994)[4]]

The Court in Aden opined, "[i]nsurance intermediaries in this State must act in a fiduciary capacity to the client because of the increasing complexity of the insurance industry and the specialized knowledge required to understand all of its intricacies." Aden v. Fortsh, 169 N.J. 64, 78 (2001).

D. Legislative Intent

Despite the "learned professional" exception being created by the court in 1976, and unanimously followed by courts thereafter, "the Legislature has not amended the CFA to include … learned professionals." Shaw, 460 N.J. Super. at 614. Therefore, it can be argued that the Legislature's failure to act has deemed said exemption within the original legislative intent of the CFA. The Court in Macedo

[4] Although Mizrahi is interpreting the previous New Jersey Insurance Producer Licensing Act, which was amended in 2001, its analysis remains instructive.

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affirmed this sentiment, "[t]hus, today, forty years after the CFA was enacted, our jurisprudence continues to identify learned professionals as beyond the reach of the Act so long as they are operating in their professional capacities. The Legislature is presumed to be aware of that judicial view." Macedo, 178 N.J. 340, 345-46 .

Plemmons, which conclusively incorporates insurance producers within the "learned professional" exception, was decided approximately nineteen years ago, and since that date, the Legislature has failed/refused to take any affirmative action limiting said precedent.[5] This is dissimilar to the Neveroski decision, wherein the Legislature acted quickly and efficiently to include real estate agents within the purview of the CFA. This inaction by the Legislature with respect to insurance producers insinuates that this precedent is in line with the legislative intent of the CFA.

Furthermore, the Legislature has opined upon this classification, in another way, as N.J.S.A, 2A:53A -26(o) designates an insurance producer as a "*licensed*

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[5] "It is assumed that the Legislature is thoroughly conversant with its own legislation and the judicial construction of its statutes." Ayres v. Dauchert, 130 N.J.Super. 522, 528 (App. Div. 1974. The Supreme Court, in Brewer recognized "[t]he long acquiescence of the Legislature in [a particular] judicial construction further emphasizes the conclusion that such construction was consistent with and expressive of legislative intent." Brewer v. Porch, 53 N.J.167, 179 (1969). In David, the Court considered the inaction by Legislature, throughout the five (5) years following the judicially crafted interpretation, as its acquiescence of such, and thus a factor in its decision. David v. Gov't Emps. Ins. Co., 360 N.J. Super. 127, 143 (App. Div. 2003).

person", classifying said profession in the same category as doctors, dentists, and engineers. As such, pursuant to N.J.S.A 2A:53A-27, Appellant was required to submit an affidavit of merit from an insurance producer expert just to maintain this claim.

Here, Appellant filed an affidavit of merit prepared by Charles W. Bowden, ChFC, with his resume. **Pa050-52.** This filing demonstrates the extensive education and experience required to be an insurance producer. **Pa050-52.** Moreover, Appellant identified this as a *"professional malpractice"* matter on his Case Information Statement. Finally, Appellant refers to Mr. Laver as an *"expert"* and *"professional"* numerous times throughout his complaint. **Pa004, 6, 11, 32, 44, ¶'s 2, 5, 29, 132, 202**.

E. Shaw And Plemmons Are Two Distinctly Different Cases

Appellant's continued reliance upon Shaw to combat the Plemmons decision is unfounded. Notwithstanding that Shaw, is a *concurrent* Appellate Division decision, which cannot "overrule" or "supersede" the Plemmon's decision[6], the two cases attack different issues.

[6] "We decide cases by panels, not en banc, and the decisions of one panel of the Appellate Division are not binding upon the remaining panels." David, 360 N.J. Super. at 142. The Appellate Division is "bound by the principles of law developed and declared by our Supreme Court. Extensive policy shifts … should not be initiated by an intermediate appellate court. The appropriate tribunal to accomplish such drastic changes is either the Supreme Court or the Legislature." Namm v. Charles E. Frosst & Co., 178 N.J. Super. 19, 35 (App. Div. 1981).

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In Shaw, the Appellate Division specifically limited its consideration to the narrow issue of whether home inspectors are exempt from liability under the CFA. Shaw, 460 N.J. Super. at 592. In Plemmons, the Appellate Division specifically limited its consideration to the narrow issue of whether insurance producers are exempt from liability under the CFA. *See* Plemmons, 387 N.J. Super. 551. The fact that both courts are addressing the applicability of the CFA does not imply that the two cases are in competition.

Despite Appellant's claims, nowhere in the Shaw decision does the Court specifically opine upon the applicability of the CFA to insurance producers. *See* Shaw, 460 N.J. Super. 592. In fact, the concurring opinion by the Hon. Jack A. Sabatino, P.J.A.D., specifically indicates that Shaw and Plemmons are two distinctly different matters when noting, "the licensure requirements for insurance brokers – and their associated fiduciary duties – appear to me to be more stringent than those governing home inspectors." Shaw, 460 N.J. Super. at 628 *(Jack M. Sabatino, P.J.A.D., concurrent opinion).*

This *concurrent opinion* is evidenced by N.J.S.A, 2A:53A -26(o), which designates an insurance producer as a "*licensed person",* classifying said profession in the same category as doctors, dentists, and engineers; while excluding home inspectors from said categorization.

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The Appellate Division panel in the instant case echoed this sentiment, stating "for the purposes of the CFA, insurance brokers are categorically exempt from liability when performing brokerage services…..We reject plaintiff's contention that Shaw overruled Plemmons….Critically, Shaw did not involve a CFA claim against an insurance broken. The dispositive issue in Shaw was whether the judicially crafted exemption to CFA liability applied to home inspectors", not insurance producers or other professions.

Based upon the above, it is inarguable that an insurance producer is a "learned professional", exempt from liability under the CFA. The Appellant's contrary claims should, therefore, be rejected.

CONCLUSION

For the reasons set forth herein, Appellant's motion for leave to file an interlocutory appeal to the Supreme Court must be denied.

Dated: July 28, 2025

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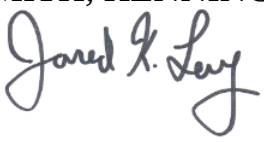

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