2007

A Tribute to Chief Justice James R. Zazzali: More than a 'Caretaker'

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A TRIBUTE TO CHIEF JUSTICE JAMES R. ZAZZALI: MORE THAN A "CARETAKER"

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I do envision going beyond being a mere caretaker. As challenges come along, I will not linger in the valleys, but would hope that we could climb a few more mountains.[1]

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1. Chief Justice-nominee James R. Zazzali delivered those words at a press conference announcing his nomination to the high court's top post. Josh Margolin, *Corzine Taps Two for Top Court*, STAR-LEDGER, Sept. 22, 2006, at 16.

When Governor Jon Corzine nominated then-Associate Justice Zazzali as the seventh Chief Justice of the Supreme Court of New Jersey, the *New Jersey Law Journal* labeled Zazzali's imminent tenure as a "caretaker term." Michael Booth, *Zazzali, Named Chief Justice, Says He's a Realist About Caretaker Term*, N.J.L.J., Sept. 25, 2006, at 1. Accepting the nomination, Chief Justice-nominee Zazzali recognized as much: "Yes, I am a realist, and how much we can do in a year remains to be seen. . . . [But] I do envision going beyond being a mere caretaker." Margolin, *supra*.

That goal became a reality. On his retirement, his predecessor, Chief Justice Deborah Poritz, said, "He leaves behind a substantial legacy. He was not a caretaker; he really tried to continue the work that made the court system really good." Kate Coscarelli, *His 8-Month Run Was One Mad Dash*, STAR-LEDGER, June 17, 2007, at 1.

Chief Justice Zazzali is now of counsel to Gibbons P.C. and Zazzali, Fagella, Nowak, Kleinbaum & Friedman, both of Newark, New Jersey.

On June 17, 2007, Chief Justice James R. Zazzali turned seventy, the mandatory retirement age for judges in the State of New Jersey.[2] That birthday brought to an end a seven-year tenure on the Supreme Court of New Jersey, capped by an abbreviated nine-month stint as chief justice.[3] Beyond those contributions, however, the Chief's birthday capped a life-long commitment to public service and to New Jersey. His near half-century legal career personifies a diversity of virtues and provides a compelling narrative. An adored father and husband,[4] a respected jurist, and a celebrated guardian of the vulnerable, Chief Justice Zazzali stepped down from the bench as one of New Jersey's most respected and beloved public servants.

Although Chief Justice Zazzali's tenure on the Court and tenure as chief justice were short, his impact on New Jersey civil law was nonetheless significant. This Tribute examines that impact and seeks to pay tribute to both the man and his jurisprudence, by highlighting the Chief Justice's important opinions in the civil law context. His clear and accessible opinions[5] consistently protected the state's children from myriad harms including negligent educators, harassing classmates, and tortfeasing businesses.[6] In the area of tort law, Chief Justice Zazzali was willing to incrementally expand the common law to account for evolving norms and provide injured plaintiffs with avenues for redress when appropriate.[7] In addition, when addressing worker's rights, Chief Justice Zazzali, the son of a labor lawyer and a labor lawyer himself, never forgot the plight of the employee. Finally, in the corporate law context, the Chief Justice, in a practical fashion, generally sought to level the playing field for aggrieved investors, consumers, and property owners seeking redress against corporate entities and municipalities.[8] In short, Chief Justice Zazzali's civil jurisprudence reflects his sympathy for the "little guy."

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2. *See* Coscarelli, *supra* note 1.

3. *Id.*

4. Although this Tribute necessarily focuses on the Chief's accomplishments during his legal career, those who know him undoubtedly know that he considers his greatest accomplishment to be his family, including his wife Eileen, their five children, and two grandchildren. In the past, the Chief often has noted that his accomplishments have been due to the love and support of his family.

5. According to former Associate Justice Peter Verniero, the Chief Justice's "clearly written opinions were 'the hallmark of an outstanding judge.'" Mary Pat Gallagher, *Zazzali Leaves Office in a Final Blaze of Rulings*, N.J.L.J., June 18, 2007, at 19.

6. *See infra* notes 81-126 and accompanying text.

7. *See infra* notes 127-72 and accompanying text.

8. *See infra* notes 242-311 and accompanying text.

I. BIOGRAPHY

Chief Justice Zazzali was born in Newark, New Jersey in 1937.[9] His parents, Andrew F. Zazzali and Aida Taverni, were both of Italian descent and the Chief traces his roots to Tuscany.[10] As a child, the Chief Justice struggled with asthma.[11] Indeed, Chief Justice Zazzali experienced severe asthma attacks, awaking during the night unable to breathe. With limited treatments available, his parents were often able to do little more than wait for the attacks to subside and considered a move to Arizona. Because of his condition, he was sidelined from many traditional boyhood activities,[12] spending much of his "young life reading, building model ships and following politics . . . ."[13] The asthma persisted through his collegiate and law school days, where he was frequently incapacitated and forced to self-administer a primitive pump to assist his breathing. The Chief Justice's experiences with asthma forced him to confront his own vulnerability and perhaps contributed to the keen awareness of the needs of the underprivileged that characterize his legal and judicial career.

Another of the Chief's shaping experiences was the early death of his aunt and uncle, who worked in a Newark sweatshop and died of pneumonia.[14] Although the family rarely discussed the tragedy,[15] the Chief Justice referenced the event as a significant factor in his decision to practice labor law, and the deaths reinforced his father's interest in representing workers, himself a labor attorney.[16]

Despite those childhood struggles and traumas, the Chief Justice successfully graduated from Seton Hall Preparatory School in South Orange,[17] which, together with the example of his parents, he credits

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9. Alison Herget, *Zazzali Lauds New Jersey Judicial System*, ASBURY PARK PRESS (Neptune, N.J.), Feb. 9, 2007.

10. *James Zazzali to Lead New Jersey's Top Court*, ITALIAN TRIB. (Montclair, N.J.), Nov. 23, 2006, at 1. More specifically, the Chief Justice's paternal grandparents resided in the mountains of Northern Italy before eventually immigrating to America via France, while his maternal grandparents were from the hills of Tuscany. *Id.*

11. Ovetta Wiggins, *An Opportunity to 'Do Good'; Distinguished Lawyer Takes Oath as Justice Today*, THE RECORD (Bergen County, N.J.), June 20, 2000, at A3 (discussing Chief Justice's childhood struggles with asthma).

12. *Id.*

13. Kate Coscarelli, *Top Justice In Brief: Modest and Warm*, STAR-LEDGER (Newark, N.J.), Nov. 9, 2006, at 21.

14. *See James Zazzali to Lead New Jersey's Top Court*, *supra* note 10.

15. *Id.*

16. *See id.*; *see also* Coscarelli, *supra* note 13.

17. Wiggins, *supra* note 11.

for his strong moral compass. Following in his father's footsteps,[18] the Chief Justice graduated from Georgetown University in 1958 and the Georgetown Law Center in 1962.[19] After graduation, Chief Justice Zazzali turned down opportunities to enter private practice, opting instead to become involved in the labor movement.[20] He joined the Eastern Conference of Teamsters and traveled throughout the Carolinas, Georgia, Virginia, and West Virginia helping to organize workers.[21] It was a challenging yet rewarding endeavor as the labor effort was closely aligned with the developing civil rights movement.[22] The poverty and civil unrest that Chief Justice Zazzali witnessed profoundly impacted him.[23] In his own words, "It was a formative period for a number of reasons. I began to see, to really see, what it means to be truly poor and powerless in this country. It was an awakening."[24] Nevertheless, he was inspired by the experience: "It occurred to me that public service [provides an opportunity,] not to remake the world, but to, in an incremental way, make things better."[25]

After working with the Teamsters for two years,[26] the Chief Justice moved back to New Jersey, accepting a clerkship with New Jersey Superior Court Judge Lawrence A. Whipple.[27] After his

18. Andrew Zazzali attended Georgetown University where, as an undergrad, he captained the school's basketball and baseball teams. *See* Georgetown Basketball History: The Top 100, Andrew Zazzali, http://www.hoyabasketball.com/features/top100/a_zazzali.htm (last visited Aug. 27, 2007). After college, the Chief Justice's father graduated from Georgetown Law Center and became a prominent labor attorney. *See James Zazzali to Lead New Jersey's Top Court*, *supra* note 10. In the early 1950s, President Harry Truman appointed Andrew Zazzali as Director of the Office of Price Stabilization during the Korean War.

19. *James Zazzali to Lead New Jersey's Top Court*, *supra* note 10.

20. Coscarelli, *supra* note 13.

21. James R. Zazzali, Chief Justice, Supreme Court of New Jersey, Commencement Address at Rutgers University School of Law–Newark (May 25, 2007), *in* N.J.L.J., June 4, 2007, at 17.

22. *Id.*; *see also* Frank Askin, Op-Ed., *Zazzali: Watchdog for the Little Guy*, THE RECORD (Bergen County, N.J.), Sept. 26, 2006 ("Most of [the Chief's] activities with unorganized workers [were] closely related to the budding civil rights movement there.").

23. Zazzali, *supra* note 21, at 17.

24. *Id.* The Chief has also commented that his salary during that period was $5000, "which, even in those days, was not a princely sum." *Id.*

25. *James Zazzali to Lead New Jersey's Top Court*, *supra* note 10; Coscarelli, *supra* note 13.

26. Askin, *supra* note 22.

27. In 1967, Judge Whipple was appointed by President Lyndon B. Johnson to the United States District Court for the District of New Jersey. *See* Lawrence A. Whipple Attorney Conference Room, http://www.njd.uscourts.gov/atty/nwkConference.html (last visited June 29, 2007). It was in Judge Whipple's chambers that the Chief met Priscilla Roth, who would later admirably serve as the Chief's secretary during his

clerkship in 1965, and at Judge Whipple's insistence,[28] Chief Justice Zazzali took a position in the Essex County prosecutor's office, where he tried thirty jury trials in his first year, and went on to argue approximately 120 cases before New Jersey's Appellate Division and Supreme Court throughout his career.[29] That experience proved to be one of the most fortuitous in the Chief's career because the then-Essex County prosecutor was Brendan T. Byrne,[30] who would later be elected Governor.[31] After serving as a prosecutor, the Chief Justice entered private practice, joining the labor firm that his father founded, Zazzali, Fagella, & Nowak.[32] He also served as an associate editor of the *New Jersey Law Journal*[33] and maintained his dedication to public service by serving as general counsel, with his brother, to the New Jersey Sports and Exposition Authority from 1974 to 1982.[34]

Zazzali's most high profile opportunity came in 1981, when Governor Byrne appointed him to serve as attorney general.[35] His term as Attorney General bears many similarities to his tenure as chief justice. He was appointed as attorney general during the waning months of Governor Byrne's second term and served for only

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tenure on the Court. Those of us law clerks who have had the privilege of working with Priscilla can attest to her importance to the Chief's tenure on the Court.

28. Wiggins, *supra* note 11.

29. The Chief served as an assistant Essex County prosecutor from 1965 to 1968. He began in the trial division but was eventually named the Chief of the Appellate Division. *See Successor to Degnan Nominated by Byrne*, N.Y. TIMES, Mar. 12, 1981, at B2; *see also* Wiggins, *supra* note 11. The Chief argued several cases before the United States Court of Appeals for the Third Circuit and the United States Court of Appeals for the District of Columbia. The Chief Justice argued before the United States Supreme Court in 1983. *See* NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984).

30. Byrne was appointed Deputy Attorney General to serve as Essex County prosecutor on February 16, 1959. *See* Donald A. D'Onofrio, Inventory of the Papers of Brendan T. Byrne, http://www2.scc.rutgers.edu/ead/manuscripts/brendanbyrnef.html (last visited June 29, 2007) (providing timeline of Byrne's career). With his characteristic humor, Chief Justice Zazzali often tells the story that when he interviewed for the position, Byrne spent the interview shining his shoes, finally looking up and saying to Zazzali, "It'll be a risk, but you're hired." Byrne and Zazzali's friendship lasts to this day. Decades after Zazzali's hiring, Governor Byrne spoke at Chief Justice Zazzali's swearing in as chief justice, at one point joking that he would keep his remarks short so that Chief Justice Zazzali's tenure would not be over by the time the ceremony concluded.

31. *Id.*

32. Wiggins, *supra* note 11.

33. *N.J. Attorney General Named*, BOND BUYER (New York, N.Y.), Mar. 12, 1981, at 3.

34. *Id.*

35. *Id.* Notably, Chief Justice Zazzali was appointed to various positions within the State of New Jersey by five governors—both Democrats and Republicans.

ten months.[36] As would be the case when he was named chief justice, his term as attorney general was initially labeled a "caretaker" term because of its brevity.[37] However, the Chief Justice approached his responsibilities with his characteristic assiduousness, making several significant contributions during his tenure.

When Zazzali became attorney general, he announced that he would make street and gang crime, and the nascent casino industry, his priorities. Illustratively, one of his first initiatives was the oversight of the state's then-fledgling gaming industry. In a controversial move, the then-attorney general adamantly opposed the issuance of a gaming permit for the Claridge casino.[38] The casino's operator, Del E. Webb Corporation, was then under federal indictment for criminal conspiracy to defraud an investor relating to its Nevada gaming activities.[39] Zazzali asserted that, in view of the federal investigation, to permit Webb to operate a New Jersey casino, even temporarily, "would seriously undermine the public's confidence in the regulatory process and would signal a retreat from every promise of integrity contained in the casino statute."[40] That stance was admirable given the countervailing pressures to grow the state's emerging gaming industry. Ultimately, Webb sought to sell its interest in the proposed casino because of the likelihood that the Casino Control Commission would adopt Zazzali's recommendation.[41]

In addition, and perhaps affected by his family's past and informed by his labor movement experience, then-Attorney General Zazzali established a task force to enforce the state's labor laws.[42] In particular, he cited the proliferation of "apparel industry sweatshops" in northeastern New Jersey as the impetus for the task force's creation.[43] Later commenting on the task force and the problems associated with sweatshops, Chief Justice Zazzali said, "I thought

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36. *See* Joseph F. Sullivan, *Jersey Politics Keyed to a Lame-Duck Governor and Redistricting*, N.Y. TIMES, Mar. 23, 1981, at B2. The attorney general position became available because Attorney General John J. Degnan resigned to seek the Democratic nomination for governor. *Id.*

37. *See* Pat Read, *Attorney General Battles Obscurity*, N.Y. TIMES, Aug. 2, 1981, at NJ-1 (quoting Chief Justice Zazzali as saying that he refuses to be simply a "caretaker").

38. *See* Donald Janson, *Jersey Opposes Casino License for Webb Corp*, N.Y. TIMES, June 10, 1981, at B2.

39. *Id.* The underlying basis for the federal indictment against Webb was that the company defrauded a Teamster pension fund of $1 million. *See* Richard Levine & Carlyle C. Douglas, *Webb Deals Itself Out of New Jersey*, N.Y. TIMES, June 21, 1981, at E-6.

40. Janson, *supra* note 38 (quoting Attorney General James R. Zazzali).

41. Levine & Douglas, *supra* note 39.

42. *See Jersey Opens Drive on Sweat Shops*, N.Y. TIMES, July 24, 1981, at B2.

43. *Id.*

those battles had been fought and won before I was born. But I was wrong."[44]

The Chief tackled other difficult and important issues as attorney general, many of which transcended the traditional scope of law enforcement. Zazzali convened a committee to investigate, for the first time, the extent of drug and alcohol use among New Jersey students.[45] He also chaired the "Superfund Committee" that studied the most efficient means of compensating victims of toxic waste dumping,[46] emphasized reform within the state's motor vehicle agency,[47] and recommended various changes regarding the regulation of solid waste disposal.[48] Most significant, however, the Chief Justice was an instrumental ally in the push to raise New Jersey's drinking age from eighteen to twenty-one,[49] which occurred in 1982 after he issued a report in favor of the change.[50]

Zazzali's tenure as attorney general concluded with his supervisory role in the tumultuous 1981 gubernatorial election. The dead heat election pitted Thomas H. Kean against James J. Florio and was, at the time, "the closest gubernatorial race in the state's history."[51] The initial tallies suggested that Kean had won by approximately 1000 votes.[52] Conscious of the impending controversy, Governor Byrne ordered his attorney general to impound "all voting machines and absentee ballots" and place them under twenty-four hour police guard.[53] Predictably, Florio requested a recount, which Zazzali, as attorney general, enforced.[54] Ultimately, after a highly

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44. *See* Read, *supra* note 37, at NJ-15.

According to the 1981 Annual Report of the New Jersey Department of Law and Public Safety, the interdepartmental task force concentrated on minimum wage and overtime violations, the proliferation of illegal industrial homework, and substandard health and safety conditions. N.J. DEP'T OF LAW AND PUBLIC SAFETY, 1981 ANNUAL REPORT 4 [hereinafter 1981 ANNUAL REPORT].

45. 1981 ANNUAL REPORT, *supra* note 44, at 2.

46. *Id.* at 3.

47. *Id.* at 4.

48. *Id.* at 3.

49. *See* Michael Norman, *Effort to Raise Drinking Age in New Jersey Unites Diverse Group*, N.Y. TIMES, Dec. 29, 1982, at B1.

50. *Id.*

51. Elizabeth Wharton, UNITED PRESS INTERNATIONAL, Nov. 4, 1981.

52. Pamela Brownstein, UNITED PRESS INTERNATIONAL, Nov. 5, 1981.

53. Jim Manion, *No Major Change in Vote Pattern As Recount Begins*, ASSOCIATED PRESS, Nov. 19, 1981. One reporter observed that "[t]he state appears under martial law. Armed state troopers stand guard round-the-clock." Pamela Brownstein, UNITED PRESS INTERNATIONAL, Nov. 7, 1981.

54. Jim Manion, *Recount of Close Governor's Race Begins Wednesday*, ASSOCIATED PRESS, Nov. 17, 1981.

scrutinized, week-long recount,[55] Florio conceded defeat to Kean.[56] Leaders of both political parties acknowledged the "objective and neutral manner in which" the attorney general's office conducted the recount.[57]

Following a successful,[58] albeit abbreviated, term as attorney general, Zazzali reentered private practice, assuming several ancillary public service positions, including fifteen years of service on the Disciplinary Review Board and ten years on the State Commission of Investigation.[59] But, nearly two decades later, he was nominated as an associate justice to the Supreme Court of New Jersey in 2000 by Governor Christine Todd Whitman[60] and was enthusiastically confirmed by the Senate.[61]

Perhaps the most compelling aspect of his appointment to the Court was its personal significance. At his swearing-in ceremony, then-Justice Zazzali recounted the story of how his father almost received a federal judgeship.[62] According to the Chief, in 1950 President Harry S. Truman "was on the verge of nominating his father to the federal court in New Jersey."[63] However, various "political powers" in the state endorsed another candidate and, according to the Chief, "[t]hey were frantic because they could not identify and thus could not neutralize" his father's support.[64] One day, when the Chief was about twelve, he answered a phone call from

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55. *See* Robert Hanley, *Jersey Election Recount Starts in all 21 Counties*, N.Y. TIMES, Nov. 18, 1981, at B1.

56. Jim Manion, *Florio Concedes to Kean for New Jersey Governor*, ASSOCIATED PRESS, Nov. 30, 1981.

57. 1981 ANNUAL REPORT, *supra* note 44, at 1.

58. Indeed, Zazzali's success as attorney general prompted rumors of a campaign for the United States Senate. Joseph F. Sullivan, *Returning to Private Life: A Jarring Trip*, N.Y. TIMES, Feb. 21, 1982, at 4.

59. Governor Kean appointed Chief Justice Zazzali to be chairman of the New Jersey State Investigation Commission. *See* Wiggins, *supra* note 11. There, he investigated, among other areas, the check cashing industry, the boxing business, solid waste regulations, local government corruption, and organized crime. *See* Kathy Carter, *Ex-AG Nominated to Top Court—Zazzali, a Democrat, Praised by Both Sides*, STAR-LEDGER (Newark, N.J.), May 26, 2000, at 3.

Zazzali also was appointed by the United Stated District Court of New Jersey as special master for the county jails in Essex, Monmouth, and Bergen counties and served as vice-chairman of the Disciplinary Review Board. Askin, *supra* note 22, at 1.

60. Carter, *supra* note 59, at 1.

61. Ovetta Wiggins, *Senate Unanimously Approves Zazzali for Seat on High Court*, THE RECORD (Bergen County, N.J.), May 26, 2000, at A3.

62. Kathy Carter, *Zazzali Joins Supreme Court with a Feeling of Redemption*, STAR-LEDGER (Newark, N.J.), June 21, 2000.

63. *Id.*

64. Sherry Conohan, *Just Rewards for Dad, Son: New top court justice recalls 50-year-old injustice*, ASBURY PARK PRESS (Neptune, N.J.), June 21, 2000.

a reporter and, being "proud of [his] Dad's support," he revealed all that he knew about his father's backers.[65] That misstep resulted in a front-page story that may have cost his father the judgeship.[66] In ascending to New Jersey's high court, Justice Zazzali expressed hope of redemption for his childhood mistake.[67]

After serving as an associate justice for six years, the Chief found himself in a fortuitous position. Because the New Jersey Constitution requires judges to retire at age seventy,[68] Chief Justice Poritz, a Republican, was destined to retire in October 2006. However, in keeping with the state's tradition that no more than four justices be from one political party,[69] Governor Jon Corzine, a Democrat, could not replace Chief Justice Poritz with a Democrat.[70] Rather than nominate a Republican chief justice, Governor Corzine opted to elevate Justice Zazzali, who would himself reach mandatory retirement in June 2007, and nominated a Republican associate justice, Helen Hoens.[71] That approach enabled Governor Corzine to make a long-term, Democratic chief justice appointment upon Chief Justice Zazzali's retirement, namely, Stuart Rabner, whose term as chief justice may last for nearly a quarter century.[72]

The circumstances of the Chief's elevation led many to characterize Chief Justice Zazzali, once again, as a "caretaker."[73] However, the Chief approached his new responsibilities with characteristic vigor and commitment, securing a legacy as chief

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65. *Id.*

66. *Id.*

67. *Id.*

68. N.J. CONST. art. VI, § VI, para. 3; *see also* Edward A. Hartnett, *Ties in the Supreme Court of New Jersey*, 32 SETON HALL L. REV. 735 (2003) (discussing New Jersey's mandatory retirement provision).

69. John B. Wefing, *Chief Justice Richard J. Hughes and His Contributions to the Judiciary of New Jersey*, 36 SETON HALL L. REV. 1257, 1261 (2006) (discussing the Court's tradition of "bipartisan division").

70. At the time, the Court consisted of four democrats—Justices Virginia Long, Zazzali, John Wallace, and Barry Albin. Chief Justice Poritz and Associate Justice Roberto Rivera-Soto were Republicans and Justice Jaynee LaVecchia was an independent. *See* Robert Seidenstein, *Call Him Chief*, N.J. LAWYER, Sept. 25, 2006, at 1 (discussing political configuration of the Court and Governor Corzine's elevation of Justice Zazzali).

71. *Id.*

72. *Id.* If reconfirmed, Chief Justice Rabner could serve as New Jersey's top judge for twenty-four years, surpassing Chief Justice Robert Wilentz's seventeen-year tenure as the longest in New Jersey Supreme Court history. Lisa Brennan, *Corzine Makes a Legacy Appointment*, N.J.L.J., June 4, 2007, at 1.

73. Robert Seidenstein, *Chief Justice Zazzali: The Court's Happy Warrior*, N.J. LAWYER, May 28, 2007, at 1.

justice on par with those of his distinguished predecessors.[74] As the judiciary's chief administrator, Chief Justice Zazzali obtained a judicial pay increase—the first of its kind in eight years.[75] Characterizing the issue as a "constitutional crisis" and emphasizing that judges were leaving the bench because of a growing disparity between judicial salaries and private sector compensation,[76] the Chief Justice won the support of both the Governor and the Legislature.[77]

Additionally, the Chief's tenure had a disproportionate, positive impact on judicial morale. Aside from the obvious goodwill that the salary increase garnered, the Chief personally visited all fifteen of the state's judicial vicinages.[78] Without pretense or ceremony, the Chief Justice met with judges to "touch base" and get a feel for the state of the judiciary.[79] The pay off for the Chief Justice was immediate, with judges across the state endeared by the Chief's interest in their circumstances and appreciation for their service.[80]

The Chief also made significant contributions to New Jersey's substantive law. By our count, during his short tenure as Chief Justice and six-year term as Associate Justice, he authored over ninety majority opinions and just over two dozen concurrences and dissents. It is to those opinions and the Chief's contributions to the State's civil law that we now turn.

II. PROTECTION OF CHILDREN

In seven years on the Supreme Court, Justice Zazzali's largest jurisprudential impact may be his efforts to protect children—"those . . . in the dawn of life"[81]—from harms including negligent

74. *See* Askin, *supra* note 22 ("James R. Zazzali is an appropriate and deserving addition to along [sic] list of distinguished New Jersey Chief Justices: Arthur Vanderbilt, Joseph Weintraub, Richard J. Hughes, Robert Wilentz, and Deborah Poritz.").

75. *Shortchanging Judges*, N.Y. TIMES, May 6, 2007, at 14NJ.

76. *See* Jason Method, *Judicial Salary Called Subpar*, ASBURY PARK PRESS (Neptune, N.J.), Feb. 16, 2007 (quoting Chief Justice Zazzali as saying, "I think it's reached a constitutional crisis. We have good judges who have left, are thinking of leaving, or will leave and have already put a date on it").

77. Numerous editorial boards supported the judicial pay increase. *See, e.g.*, Editorial, *Judicial Compensation: Enabling the New Jersey Judiciary*, N.J. LAWYER, Mar. 12, 2007, at 6.

78. Coscarelli, *supra* note 1, at 15.

79. *See* Robert G. Seidenstein, *Knock, Knock: Who's There? The Chief Justice*, N.J. LAWYER, Feb. 12, 2007, at 1.

80. *See* Coscarelli, *supra* note 1, at 15 (quoting one judge as saying, "It was just so meaningful to all of us, on a personal level, because of his warmth and sincerity").

81. Hubert Humphrey observed: "[T]he moral test of government is how that government treats those who are in the dawn of life, the children; those who are in the

schools, harassing peers, unfit parents, and corporate tortfeasors. His predilection for ensuring child safety in myriad environments and circumstances is most evident in his final two years on the Court.[82]

In his final majority opinion, *Jerkins v. Anderson*,[83] Chief Justice Zazzali and a unanimous Court "reaffirmed . . . the strong state interest in protecting children,"[84] and held that a school's duty of reasonable care "does not summarily disappear when the school bell rings," but, rather, continues throughout dismissal.[85] In *Jerkins*, a nine-year-old boy was struck by a car following an early dismissal from school, and subsequently was paralyzed from the neck down.[86] The child and his family alleged that the school district breached its duty of reasonable supervision with respect to the child's dismissal that day and did not adequately apprise the parents of the scheduled early dismissal.[87] In finding that schools must act, under the totality of the circumstances,[88] as a reasonable educator in like

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twilight of life, the elderly; and those who are in the shadows of life—the sick, the needy and the handicapped." RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS REQUESTED FROM THE CONGRESSIONAL RESEARCH SERVICE 142 (Suzy Platt ed. 1989). Chief Justice Zazzali referenced Humphrey's words during his formal swearing-in ceremony and, at retirement, said, "Our children are the state's most important assets." Coscarelli, *supra* note 1, at 15.

82. In addition to the cases addressed herein, Chief Justice Zazzali protected the "best interest of the child" in an opinion issued in his final week on the Court, *MacKinnon v. MacKinnon*, 929 A.2d 1252 (N.J. 2007). There, the Court permitted a Japanese citizen and United States national to remove her child to Japan despite the protestations of the child's father. *Id.* at 1261-62. The Court agreed with the trial court's finding that relocation to Japan served the child's best interests. *Id.*

That willingness to protect children extended beyond his jurisprudence. For example, in cooperation with the Division of Youth and Family Services, Chief Justice Zazzali formed a joint task force to address the needs of children victimized by domestic violence. *See Zazzali: Initiatives and Successes*, N.J. LAWYER, May 21, 2007, at 6 (text of "State of Judiciary" Speech). "We need to help the children who are living in these troubled homes and I am quite hopeful that the task force sets us on the right path toward solutions." *Id.*

83. 922 A.2d 1279 (N.J. 2007).

84. Kate Coscarelli, *Schools' Duty to Guard Kids Doesn't End at Last Period*, STAR-LEDGER (Newark, N.J.), June 15, 2007, at 1.

85. *Id.* A school's duty of reasonable care extends beyond the classroom, to lunchtime and activities occurring on school grounds prior to the start of the school day. *See id.* Labeled as a reasonable decision by the New Jersey School Boards Association, commentators recognized that *Jerkins*'s impact may be far reaching. Coscarelli, *supra* note 84.

86. *Jerkins*, 922 A.2d at 1281.

87. *Id.* at 1281-83.

88. According to the New Jersey State Bar Association's School Law Committee, school districts "may take comfort in the Court's adoption of a totality-of-the-circumstances standard." Charles Toutant, *School May be Liable for Exercising Poor Supervision During Dismissal*, N.J.L.J., June 18, 2007, at 13.

circumstances would,[89] the Court found that such a duty may generally be discharged by: (1) adoption of a reasonable policy concerning dismissal; (2) provision of adequate notice of that policy to parents or guardians; and (3) effective implementation of that policy, including adherence to the reasonable requests of parents regarding dismissal.[90]

Opinions regarding the safety of school children served as bookends to Chief Justice Zazzali's tenure as head of the courts. In his first and, according to at least one commentator, his "signature"[91] opinion as Chief Justice, *L.W. v. Toms River Regional Schools Board of Education*,[92] the Court established a right to recovery against a school district for victims of student-on-student sexual or affectional orientation harassment under the state's Law Against Discrimination.[93] Beginning in the fourth grade, plaintiff L.W., who was perceived by his peers as being a homosexual, was subjected to incessant verbal abuse, sexual molestation, and physical violence.[94] The Court held that to recover, plaintiffs such as L.W. must prove that the school district, with actual or constructive notice of the severe or pervasive harassment, failed to take measures "reasonably calculated to end" the offensive conduct.[95] That practical standard mirrors the standard applicable to hostile work environment allegations,[96] a recognition that "[s]tudents in the classroom are entitled to no less protection from unlawful discrimination and

89. *Id.* at 1288.

90. *Id.* The Court tempered its ruling, noting that the imposition of a duty on educators "does not diminish the responsibilities that parents or guardians have to their children." *Id.* at 1291.

Four months after the court's "landmark" ruling in *Jerkins*, the Pleasantville Board of Education and the Jerkins family settled their dispute for $6 million. *School to Pay $6M in Case of Boy Hit by Car After Early Dismissal*, N.J.L.J., Oct. 29, 2007, at 9.

91. Editorial, *The Chief's Proud Record*, N.J.L.J., June 8, 2007, at 22. According to the *New Jersey Law Journal*, *L.W.* embodied Chief Justice Zazzali's commitment to the underprivileged. "The lawyer who began his career in 1962 working for labor unions in the South never forgot the struggle for civil rights that he witnessed there." *Id.*

92. 915 A.2d 535 (N.J. 2007).

93. *Id.* at 547. The Court relied on the Law Against Discrimination's plain language, the Law's broad remedial goal, and the pervasive nature of student-on-student sexual harassment. *Id.*

94. *Id.* at 539-44.

95. *Id.* at 550. The Court distinguished, however, that "isolated schoolyard insults or classroom taunts are not actionable." *Id.* at 547. Additionally, the Court rejected the "deliberate indifference" standard, advanced by the defendant, as applicable to claims filed under Title IX of the Education Amendments of 1972, because Title IX is a narrower remedial statute than the Law Against Discrimination. *L.W.*, 915 A.2d at 549.

96. *Lehmann v. Toys 'R' Us, Inc.*, 626 A.2d 445, 464 (N.J. 1993).

harassment than their adult counterparts in the workplace."[97] In sum, although "[a] school cannot be expected to shelter students from all instances of peer harassment[,] . . . reasonable measures are required to protect our youth, a duty that schools are more than capable of performing."[98]

Civil rights organizations, including the American Civil Liberties Union of New Jersey[99] and Garden State Equality,[100] as well as commentators, hailed the unanimous opinion. Notably, in praising the "landmark ruling," *The New York Times* editorial board wrote that the opinion "changes the legal landscape in New Jersey," and hoped that the opinion would herald the "start of a new national approach to the problem [of anti-gay student bullying]."[101] Education consultants concurred, proclaiming that Chief Justice Zazzali's "well-reasoned opinion . . . should serve[] as a model for other states."[102]

In his last opinion as an associate justice,[103] *New Jersey Division of Youth and Family Services v. M.M.*,[104] the Court held that one parent's parental rights may be terminated if he or she is unable to protect his or her child from danger created by the presence of the other parent.[105] The case involved a difficult domestic situation where a mother's parental rights had previously been terminated because of substance abuse and severe mental impairment, among other things.[106] However, the father continued to cohabitate with the

97. *L.W.*, 915 A.2d at 549.

98. *Id.* at 550.

99. Rick Hepp, *Schools Held Liable for Bullying of Students*, STAR-LEDGER (Newark, N.J.), Feb. 22, 2007, at 1; *see also* John G. Geppert, Jr., *No Tabula Rasa Here*, N.J.L.J., May 7, 2007, at 23 (observing that *L.W.* "has received wide-spread acclaim").

100. Lauren O. Kidd, *Schools Must Stop Student Harassment*, ASBURY PARK PRESS (Neptune, N.J.), Feb. 22, 2007.

101. Editorial, *Protecting All Students*, N.Y. TIMES, Feb. 24, 2007, at 14. "The court's ruling . . . sets a worthy standard for courts and educators nationwide." *Id.*

102. Amelia Carolla & Catherine Merino Reisman, *A Model for Clamping Down on Harassment in Schools*, N.J.L.J., Mar. 16, 2007, at 23; *see also* George S. Anthony, *Focus on Students as Agents of Change to Confront Bullying*, ASBURY PARK PRESS (Neptune, N.J.), Feb. 25, 2007, at C3 (stating that *L.W.* "provides an opportunity to seek sustainable solutions for our children at risk of bullying on a daily basis").

103. Although *M.M.* was filed on February 8, 2007—three months into Chief Justice Zazzali's term as chief justice—the Supreme Court heard oral argument on October 11, 2006, fifteen days before Justice Zazzali's elevation. Therefore, the published opinion is authored by "Justice," not "Chief Justice," Zazzali. The same anomaly occurred in *Hodges v. Sasil Corp.*, 915 A.2d 1 (N.J. 2007) (heard Sept. 25, 2006 and filed Jan. 31, 2007).

104. 914 A.2d 1265 (N.J. 2007).

105. *Id.* at 1269-70, 1278-79.

106. *Id.* at 1271-72.

mother and frequently left the child alone with her.[107] Because the father could not provide adequate care or protection for his son, and because he refused to maintain a residence separate from the mother, the Court held that termination of his parental rights was in the son's best interests.[108] Although a close case, the evident concern in Justice Zazzali's opinion was the best interests of the child in view of all the circumstances, including the harmful presence of another parent.[109]

Justice Zazzali's penchant for protecting children was also apparent in *Hojnowski v. Vans Skate Park*.[110] Referred to as "the children's rights issue of 2005,"[111] the dispute arose after a twelve-year-old fractured his femur while using a recreational skateboard facility maintained by a Vans store.[112] Prior to the child's use of the facility, his mother signed a release requiring arbitration of disputes and relinquishing the right to seek damages for injury "unless Vans intentionally failed to prevent or correct a hazard caused by unsafe equipment or devices."[113] The Court was called on to determine "whether a parent can bind a minor child to either a pre-injury waiver of liability or an agreement to arbitrate."[114]

In respect of a parent's authority to release a minor child's latent tort claims arising from the use of a commercial recreational facility, the majority[115] found that New Jersey's public policy prohibited parents from waiving their child's potential claims.[116] Justice Zazzali analogized the question presented to New Jersey Court Rule 4:44,

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107. *Id.* at 1272-78.

108. *Id.* at 1279-80. The Court's opinion received both praise and criticism. *See* Margaret McHugh, *Home Situation Outweighs Father's Rights, Say Justices*, STAR-LEDGER (Newark, N.J.) Feb. 9, 2007, at 19. Child advocates hailed the opinion as "a good decision for kids" because it considered all factors bearing on a child's well-being, including the harmful presence of another parent. *Id.* However, public interest groups expressed concern that the Court was infringing on constitutional parentage rights. *Id.* Justices Wallace and Rivera-Soto dissented, arguing that the record did not sustain the majority's conclusion that termination was in the child's best interests. *M.M.*, 914 A.2d at 1285-86 (Wallace, J., dissenting).

109. *See M.M.*, 914 A.2d at 1278-85 (majority opinion) (analyzing spectrum of interests at issue).

110. 901 A.2d 381 (N.J. 2006).

111. Robert G. Seidenstein, *Can Parents Sign Away Kids' Rights?*, N.J. LAWYER, Mar. 21, 2005, at 1.

112. *Hojnowski*, 901 A.2d at 384.

113. *Id.* at 383-84.

114. *Id.* at 383.

115. Seeking to uphold the waiver, Justice LaVecchia, joined by Justice Rivera-Soto, dissented on the first question presented, whether a parent may waive access to the courts, in lieu of arbitration, on behalf of a child. *Id.* at 395 (LaVecchia, J., concurring in part and dissenting in part).

116. *Id.* at 386 (majority opinion).

which prohibits a minor's parent from settling the child's personal injury action without statutory or judicial approval[117] and "guard[s] a minor against an improvident compromise."[118] According to the Court, minors "deserve as much protection from the improvident compromise of their rights before an injury occurs as Rule 4:44 affords them after the injury."[119] Moreover, Justice Zazzali stated that policies restricting a parent's right to release tortfeasors from liability should apply with greater force in the preinjury context.[120] To be sure, a contrary result "would remove a significant incentive for operators of commercial enterprises that attract children to take reasonable precautions to protect their safety."[121]

On the second issue, the Court, paying homage to the strong policies of enforcing arbitration agreements and encouraging alternative dispute resolution, unanimously agreed that a parent's preinjury agreement to arbitrate a child's tort claim is enforceable.[122] The Court held that "allowing a parent to bind a minor child to arbitrate is not contrary to our duty as *parens patriae* to protect the best interests of the child."[123] However, the majority's temperate decision moved some commentators to chastise the Court's sanctioning of arbitration agreements.[124] One critic proclaimed, "The Court should not allow businesses to extinguish a citizen's right to a jury trial simply because a form is signed by a customer."[125]

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117. *Id.* at 387.

118. *Id.* (quoting Colfer v. Royal Globe Ins. Co., 519 A.2d 893, 894 (N.J. Super. Ct. App. Div. 1986).

119. *Id.* (formatting omitted). According to commentators, the Court's holding on preinjury liability waivers was "not a departure from settled law." Michael Booth, *Parents Can't Waive a Child's Suit Over Injuries But Can Limit Forum*, N.J.L.J., July 24, 2006, at 7.

120. *Hojnowski*, 901 A.2d at 387.

121. *Id.* at 388. The majority rejected defendant's arguments. The Court was not persuaded that: (1) a parent's decision to issue a preinjury release was no different from a parent's decision not to bring suit on a minor's behalf; (2) a parental release of liability implicated the parent's fundamental right to direct the child's upbringing; and (3) enforcement of parental preinjury liability releases is necessary to ensure the viability of businesses that offer activities to minors.

122. *Id.* at 391-92, 394.

123. *Id.* at 392.

124. Grayzel, *infra* note 129, at 894.

> There has been a long-term trend in our state's jurisprudence sanctioning the widespread practice of compelling arbitration of negligence claims and cutting off access to the courts. It is particularly disheartening that the court would allow this to happen in a case involving a minor where the civil justice system has long recognized its obligation to safeguard their rights by approving settlements.

Id.

125. *Id.*

Nevertheless, the Court's moderated result protects the interests of injured minors and provides a modicum of protection to businesses seeking to arbitrate personal injury disputes.[126]

III. TORTS

Beyond the child context, scholars recognize that Chief Justice Zazzali "is a man who has always gone to great lengths to serve the needs of ordinary people."[127] Chief Justice Zazzali admits his predilection for the underdog.[128] That consistent outlook has made him a key component of the Supreme Court's liberal tort law tradition.[129] Nevertheless, the Chief's jurisprudence reflects a balanced approach and a healthy respect for stare decisis and legislative pronouncements.[130] Such moderation places Chief Justice Zazzali within the mainstream of the progressive Supreme Court of New Jersey.

Particularly insightful is Justice Zazzali's opinion in *Maisonave v. Newark Bears Professional Baseball Club, Inc.*,[131] concerning a plaintiff who was struck by a foul ball while purchasing a beverage

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126. According to Arthur Leyden III, president of the New Jersey Defense Association, "As far as commercial recreation facilities go, [*Hojnowski*] does not change the status quo regarding the common law on torts. This just allows the center to choose the forum, and arbitration is usually less expensive." Booth, *supra* note 119.

127. Kevin Penton, *Zazzali is Next Chief Justice*, ASBURY PARK PRESS (Neptune, N.J.), Oct. 24, 2006, at 1A (quoting Rutgers University law professor Frank Askin); Gallagher, *supra* note 5 ("[H]e became known as a champion for the underdog: not just the workers he represented as a labor lawyer in private practice, but the poor, the elderly, the handicapped, consumers and children."); Askin, *supra* note 22. According to Justice Helen Hoens, Chief Justice Zazzali "has been a solid voice for those who otherwise would have no voice." Kate Coscarelli, *State Supreme Court Justices Honor Their Outgoing Chief*, STAR-LEDGER (Newark, N.J.), June 8, 2007, at 62.

128. Before the Senate Judiciary Committee, then-Associate Justice Zazzali said, "I have a certain preference for the average citizen. But I don't consider myself the driver of the rescue squad." Robert G. Seidenstein & Harvey C. Fisher, *Changing of the Guard: Major Recasting of High Court Set in Motion*, N.J. LAWYER, Oct. 23, 2006, at 9. *See also* Penton, *supra* note 127 (quoting Chief Justice Zazzali: "I've tried to show concern for the needs of the average citizen").

129. Ronald Grayzel, *Justices Retool Common Law Doctrines; Two Landmark Decisions Alter Application of Res Ipsa and Respondeat Superior*, N.J.L.J., Sept. 2006, at S-52 (noting "the liberal tradition of the New Jersey Supreme Court in tort law"); *see also* Wefing, *supra* note 69, at 1257 (recognizing Court's reputation as a "progressive, activist, liberal court").

130. *The Star-Ledger* stated that Chief Justice Zazzali's "legal reasoning has always been infused with the desire to reach a just result." Editorial, *The Court's Loss and Jersey's*, STAR-LEDGER (Newark, N.J.), June 17, 2007, at 2. "He was able to rule for the little guy when the law and the fact allowed, though it was not always possible to 'drive a rescue ambulance.'" Gallagher, *supra* note 5.

131. 881 A.2d 700 (N.J. 2005).

on the concourse of a minor league baseball stadium.[132] In a question of first impression, Justice Zazzali analyzed "the limited duty rule . . . [,] a specialized negligence standard shielding stadium owners and operators" from liability if sufficient protective seating is provided to spectators.[133] Although the Court continued to apply the limited duty rule to the stands of a stadium,[134] it declined to extend the standard to the entire stadium, instead holding that traditional tort concepts govern areas other than the stands, such as the concourse where plaintiff was injured.[135] The opinion was classic Zazzali—rejecting immunities for corporations and protecting injured plaintiffs.[136] "To apply the baseball rule to the entire stadium would convert reasonable protection for owners to immunity by virtually eliminating their liability for foreseeable, preventable injuries to their patrons even when the fans are no longer engaged with the game."[137]

Despite Justice Zazzali's general preference for the underdog, he remained unwilling to mold the law for specific ends. Rather, *Maisonave* suggests a sensible approach[138] that adapted the common law to changing standards, expanding it incrementally to meet evolving norms.[139] As one commentator observed, *Maisonave* was "the essence of common sense, a picture of judicial adaptation and/or activism in the tradition of the common law, a nod to precedent—or,

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132. *Id.* at 702.

133. *Id.* at 704-05.

134. The Court defined "stands" to include fan seating, stairs used to access seats, "standing room only" sections, and other areas dedicated to viewing the game. *Id.* at 707.

135. *Id.* at 709.

136. "Zazzali has been sensible, but on tough calls he does look out for the rights of employees, consumers, unions and the poor. He is not shy about taking a more expansive view of the rights of individuals over corporations or government." Tim O'Brien, *A Labor Lawyer at Heart, He Defends the Underdog*, N.J.L.J., Feb 16, 2004, at S-10.

137. *Maisonave*, 881 A.2d at 709.

138. In 2000, Justice Zazzali described his judicial philosophy as "sensible." O'Brien, *supra* note 136, at S-10.

139. For example, in his dissent in *In re Lead Paint*, 924 A.2d 484, 506 (N.J. 2007), released two days before his seventieth birthday, he noted that "[t]his Court has a duty to reconcile outdated formulations of the common law with the complexities of contemporary society." *Id.* The Chief Justice continued:

> Common law claims must keep step with the schemes of those who would unfairly profit at the expense of others. It is our responsibility to ensure that formalistic distinctions and outdated definitions do not thwart justice. Rather, we must mold the common law to the unanticipated injustices that inevitably arise as our society advances through time.

Id. at 511.

well, all of the above."[140] That praise, however, was not unanimous,[141] as the majority opinion had some crying "foul."[142] In response, the New Jersey Legislature, with noticeable haste, enacted the Spectator Safety Act of 2006—"a complete bar" to suits against stadium owners by spectators injured by the inherent risks of watching professional baseball.[143] The Legislature felt that the Supreme Court had struck out.[144]

Another notable opinion written during the latter part of Justice Zazzali's tenure was *Creanga v. Jardal*,[145] where the Court held that expert opinions derived from "differential diagnosis"[146] are admissible.[147] The facts were compelling: Mihaela Creanga, twenty-four-weeks pregnant with twins, was struck from behind by a Lucent Technologies–owned van.[148] Two days later, Creanga went into premature labor. Although her second infant survived, her first infant died immediately after delivery as a result of the premature labor.[149] The delivering doctor, Dr. Faramarz Zarghami, concluded, after performing a differential diagnosis, that the "trauma of the accident" caused the premature labor.[150] However, Dr. Zarghami also signed a preoperative diagnosis report stating that the cause "was an incompetent cervix, not the automobile trauma."[151]

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140. Robert G. Seidenstein, *Case Offers Playbook on Justices*, N.J. LAWYER, Sept. 19, 2005, at 1.

141. Justice Rivera-Soto, joined by Justice LaVecchia, rejected the majority's hybrid rule. *Maisonave*, 881 A.2d at 713-18 (Rivera-Soto, J., dissenting).

142. According to critics, *Maisonave* "ignores Justice Holmes's admonition that the life of the law has been experience, not logic. In this case, the owners and operators of such stadiums in New Jersey can, with good cause, cry 'foul.'" *Baseball, Vending Carts and the New Jersey Supreme Court*, N.J. LAWYER, Oct. 31, 2005, at 6.

143. N.J. STAT. ANN. § 2A:53A-43 to -48 (West 2000). The legislative response was "one of the fastest moves to overturn a court opinion." Kathleen Bird, *Lawyers Boo Ballpark Immunity*, N.J. LAWYER, Jan. 16, 2006, at 4. The act protected New Jersey's burgeoning minor league baseball industry. Charles Toutant, *Play Ball! Carefully*, N.J.L.J., Sept. 19, 2005, at 1.

144. The Assembly unanimously approved the measure. The Senate approved the bill 25-7. Bird, *supra* note 143.

145. 886 A.2d 633 (N.J. 2005).

146. "[A] differential diagnosis is a medical construct for determining which one of two or more diseases or conditions a patient is suffering from, by systematically comparing and contrasting their symptoms." *Id.* at 639 (quotation omitted).

147. *Id.* at 640.

148. *Id.* at 635-36.

149. *Id.* at 636.

150. *Id.* Dr. Zarghami testified that, "[w]ith a reasonable degree of medical certainty, yes, I think [the trauma of the accident was] probably the cause of her premature labor." *Id.* (latter alteration in original).

151. *Id.* at 637.

Nevertheless, Justice Zazzali declared that Dr. Zarghami's inconsistencies went to credibility, not admissibility.[152] Therefore, because Dr. Zarghami's opinion satisfied the other requirements for admitting expert testimony,[153] the Court joined the majority of courts that freely admit differential diagnosis.[154] Although espousing a narrow evidentiary principle, *Creanga* represents a significant victory for plaintiffs,[155] who may now prove causation with greater ease by introducing expert differential diagnosis, to defeat motions for summary judgment.[156]

Although injured plaintiffs generally fare well in tort opinions authored by Justice Zazzali,[157] occasionally their recovery has been foreclosed, as evidenced by *Alston v. City of Camden*,[158] a case implicating the charitable immunity doctrine,[159] specifically the Tort

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152. *Id.* at 643.

153. *Id.* at 638-39.

154. *Id.* at 639-40.

155. Henry Gottlieb, *A Differential Diagnosis Is Not a Net Opinion, High Court Says*, N.J.L.J., Dec. 19, 2005, at 1, 8 (describing *Creanga* as "good mostly for plaintiffs").

156. Indeed, in *Creanga*, the Court remanded the matter for "reinstatement of the complaint," permitting the lawsuit to proceed. *Creanga*, 886 A.2d at 643.

One commentator said that *Creanga* "opens the door for plaintiffs and defendants to have another way to get your expert over the admissibility hurdle." Gottlieb, *supra* note 155. According to the Association of Trial Lawyers of America, *Creanga* allows doctors to explain their opinions on causation, without framing their answers in legalese. *Id.*

157. In addition to the opinions addressed above, Justice Zazzali has authored numerous other plaintiff-friendly opinions during his term on the Supreme Court of New Jersey. Foremost among those not discussed above is *Caballero v. Martinez*, 897 A.2d 1026 (N.J. 2006), where a unanimous Court held that an undocumented alien was eligible to receive benefits from the Unsatisfied Claim and Judgment Fund, N.J. STAT. ANN. § 39:6-61 to -91. (West 2002), after being severely injured while riding as a passenger in an uninsured vehicle. In a case that underscored the Court's commitment to human rights, James R. Zazzali, *International Human Rights: An Overview: Annual Vanderbilt Address to the New Jersey Alumni of Harvard Law School*, 37 SETON HALL L. REV. 661, 685 (2007), the Court adopted an expansive view of "resident"—the term central to claimant's eligibility under the fund. Indeed, plaintiff was a resident who "lived here, worked here, paid taxes here, and stayed out of trouble here." *Id.* In championing the blameless plaintiff, Justice Zazzali wrote that the Court's holding furthered the statute's purpose of "providing compensation to those injured through no fault of their own." *Caballero*, 897 A.2d at 1033.

158. 773 A.2d 693 (N.J. 2001).

159. Another charitable immunity opinion written by Justice Zazzali is *O'Connell v. State*, 795 A.2d 857 (N.J. 2002). There, a full-time student at a nonprofit state university suffered bone fractures after stumbling down campus stairs. *Id.* at 858. The Court held that the university was entitled to immunity under the Charitable Immunity Act's plain language. *Id.* at 861. Justice Stein harshly criticized the majority, calling the opinion "discordant and incongruous." *Id.* at 867 (Stein, J., dissenting).

Claims Act's immunity provisions.[160] There, a police officer pursued a suspected drug dealer on foot.[161] During the chase, the officer's gun dislodged from his holster and fell to the ground.[162] As a result of the officer's failure to engage the firearm's safety feature, the gun discharged, with the errant bullet striking plaintiff.[163]

In reinstating the jury verdict in defendant's favor,[164] Justice Zazzali focused on the "pursuit immunity" and "good faith immunity" provisions of the Tort Claims Act, which "provides immunity for public entities with liability as the exception."[165] Particularly telling was Justice Zazzali's emphatic language in discussing pursuit immunity, a doctrine that prohibits liability for "*any* injury caused by" an escapee, except where "a police officer engages in willful misconduct."[166] After finding that the doctrine provided immunity regardless of whether the injuries were caused by the pursued or the pursuer, or whether the injury was caused by a police car or some other instrument,[167] the former attorney general with "an aptitude for law enforcement"[168] penned the following:

> [I]t fairly can be argued that it . . . is fundamentally unfair to impose liability on police officers who risk their own lives in those pursuits, who by definition face emergency circumstances and extraordinary events in pursuit, who act in good faith, and who should be encouraged to pursue suspects and to do so effectively. The unfairness to both the innocent bystander and the police officers is palpable, but society cannot have it both ways . . . . [We cannot] expect, indeed demand, effective law enforcement and then dilute that expectation with the imposition of liability because of the bystander who may be a victim of unfairness.[169]

However, Justice Zazzali's two charitable immunity opinions coincided with a "trend by the Court to afford charities, churches and educational institutions the broadest possible protections against litigation, including a fast track to summary judgment." Ronald Grayzel, *The Floodgates Open*, N.J.L.J., Sept. 1, 2003, at S-22.

160. N.J. STAT. ANN. §§ 59:1-1 to 59:12-3 (West 2006).

161. *Alston*, 773 A.2d at 695.

162. *Id.*

163. *Id.*

164. *Id.* at 696.

165. *Id.* at 697.

166. *Id.*

167. *Id.* at 698-99.

168. Michael Booth, *Zazzali, a Liberal With a Cop Side, Named to Court*, N.J.L.J., May 8, 2000, at 1, (noting that in private practice Chief Justice represented public unions including police officers' unions); *cf.* O'Brien, *supra* note 136, at S-10 (noting that in criminal cases, Justice Zazzali "give[s] police the benefit of the doubt").

169. *Alston*, 773 A.2d at 700-01.

The Court's 4-3 split demonstrates the closeness of the appeal.[170] The sympathetic postures of both parties—provision of recovery to a blameless victim and immunization of a law enforcement officer[171] undeserving of punishment—are visible in Justice Zazzali's opinion, which invites the Legislature "to reconsider the issue and alter the equation."[172]

IV. WORKERS' RIGHTS

In his seven years on the bench, Chief Justice Zazzali was an unswerving champion of workers' rights. Our examination of his workers' rights jurisprudence begins with two cases in which Justice Zazzali's predilections for injured plaintiffs and aggrieved workers overlapped, as the Court delineated the scope of the Workers' Compensation Act. The first was *Lozano v. Frank DeLuca Construction*.[173] That appeal arose from the plaintiff's employment as a laborer for a construction company.[174] At the end of a shift, his supervisor directed him to "get in" a go-cart at the site.[175] Despite his inability to drive, the employee obeyed.[176] Inevitably, the plaintiff crashed the go-cart and suffered severe injuries.[177]

The Workers' Compensation Act provides that employers shall compensate employees for accidental injuries, except when such injuries arise from "recreational or social activities."[178] However, carved out from that exception are injuries sustained from "such recreational or social activities [that] are a regular incident of employment and produce a benefit to the employer beyond

170. Justice Long, joined by Chief Justice Poritz and Justice Coleman, dissented. *Id.* at 704 (Long, J., dissenting). Finding the immunity provision inapplicable, the dissent viewed the tortious conduct as the officer's failure to ensure that his gun's safety mechanism was on, not the dislodging of the gun from its holster. *Id.* at 705.

171. In *Shaw v. City of Jersey City*, 811 A.2d 404, 411 (N.J. 2002), Justice Zazzali found in an injured police officer's favor. There, the plaintiff and another undercover officer observed what they believed to be a stolen vehicle. *Id.* at 406. When the plaintiff approached the suspected perpetrators, a vehicle accelerated towards the plaintiff and hit him, breaking his ankle in three places. *Id.* "The driver fled and was not apprehended." *Id.* In remanding the matter for entry of judgment for plaintiff, the Court defined "accident" broadly under the state's uninsured motorist statute, N.J. STAT. ANN. § 17:28-1.1 (West 1994), to allow injured plaintiffs to recover when the injuries occur because of another's intentional conduct. *Id.* 410-11.

172. *Alston*, 773 A.2d at 701.

173. 842 A.2d 156 (N.J. 2004).

174. *Id.* at 159.

175. *Id.*

176. *Id.*

177. *Id.*

178. N.J. STAT. ANN. § 34:15-7 (West 2000).

improvement in employee health and morale . . . ."[179] After examining the Act's century-long evolution, a unanimous Court held that "when an employer compels an employee to participate in an activity that ordinarily would be considered recreational or social in nature, the employer thereby renders that activity a work-related task as a matter of law."[180] Thus, the Court recognized that employers may "expand the scope of employment" by directing employees to engage in conduct beyond their general duties.[181]

According to Justice Zazzali, "A contrary reading of [the Act] would impose on employees a classic Hobson's choice: obey the employer's order and jeopardize eligibility for workers' compensation benefits, or refuse to engage in the required activity and risk loss of employment."[182] Such was unacceptable to the former labor lawyer, who, consistent with precedent, liberally construed the "humane social legislation."[183] By permitting injured employees to recover for injuries arising in quasi-work situations, *Lozano* highlights Justice Zazzali's "real world" approach, whereby jurisprudence rooted in legislative intent and past precedent meets compassion.

The second workers' compensation case is *Sager v. O.A. Peterson Construction Co.*[184] The plaintiff, employed by a New Jersey company, was working at a construction site in New York on September 11, 2001.[185] Because the terrorist attacks of that day closed all bridges and tunnels between New York and New Jersey, the plaintiff and his co-workers were unable to return home at the end of their shift.[186] At a supervisor's behest, they went to a local eatery.[187] On the way back to work, the plaintiff "was seriously

179. *Id.*

180. *Lozano*, 842 A.2d at 167. Significantly, both attorneys hailed the ruling as "a logical application of the law." Michael Booth, *Non-Work-Related Recreational Injury Compensable, Supreme Court Rules*, N.J.L.J., Mar. 15, 2004, at 5.

181. *Lozano*, 842 A.2d at 167.

182. *Id.*

183. *Id.* at 167, 168 (quotation omitted). Justice Zazzali quoted the same language in *Sager v. O.A. Peterson Constr. Co.*, 862 A.2d 1119, 1127 (N.J. 2004).

Although the Court remanded the matter, it stated that an employer's direct commands and indirect pressure may compel employees to engage in certain acts. *Lozano*, 842 A.2d at 168, 170. However, if indirect compulsion is alleged, an injured "employee must demonstrate an objectively reasonable basis in fact for believing that the employer had compelled participation in the activity." *Id.* at 168. Resolution of such issues requires a case-by-case analysis of many factors. *Id.*

184. 862 A.2d 1119.

185. *Id.* at 1120.

186. *Id.*

187. *Id.* at 1120-22.

injured in an automobile accident," suffering femur and knee injuries requiring twelve days of hospitalization.[188]

The Court addressed when an injury arises "out of and in the course of employment" under the Workers' Compensation Act.[189] The majority opinion,[190] written by Justice Zazzali, found that "compulsion, standing alone, brings an activity that is otherwise unrelated to work within the scope of employment."[191] The Court concluded that "when an employer compels an employee's participation in an activity generally viewed as recreational or social in nature, the employer thereby renders that activity work-related as a matter of law."[192] Because the plaintiff's supervisor testified that he ordered his employees to eat an early dinner and return to the job site, the record contained sufficient evidence to uphold the agency judgment in the plaintiff's favor.[193]

Justice Zazzali's steadfast protection of workers is also highlighted by two opinions involving the New Jersey Conscientious Employee Protection Act (CEPA),[194] better known as the New Jersey Whistleblower Protection Act. As is apparent in much of his jurisprudence, the Chief Justice's decisions on CEPA are protective of workers, but also mindful of real world consequences and the necessity for practical decision making.[195]

The first CEPA case, and perhaps the finest example of this judicial philosophy, is Justice Zazzali's opinion in *Dzwonar v.*

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188. *Id.* at 1120-21.

189. *Id.* at 1122 (quoting N.J. STAT. ANN. § 34:15-7 (West 2000)).

190. Justice Wallace penned a dissent, joined by Justice Rivera-Soto, arguing that the case should be remanded due to conflicting testimony in light of the "going and coming" rule, which precludes compensation benefits for injuries sustained during routine commuting. *Id.* at 1127 (Wallace, J., dissenting).

191. *Sager*, 862 A.2d at 1123 (quoting *Lozano*, 842 A.2d 156, 167 (N.J. 2004)).

192. *Id.* (quoting *Lozano*, 842 A.2d at 159). Justice Zazzali's opinion in *Sager* was viewed as "yet another expansion of the 'going and coming rule' that has broadened availability of workers' benefits over the years." Michael Booth, *Workers' Comp Covers Worker Hurt Going to Dinner at Boss's Instance*, N.J.L.J., Dec. 27, 2004, at 7.

193. *Sager*, 862 A.2d at 1124.

194. N.J STAT. ANN. § 34:19-1 (West 2001).

195. *See* Coscarelli, *supra* note 1, at 15 (quoting Nancy Erika Smith, a frequent litigator before the Court, stating that Chief Justice Zazzali "never lost sight of what it is like to work for a living and be a regular person").

When Zazzali was elevated to the post, the *New Jersey Lawyer* observed that the new Chief Justice was "a Democrat of the old school, deeply concerned about the rights of working people while generally moderate on other issues. On the court, his otherwise dispassionate approach changes noticeably when issues involving the workplace arise." Robert G. Seidenstein, *Call Him Chief–Zazzali: Rounded Intellect, Intensity with Humor*, N.J. LAWER, Sept. 25, 2006, at 1. *See also* O'Brien, *supra* note 136, at S-10 ("In workplace disputes, more often than not [Justice Zazzali] has sided with employees.").

McDevitt.[196] In *Dzwonar*, the plaintiff, an arbitration officer and elected executive board member of Local 54 of the Hotel and Restaurant Employees International Union, alleged that the union improperly discharged her in violation of CEPA.[197] In 1996, the plaintiff was elected as recording secretary to the union's executive board, and later accepted a paid position as an arbitration officer and representative for the union.[198] However, shortly after the election, the plaintiff came into conflict with other members of the executive board over various internal policies and complained that the executive board failed to disclose certain decisions to the union's membership in violation of its bylaws.[199] Plaintiff also alleged that, although not illegal, the executive board's refusal to read its minutes at meetings denied rank-and-file members their right to participate, deliberate, and vote in union matters as prescribed by the Labor Management Reporting and Disclosure Act (LMRDA).[200]

Plaintiff brought her concerns to the executive board's attention and demanded that the membership be informed of its actions.[201] Thereafter, the executive board discharged the plaintiff from her position as a union arbitrator, claiming that she was insubordinate and had mishandled internal documents.[202] The plaintiff maintained her position as recording secretary of the executive board, but continued to raise concerns about open access to executive board decisions.[203] She then brought suit under CEPA against other members of the executive board, claiming that she was "terminated in retaliation for expressing [her] opinions and [her] efforts to keep [the] Union members informed of important Union business."[204] She further claimed that her termination was in retaliation for her "reasonable belief" that the executive board's failure to inform its membership of its actions violated the LMRDA and the union's bylaws.[205]

A jury found that the defendants violated CEPA.[206] The Appellate Division reversed, concluding that the plaintiff's CEPA claim was preempted by federal labor law and that, even assuming the plaintiff was discharged because she reasonably believed the

196. 828 A.2d 893 (N.J. 2003).
197. *Id.* at 896.
198. *Id.* at 897.
199. *Id.*
200. *Id.* at 898. The LMRDA can be found at 29 U.S.C. §§ 401-531 (2006).
201. *Dzwonar*, 828 A.2d at 898.
202. *Id.*
203. *Id.*
204. *Id.* at 898-99.
205. *Id.* at 899.
206. *Id.*

LRMDA required more of the defendants, LRMDA in itself could not provide a basis for a CEPA claim.[207]

A unanimous Court affirmed the Appellate Division decision to dismiss the plaintiff's lawsuit, but in doing so significantly eased the burden on plaintiffs bringing CEPA claims. Justice Zazzali stated that the issue was whether the plaintiff "reasonably believed" that she was terminated in violation of law and public policy.[208] Although the Court previously held that a plaintiff need only show a "reasonable belief" that a law or mandate of public policy had been violated—not an actual violation—a majority of lower courts added a threshold requirement that the trial court must "first find and enunciate the specific terms of a statute or regulation, or the clear expression of public policy, *which would be violated if the facts as alleged are true.*"[209]

However, writing for the Court, Justice Zazzali rejected that additional requirement.[210] Because CEPA is remedial legislation that should be liberally construed, Justice Zazzali reasoned that a contrary holding effectively would require whistleblowing employees to become lawyers.[211] Instead, the trial court should "make a threshold determination that there is a substantial nexus between the complained-of conduct and a law or public policy identified by the court or the plaintiff."[212] Only then may the jury determine whether the plaintiff actually held such a belief and, if so, whether that belief was objectively reasonable.[213]

In so holding, Justice Zazzali provided CEPA plaintiffs with a significant advantage and reaffirmed CEPA's "reasonable belief" language. However, in applying that test to the plaintiff's allegations, the Court made clear that its construct was not merely a rubber stamp for getting CEPA claims to a jury. Indeed, the Court found that the plaintiff did not have an objectively reasonable belief that

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207. *Id.* at 899-900.

208. *Id.*

209. *Id.* at 900 (quoting Fineman v. N.J. Dep't of Human Servs., 640 A.2d 1161, 1169 (emphasis added)).

210. *Id.*

> We agree with the lower courts that when a plaintiff brings an action pursuant to N.J.S.A. 34:19-3c, the trial court must identify a statute, regulation, rule, or public policy that closely relates to the complained-of conduct. The trial court can and should enter judgment for a defendant when no such law or policy is forthcoming. We do not agree, however, that a plaintiff must allege facts that, if true, actually would violate that statute, rule or public policy.

Id.

211. *Id.* at 901.

212. *Id.*

213. *Id.* at 901-02.

the executive board's actions violated either the LMRDA or the Union's bylaws.[214] Accordingly, the Court rejected the plaintiff's claims.[215]

The following year, Justice Zazzali reaffirmed his belief in a broad and protective application of CEPA,[216] to protect discharged employees, in his dissent in *Maw v. Advanced Clinical Communications, Inc.*[217] There, the Court held that an employer did not engage in impermissible retaliatory action under CEPA when it discharged the plaintiff after she refused to sign an employment agreement with a noncompete agreement.[218] The plaintiff alleged that the noncompete agreement was against a clear mandate of public policy and, therefore, her discharge violated CEPA, which prohibits the discharge of employees who object to or refuse to participate in any activity incompatible with a clear mandate of public policy.[219] The majority disagreed, concluding that there was no "clear mandate" of public policy at issue because the private dispute did not have "public ramifications."[220]

However, in a "strong dissent,"[221] Justice Zazzali maintained that "the allegations of the complaint implicate a clear mandate of public policy that the majority . . . fails to apprehend . . . ."[222] Justice Zazzali argued that "in New Jersey historically we have presumed [noncompete agreements] to be invalid as restraints on trade and, therefore, violative of public policy unless an employer demonstrates the reasonableness of its agreement."[223] Further, the Justice contended that the majority's characterization of the issue as a

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214. *Id.* at 902-04.

215. *Id.* at 904. Justice Zazzali's opinion in *Dzwonar* "made clear that plaintiffs suing under the Conscientious Employee Protection Act must be very specific how their allegations of being ill-treated as whistleblowers run afoul of state law or public policy, and they also must have the goods to back up those claims." Robert G. Seidenstein, *Political Controversy Abounds; Election Law, New Justice Selection at Center Stage*, N.J. LAWYER, Aug. 25, 2003.

216. Scholars recognize that New Jersey's jurisprudence, including *Dzwonar*, has made CEPA "the most far-reaching whistleblower statute in the nation." Richard A. West, Jr., *No Plaintiff Left Behind: Liability for Workplace Discrimination and Retaliation in New Jersey*, 28 SETON HALL LEGIS. J. 127, 141 (2003) (quoting Mehlman v. Mobile Oil Corp., 707 A.2d 1000, 1008 (N.J. 1998)).

217. 846 A.2d 604 (N.J. 2004).

218. *Id.* at 607.

219. *Id.* (citing N.J. STAT. ANN. § 34:19-3c(3) (West 2000)).

220. *Id.* at 608.

221. Michael J. Garrison, *Limiting the Protection for Employees from Compelled Noncompete Agreements Under State Whistleblower Laws: A Critical Analysis of* Maw v. Advanced Clinical Communications, 20 LAB. LAW. 257, 285 (2005), *available at* http://www.bna.com/bnabooks/ababna/laborlawyer/20.3.pdf (last visited July 15, 2007).

222. *Maw*, 846 A.2d at 610 (Zazzali, J., dissenting).

223. *Id.* at 613.

private dispute was improper because "it does not reckon with, much less reconcile, the vital public-policy considerations that undergird the jurisprudence of non-compete agreements."[224] According to Justice Zazzali, "For centuries the courts of England and of this State have stated repeatedly that covenants-not-to-compete implicate important public-policy interests."[225] In striking words, Justice Zazzali wrote: "If there is any continuing truth to that notion, then a plaintiff who claims that she resisted signing an agreement that she believed to violate that public policy cannot be summarily cast out of court on the ground that her concerns constitute only a private dispute with her employer."[226] Rather, Justice Zazzali argued that the better approach "would be to hold that a plaintiff has stated a claim under CEPA when she has alleged that she refused to sign a non-compete agreement that she believed to be in violation of public policy."[227] An employer would then have the opportunity to demonstrate the reasonableness of the agreement as a defense to the action.[228]

Chief Justice Zazzali defended workers' rights through his last days on the Court,[229] as evidenced by one of his final opinions—*Iliadis v. Wal-Mart Stores, Inc.*[230] In that case, the Court was asked

224. *Id.* at 615.

225. *Id.*

226. *Id.*

227. *Id.* at 616.

228. *Id.* at 610. Another of Justice Zazzali's noteworthy dissents came in *Camden Board of Education v. Alexander*, 854 A.2d 342 (N.J. 2004). There, a four-member majority of the Court permitted a school board to terminate fifteen custodians for nonarbitrary and noncapricious reasons without being subject to an arbitrator's review. *Id.* at 356. Justice Zazzali, joined by Justices Long and Albin, dissented, arguing that arbitration should be permitted in this "negotiable and substantively arbitrable" matter. *Id.* at 378 (Zazzali, J., dissenting). Contending that the majority departed from the Court's well-settled principles, Zazzali vociferously opined that the majority's approach "amount[ed] to a departure that steps backwards in the otherwise commendable progress this Court has made in establishing fairness in our labor-law jurisprudence." *Id.* at 356. The Legislature later overruled the majority opinion and vindicated Justice Zazzali's perspective by amending N.J. STAT. ANN. § 34:13A-5.3. *See* Bd. of Educ. of Alpha v. Alpha Educ. Ass'n, 918 A.2d 579, 587-88 (N.J. 2006). That amendment now provides that courts and agencies interpreting collective bargaining agreements "shall be bound by a presumption in favor of arbitration." N.J. STAT. ANN. § 34:13A-5.3 (West Supp. 2007).

229. Another opinion from the Chief Justice's final year on the bench is *New Jersey Turnpike Authority v. Local 196, IFPTE*, 920 A.2d 88 (N.J. 2007), where the Court, in deference to an arbitrator's determination, upheld an award reinstating a toll collector who, in an act of road rage, fired a paintball gun at a slower-moving vehicle that impeded his commute home. Despite that decision's deference to an arguably debatable arbitral award, the opinion was publicly criticized. Editorial, *Ruling Misses The Mark*, ASBURY PARK PRESS (Neptune, N.J.), Apr. 25, 2007, at 18.

230. 922 A.2d 710 (N.J. 2007).

to consider whether a putative class of 72,000 former and current hourly Wal-Mart employees should be certified.[231] The employees alleged that Wal-Mart denied them rest and meal breaks and forced them to work off-the-clock in violation of corporate policy, statutory law, and administrative regulations.[232] The trial court denied class certification, finding, among other reasons, that common questions did not predominate over individual issues and that the proposed class members had an alternative, superior method for redress in the Wage Collection Division of the Department of Labor.[233] The Appellate Division affirmed.[234]

Writing for the majority,[235] Chief Justice Zazzali reversed the Appellate Division and held that the class had satisfied the requirements for class certification.[236] In making that determination, Chief Justice Zazzali emphasized the disparity in resources between the parties, stating: "Plaintiffs are hourly employees of a retail store. Independently, they lack the financial resources of their corporate adversary. The equalizing mechanism of representative litigation allows them to adequately seek redress."[237] Further, the Court could not "ignore the reality that if the proposed class is not certified, thousands of aggrieved employees will not seek redress for defendant's alleged wrongdoing."[238] Indeed, Chief Justice Zazzali wrote:

> By equalizing adversaries, we provide access to the courts for small claimants. By denying shelter to an alleged wrongdoing defendant, we deter similar transgressions against an otherwise vulnerable class—72,000 hourly-paid retail workers purportedly harmed by their corporate employer's uniform misconduct.[239]

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231. *Id.* at 714. The statewide class included all current and former Wal-Mart hourly employees from May 30, 1996 to the present. *Id.*

232. *Id.*

233. *Id.* at 716-17.

234. *Id.* at 717.

235. *Id.* at 728-29. In dissent, Justice Rivera-Soto argued that the determinations below should be affirmed due to the substantial deference owed to the trial court's discretionary ruling. *Id.* at 730-31 (Rivera-Soto, J., dissenting).

236. *Id.* at 728-29 (majority opinion).

237. *Id.* at 726. According to former Associate Justice Verniero, *Iliadis* "opened the door widely to class action litigation in New Jersey." Jeffrey Gold, *Workers' Suit vs. Wal-Mart Gets New Life*, STAR-LEDGER (Newark, N.J.), June 1, 2007, at 25. *The Star-Ledger* praised Chief Justice Zazzali's *Iliadis* opinion, noting that "[s]uch suits allow employees—who are often afraid of retaliation, lack resources or are too intimidated to take on a corporate behemoth—to redress their grievances in court." Editorial, *Recognizing Worker Rights*, STAR-LEDGER (Newark, N.J.), June 4, 2007, at 14.

238. *Iliadis*, 922 A.2d at 726.

239. *Id.* at 728.

In permitting the litigation to proceed as a class action,[240] Chief Justice Zazzali and the Supreme Court honored "[t]he class action's historic mission of taking care of the smaller guy."[241]

V. CORPORATE LAW[242]

A. Accountant Liability

A starting point for an analysis of Chief Justice Zazzali's decisions in the corporate context is then–Justice Zazzali's opinion in *NCP Litigation Trust v. KPMG LLP*.[243] Born out of the corporate financial reporting scandals of the late 1990s and early 2000s, the dispute in *NCP* concerned two corporate officers of Physician Computer Network, Inc. who intentionally misrepresented the corporation's financial status to the company's investors and its accounting firm, KPMG.[244] This resulted in improper inflation of the company's financial status and, after the fraud was uncovered, ultimately led to the company declaring bankruptcy and significant investor losses.[245] Various shareholder groups filed investor lawsuits against the corporation and the offending corporate officers, resulting in cash settlements.[246]

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240. Buttressing the Court's "confidence in the resourcefulness, creativity, and administrative abilities of trial courts," were recent developments in Pennsylvania and California. *Id.* at 727. Specifically, similarly filed statewide class actions against Wal-Mart proceeded to trial and jury verdicts in both states. *Id.* In Philadelphia, the jury awarded a class of 186,000 current and former employees $78.5 million. Kris W. Scibiorski, *Class Certification; Victory for Wal-Mart Workers*, N.J. LAWYER, June 4, 2007, at 3. According to the Court, New Jersey's "trial courts are equally capable of managing such complex litigation." *Iliaids*, 922 A.2d at 727.

241. *Iliaids*, 922 A.2d at 719 (quotation marks and quotation omitted). "In short, the class action's equalization function opens the courthouse doors for those who cannot enter alone." *Id.*

242. It bears noting that the following cases are not—nor are they intended to be—an all-inclusive recitation of Chief Justice Zazzali's opinions in the general area of corporate law. Further, one will undoubtedly realize that the term "corporate law" has been employed loosely. In that respect, this section includes an analysis of not only what might be thought of as classic corporate law cases such as those involving accountant liability, but also an analysis of some of Chief Justice Zazzali's decisions on other "corporate law" matters such as general property law. The hope in employing this loose definition is to not let the difficulty of finding a proper descriptive term for these cases stand in the way of this Tribute's true purpose—to analyze and reflect on Chief Justice Zazzali's judicial philosophy and his contributions to New Jersey civil jurisprudence during his tenure.

243. 901 A.2d 871 (N.J. 2006).

244. *Id.* at 873-75.

245. *Id.* at 874-76.

246. *Id.* at 876.

However, a trust created out of the bankruptcy proceedings, the NCP Litigation Trust, also filed suit against KPMG.[247] The trust alleged that KPMG "negligently failed to exercise due professional care in performing its audits and in the preparation of its financial statements and audit reports."[248] Among other allegations, the trust alleged that: the financial records certified by KPMG during the fraud were in complete disarray; that they could not be reconstituted by another auditor; that KPMG never verified the receipt and deposit of a $3.5 million check that was part of a fraudulent asset purchase; and that KPMG failed to follow generally accepted accounting principles in its audits.[249]

In response, KPMG argued that the suit against it was barred by the imputation doctrine.[250] Essentially, KPMG contended that the corporate officers' fraudulent conduct was imputed to the corporation such that the corporate shareholders had constructive knowledge of that fraudulent conduct and, therefore, could not sue KPMG for its allegedly negligent conduct in auditing the company's financial statements.[251]

Writing for the Court,[252] Justice Zazzali granted "a major victory for shareholders"[253] and rejected KPMG's contention that the imputation doctrine barred suit. Focusing on the harm that would be wrought on shareholders and the inequity that would be created by allowing allegedly negligent parties to escape liability, Justice Zazzali argued:

> [T]he imputation defense exists to protect innocent third parties from being sued by corporations whose agents have engaged in malfeasant behavior against those third parties. . . . However, this matter does not present the typical circumstances for which the imputation defense was designed because PCN's agents did not directly defraud an innocent third party. They defrauded the corporation and its creditors. In that respect, KPMG is not a victim of the fraud in need of protection.[254]

In remanding the matter, Justice Zazzali emphasized:

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247. *Id.*

248. *Id.* at 876-77.

249. *Id.* at 877.

250. *Id.* at 877-78.

251. *See id.* at 879-80.

252. Justices LaVecchia and Rivera-Soto both dissented, each filing written opinions. *See id.* at 890 (LaVecchia, J., dissenting); *id.* at 892 (Rivera-Soto, J., dissenting).

253. Robert G. Seidenstein, *Shareholders Can Pursue Auditor*, N.J. LAWYER, July 3, 2006, at 5.

254. 901 A.2d at 882.

> If we allow imputation to shield a negligent auditor from the consequences of its actions, we will force shareholders to shoulder the entire loss—a result that violates principles of fairness and equity. . . . In circumstances such as these, where an auditor allegedly failed to comply with applicable standards, we fail to see how the auditor can be deemed to be an innocent party deserving of protection. To deter future such wrongdoing, we will not indiscriminately provide a safe haven for allegedly negligent conduct.[255]

B. Arbitration Agreements and Subprime Lending

Although this Tribute has predominantly focused on the Chief's majority opinions, another of the Chief's dissenting opinions is worthy of examination:[256] *Delta Funding Corp. v. Harris*,[257] which involved subprime predatory lending. The plaintiff, Alberta Harris, a seventy-eight-year-old woman, entered into a $37,700 mortgage loan contract with Delta Funding Corporation, a subprime lender specializing in high interest loans to individuals with poor credit or limited financial means.[258] The plaintiff's loan was guaranteed by a mortgage on her Newark home, which Harris previously owned outright.[259] Harris had little education or financial sophistication, and was living off of a modest, fixed income.[260] The circumstances of Harris's entering into the contract also were suspect, as the loan company sent a representative to Harris's home while she was sick in bed and allegedly told her that she was required to sign the papers at

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255. *Id.* at 887. Writing on the effect of *NCP* and the Appellate Division's decision in *Division of Investment v. Qwest Communications International, Inc.*, 904 A.2d 775 (N.J. Super. Ct. App. Div. 2006), one commentator noted that "accountants must be aware that their liability in New Jersey has dramatically changed in the past few months." David M. Stauss, *Aiding and Abetting Corporate Fraud*, N.J.L.J., Nov. 13, 2006, at S-9; *see also* Robert Schwaneberg, *State's High Court Revives Lawsuit vs. KPMG*, STAR-LEDGER (Newark, N.J.), June 6, 2006, at 67.

256. An analysis of dissenting opinions may seem to be a strange choice, given our focus on Chief Justice Zazzali's influence on the civil law during his tenure on the Court. However, the purpose of this Tribute is not merely to provide a recitation of decisions. Rather, the purpose is also to gain an insight into the man who wrote those decisions. In that respect, perhaps the greatest insights into an individual jurist's judicial philosophy are not gained by analysis of majority opinions, which necessarily require group consensus and input. To the contrary, it is in dissenting opinions where one can truly gain insight about the author. However, it is worth noting that Chief Justice Zazzali was "[n]ot a frequent dissenter." Gallagher, *supra* note 5.

257. 912 A.2d 104 (N.J. 2006).

258. *Id.* at 108. The instant loan was at an interest rate of fourteen percent. *Id.*

259. *Id.*

260. *Id.* at 108. Harris's monthly income consisted of $988 in social security checks. *Id.* at 118 (Zazzali, J., dissenting).

that time.[261] Harris inevitably defaulted on the loan, and Wells Fargo initiated a foreclosure suit in New Jersey state court.[262] Harris responded by alleging violations of the Truth in Lending Act, the Real Estate Settlement Procedures Act, and the New Jersey Consumer Fraud Act.[263] In response, Delta filed a petition in federal district court to compel arbitration based on a loan agreement provision that permitted either party to compel arbitration in lieu of litigation.[264]

The subject arbitration agreement also: (1) permitted the arbitrator to decide, at the end of arbitration, which party should bear the costs of the proceeding; (2) required that each party bear its own expenses for attorney and witness fees regardless of which party prevailed; (3) stated that the costs of any appeal would be borne by the appealing party regardless of the appeal's outcome; (4) precluded the borrower from engaging in any class action suit against Delta; and (5) contained a provision excluding the underlying foreclosure action from being submitted to arbitration in the same proceeding.[265] The district court rejected Harris's motion for summary judgment, concluding that although the agreement was a contract of adhesion, it was not substantively unconscionable.[266] On appeal, the Third Circuit certified the question of whether the contract was unconscionable to the Supreme Court of New Jersey.[267] Based on a limited review of the certified question, the Court held that the cost-shifting, attorney fee, and appellate fee provisions could be unconscionable depending on the arbitrator's interpretation of such provisions, that the class-action waiver was not unconscionable, that the provision excluding foreclosure actions from arbitration was not unconscionable, and that the arbitration agreement was not cumulatively unconscionable.[268]

However, in a vigorous dissent, Justice Zazzali argued that the majority had not gone far enough and should have found that all of the subject provisions were unconscionable and that the agreement in whole was unconscionable.[269] According to Justice Zazzali, the:

> [C]ircumstances under which this matter comes before the Court—on a sparse record that consists of mere allegations—preclude the court from properly examining whether factors

261. *Id.* at 118-19.
262. *Id.* at 109 (majority opinion).
263. *Id.* at 109.
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*
268. *See generally id.*
269. *Id.* at 117 (Zazzali, J., dissenting).

> such as age, literacy, lack of sophistication, unfair bargaining tactics, or the particular setting of the contract formation affect the determination of procedural unconscionability. Suffice it to note that the allegations, if proven true, including the late night visit to Harris's home and the rushed nature of her signing the documents, could have a significant effect on future unconscionability determinations, such as whether the loan agreement itself is unconscionable.[270]

Nonetheless, Justice Zazzali determined that the subject provisions, on their face, created a situation "so one-sided as to shock the . . . conscience."[271] He also noted that the provisions required a litigant—in this case a poor litigant—to defend claims in two forums: a foreclosure action and an arbitration.[272] "[A]lthough the majority is correct in noting that foreclosure actions are properly commenced in court, that fact does not give Delta the right to exclude claims that it finds unfavorable from that court action by forcing them into arbitration."[273]

As it pertained to the contract provisions precluding class-action lawsuits, Justice Zazzali noted that:

> [T]he question is whether the class action waiver is unconscionable in the context in which Delta concededly conducts its business, that is, Delta's business model seeks out those who are in financial difficulty. It is precisely those types of individuals who would benefit from being able to enter into class action suits and minimize the expense of litigation.[274]

Finally, Justice Zazzali opined that the agreement was cumulatively unconscionable, stating "the purpose of the agreement is not merely to arbitrate claims; it is to arbitrate claims in a way that significantly advantages Delta at the expense of borrowers."[275] In words that summarize his judicial philosophy, Justice Zazzali concluded: "Because I believe that this agreement exploits the individual and manipulates the process, I respectfully concur in part and dissent in part."[276]

C. Property

This Tribute's broad definition of "corporate law" also permits analysis of Chief Justice Zazzali's property decisions, specifically in the areas of eminent domain and landlord-tenant law. As it pertains

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270. *Id.* at 120 (citations omitted).
271. *Id.* at 122 (citations and quotation marks omitted).
272. *Id.*
273. *Id.* at 123.
274. *Id.* at 123-24.
275. *Id.* at 124.
276. *Id.* at 125.

to eminent domain, two of the Chief's decisions have been heralded as significant victories for property owners.[277] The first decision was in *Mansoldo v. State*.[278] In *Mansoldo*, a company owned by Ronaldo Mansoldo purchased a piece of property adjacent to the Hackensack River in 1959.[279] Many years later, in 1993, Mansoldo's son sought to construct two single-family homes on the property, which was a permitted use under the local zoning code.[280] However, because the property was in an area that the state had deemed—in 1982, twenty-three years after the purchase of the property—to be subject to fluvial flooding, Mansoldo was required to obtain a special permit from the Department of Environmental Protection (DEP).[281] However, the DEP rejected Mansoldo's application citing flooding concerns.[282] The DEP also found that Mansoldo had not "'adequately pursued alternative uses for the property' such as selling it 'to adjacent property owners for use as a parking lot, a park, or open space.'"[283] The matter was thereafter submitted to an administrative law judge (ALJ), who found that Mansoldo had made several attempts to sell the property as "a parking lot . . . or open space"—the only uses permitted under the regulations—but that no one was interested in purchasing the property.[284] However, the ALJ ultimately dismissed Mansoldo's appeal.[285]

Mansoldo thereafter filed suit, alleging that the "floodway regulations resulted in an inverse condemnation of his property."[286] The Appellate Division held that a taking had occurred but found that Mansoldo was only entitled to the value of the property as parkland, open space, or a parking lot, not as building lots.[287] On certification, then-Justice Zazzali, writing for the Court, reversed the Appellate Division, finding that it had incorrectly applied standing precedents.[288] Zazzali wrote that the issue was "whether the DEP regulation denied all economically beneficial or productive use of the

277. *See, e.g., Tightening 'Blight' in Eminent Domain*, N.J.L.J., July 9, 2007, at 18 (describing *Gallenthin Realty Development, Inc. v. Borough of Paulsboro*, 924 A.2d 447 (N.J. 2007), as "both legally sound and politically responsive").

278. 898 A.2d 1018 (N.J. 2006).

279. *Id.* at 1021.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.* (internal quotation omitted).

285. *Id.*

286. *Id.* at 1022.

287. *Id.* at 1023.

288. *Id.* at 1023-24.

land."[289] If the regulation does deny all economically beneficial use of the land, then it is considered a taking and the state must provide just compensation.[290] Accordingly, the Court remanded the matter to the trial court for further proceedings.[291] The *Mansoldo* decision was hailed as a "significant victory to private property owners whose holdings plummet in value when new government regulations are imposed."[292]

Almost one year to the date after *Mansoldo*, Chief Justice Zazzali issued one of the most important eminent domain cases in New Jersey jurisprudence. In *Gallenthin Realty Development, Inc. v. Borough of Paulsboro*,[293] the Court held that a statute allowing "redevelopment of land that was in a stagnant condition did not authorize [the Borough of Paulsboro] to redevelop property owners' land simply because it was not fully productive."[294] In *Gallenthin*, the plaintiff owned a sixty-three-acre parcel of largely vacant wetlands.[295] In an effort to revitalize the area, Paulsboro classified the subject property as "in need of redevelopment" under New Jersey statute, maintaining that the property's unimproved condition made it "not fully productive" and subject "to taking by eminent domain."[296] Both of the lower courts upheld the borough's action and permitted the taking.[297]

Writing for a unanimous Court, however, Chief Justice Zazzali struck down the redevelopment designation, concluding that Paulsboro's interpretation of its statutory authority violated the New Jersey Constitution's blighted areas clause.[298] The Chief reasoned that:

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289. *Id.* (internal quotation omitted).

290. *Id.*

291. *Id.* at 1025.

292. Robert G. Seidenstein, *One for the Little Guy; Let Government Pay*, N.J. LAWYER, June 12, 2006, at 1.

> Rejecting lower court rulings, the justices said when the government regulates the value out of private property, it is expected to pay up as if it were flat-out taking it. The high court delivered that message in a ruling that could have had grave consequences for property owners had it gone the other way. But the court made clear that government cannot walk away from the financial losses triggered when government-ordered limits are placed on properties.

Id.

293. 924 A.2d 447 (N.J. 2007).

294. *Id.*

295. *Id.* at 449.

296. *Id.* The statute in question was N.J. STAT. ANN. § 40A:12A-5(e) (West 2006).

297. *Gallenthin*, 924 A.2d at 449.

298. *Id.* at 461-62. The clause provides:

> [B]ecause we must presume that the Legislature intended subsection (e) to function in a constitutional manner, and because subsection (e) is reasonably susceptible to an alternative interpretation, we conclude that the Legislature intended [the statute] to apply only to property that has become stagnant because of issues of title, diversity of ownership, or other similar conditions.[299]

Focusing on the constitutional limitations on takings, the Chief then concluded that "[t]he New Jersey Constitution does not permit government redevelopment of private property solely because the property is not used in an optimal manner."[300]

The decision in *Gallenthin* drew praise for its protection of individual property owner rights, and had an immediate impact on eminent domain in New Jersey. Indeed, within two months of *Gallenthin*'s filing, state appellate courts rejected redevelopment projects in three New Jersey towns.[301] As one commentator noted, "The decision made one important, far reaching point: The courts in New Jersey will not rubber-stamp either development-minded towns or even the Legislatures, despite the deference given to them in the past."[302] The state's public advocate also praised the decision, stating, "It's a pretty far-reaching [decision] that addresses a very, very real issue in modern redevelopment—which is an overly expansive, bogus

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> The clearance, replanning, development or redevelopment of blighted areas shall be a public purpose and public use, for which private property may be taken or acquired. Municipal, public or private corporations may be authorized by law to undertake such clearance, replanning, development or redevelopment; and improvements made for these purposes and uses, or for any of them, may be exempted from taxation, in whole or in part, for a limited period of time . . . . The conditions of use, ownership, management and control of such improvements shall be regulated by law.

N.J. CONST. art. VIII, § 3, ¶ 1.

299. *Gallenthin*, 924 A.2d at 463.

300. *Id.* at 465.

301. In *Gallenthin*'s immediate wake, New Jersey's Appellate Division began to derail municipal redevelopment efforts. Kris W. Scibiorski & Robert G. Seidenstein, *Pullback on Eminent Domain Taking Hold*, N.J. LAWYER, July 23, 2007, at 3. Appellate panels, citing *Gallenthin*, found government takings to violate the New Jersey Constitution in at least three municipalities: Belmar, Camden, and Lodi. *See id.*; *see also* Erik Larsen, *Appellate Court Tightens Blight Standards*, ASBURY PARK PRESS (Neptune, N.J.), July 25, 2007, at A7; *Another Victory in "Blight" Fight*, ASBURY PARK PRESS (Neptune, N.J.), July 27, 2007, at A16. According to one attorney, "[c]ourts are clearly taking a much closer look at the evidence provided by towns," a level of scrutiny that may foreclose towns from merely "reiterate[ing] the language found in the statute without [conducting] a detailed investigation." Scibiorski & Seidenstein, *supra*.

302. Bob Braun, *Caution, Development Ahead: 'Anything Goes' Becomes 'Not So Fast' With Supreme Court's Decision on Eminent Domain*, STAR-LEDGER (Newark, N.J.), June 14, 2007, at 67.

definition of blight. The court has made it quite clear it won't countenance that expression of blight. It's a very important statement."[303]

Finally, with respect to landlord-tenant jurisprudence, three of the Chief's opinions are worthy of treatment. In *Miah v. Ahmed*,[304] a unanimous court found that tenants who are evicted from their apartment as a result of their landlord's citation for illegal occupancy are entitled to relocation assistance under New Jersey law in an amount equal to six times their rent—not simply to reimbursement for their relocation expenses.[305] Although the Court's holding was based on a plain reading of the statute, Justice Zazzali also found policy justifications for the Court's holding, stating:

> Although in some circumstances our interpretation will require the landlord to pay more than the tenant's actual expenses, that result is neither unreasonable nor inequitable. By advertising a space as available for rent, it is the landlord that is responsible for an illegal occupancy and for the corollary threat to the health, safety, and welfare of the tenant and the community at large.[306]

Chief Justice Zazzali also authored two notable decisions concerning summary dispossess proceedings, in which the Court provided protection to low-income tenants. In *Housing Authority & Urban Redevelopment Agency of Atlantic City v. Taylor*,[307] the Court held that landlords may not recover attorneys' fees and late charges as "additional rent" in summary dispossess proceedings.[308] Five years later, in *Hodges v. Sasil Corp.*,[309] the Court held that a law firm that regularly files summary dispossess actions for nonpayment of rent may be a "debt collector" under the Fair Debt Collection Practices Act.[310] In so holding, Justice Zazzali displayed the Court's concern for protecting low-income tenants: "Application of the FDCPA to law firms regularly engaged in summary dispossess actions furthers the congressional objective underlying the statute – protection of

303. Kate Coscarelli, *Court Limits Towns' Power to Seize Land: 'Underused' Designation Deficient in S. Jersey Eminent Domain Case*, STAR-LEDGER (Newark, N.J.), June 14, 2007, at 1.

304. 846 A.2d 1244 (N.J. 2004).

305. *Id.* at 1252.

306. *Id.*

307. 796 A.2d 193 (N.J. 2002).

308. *See id.* at 202.

309. 915 A.2d 1 (N.J. 2007).

310. *Id.* at 3.

consumers from debt collectors who coerce payment of debts and additional charges."[311]

VI. CONCLUSION

Chief Justice Zazzali's career and tenure on the Court reveal a dedication to public service and an unyielding sympathy for the disadvantaged. His judicial opinions are recognized as clear, concise, and unembellished,[312] and his exceptional accomplishments are often veiled by his approachability.[313] His six years as an associate justice on the Supreme Court of New Jersey and his brief tenure as the judiciary's top judge epitomize a life-long dedication to justice and service. One of New Jersey's most beloved public servants, James Zazzali will undoubtedly be remembered as a model public servant—uncompromising yet compassionate.

It is all too appropriate that Chief Justice Zazzali's seventieth birthday fell on Sunday, June 17, 2007—Father's Day. On his swearing in as Chief Justice, the always-humble public servant noted, albeit incorrectly, that he would not be remembered for his judicial opinions. Rather, pointing to his five children (and at the time one grandchild), he noted that they would be his legacy.[314] On his swearing in as an associate justice, as noted, he referenced his father's near appointment to a federal judgeship, commenting that his own nomination to New Jersey's high court vindicated his father's near miss.[315] And, throughout his tenure on the bench, Chief Justice Zazzali, as only a protective father could, doggedly championed the rights of the underprivileged, the young, the downtrodden, and the injured. He was indeed the guardian of the little guy. By taking care of the Garden State's underdogs, Chief Justice Zazzali was more than a caretaker.

311. *Id.* at 11. Although the director of Essex-Newark Legal Services hailed Justice Zazzali's majority opinion as "a significant victory" for subsidized housing tenants, the New Jersey Apartment Association opined that the ruling may unintentionally curtail settlement of rent disputes. Rick Hepp, *Justices Protect Federally Subsidized Tenants*, STAR-LEDGER (Newark, N.J.), Feb. 1, 2007, at 17.

312. *See* Gallagher, *supra* note 5.

313. *See, e.g.*, Coscarelli, *supra* note 13.

314. Seidenstein, *supra* note 70.

315. *See infra* notes 62-67 and accompanying text.