SURVEY OF RECENT DEVELOPMENTS IN NEW JERSEY LAW

In this section, the Seton Hall Law Review presents synopses of recent New Jersey cases of interest to practitioners. In so doing, we hope to assist the legal community in keeping abreast of some of the more interesting changes in significant areas of practice.

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CONDOMINIUMS—STANDING TO SUE—OWNER'S ASSOCIATION HAS EXCLUSIVE RIGHT TO SUE FOR DEFECTS IN COMMON ELEMENTS— *Siller v. Hartz Mountain Assocs.*, 93 N.J. 370, 461 A.2d 568 (1983).

Harmon Cove is a condominium community in Secaucus developed by Hartz Mountain Associates (Developer). Under New Jersey's Condominium Act, each unit is a separate parcel of real estate owned in fee simple. Additionally, each owner enjoys an individual interest as tenant in common in the "common elements," such as the grounds and facilities used by, and accessible to all unit owners. 93 N.J. at 375, 461 A.2d at 570. Management, maintenance, and repair of the common elements are entrusted to an association run by a board of directors. Initially the board is controlled by the developer, but as the percentage of unsold units decreases, the unit owners' representation on the board increases until all the units are sold and the board is comprised entirely of unit owners. *Id.* at 376, 461 A.2d at 571. In January, 1978 Harmon Cove Association (Association) empanelled a Legal Action Committee (Committee) to investigate charges that the Developer was responsible for substantial and varied construction defects in the residential buildings and the common elements. In June, 1978 the Committee reported that it found the units noisy, leaking, improperly heated, improperly air conditioned, and poorly insulated, and that the development as a whole suffered from inadequate parking, landscaping, and recreational facilities. The Committee recommended that an attorney be retained to bring suit against the Developer. The Association at first adopted the recommendation, but later dismissed the attorney and negotiated a settlement through its general counsel. The settlement called for payment of $400,000 to the Association by the Developer in exchange for a general release. *Id.* at 383, 461 A.2d at 575.

Five unit owners, unhappy with the terms of the settlement, brought suit individually and on behalf of others similarly situated in the chancery division. Four of the five counts charged the Developer with liability for the numerous defects and deficiencies found by the Committee. The remaining count was against the Association. It alleged the facts of the pending settlement and claimed, essentially, that the Association had breached its fiduciary duty to plaintiffs by negotiating an inadequate, unreasonable settlement. The trial court considered the initial issue to be one of standing. While the trial court dismissed the four counts against the Developer, holding that the Association alone had standing to enforce these rights, it sustained the one count against the Association. Plaintiffs appealed to the appellate

division which affirmed the trial court decision. Plaintiffs' petition for certification to the New Jersey Supreme Court was granted. *Id.* at 373-74, 461 A.2d at 569-70.

The supreme court affirmed in part and reversed in part. In an opinion by Justice Schreiber, the court held that, except in four circumstances, the Association has the exclusive right to remedy defects to the common elements. Justice Schreiber began by noting that while condominiums were an ancient concept, the rights and duties associated with this unique form of ownership are created by modern statute. He observed that while an individual may own his own apartment, under the statutory scheme of the Condominium Act, the common elements are specifically charged to the Association, which has the power to contract, to sue and be sued, to obtain insurance, and to assess maintenance fees to common owners. Moreover, while the Association retains a right of entry to each unit for repairs of common elements, the unit owner is precluded under penalty of injunction from any unauthorized action affecting these areas. The court concluded that a sensible reading of the statute mandates that the Association have exclusive standing to maintain actions relating to common elements. *Id.* at 375-81 & n.4, 461 A.2d at 570-73 & n.4.

The court specified, however, four situations where the individual owners have a right to sue. First, where an association fails to act on a claim involving common elements, the individual owner may bring suit against the developer. The court observed that since such actions are derivative in nature, the association must also be named as a party. Second, an individual may sue the developer when the association is still under the developer's control. The court reasoned that this protects first buyers who purchase without the benefit of an independent association. Third, the court held that with the right to exclusive management comes a fiduciary duty to the individual owners. Breach of that duty, as was properly alleged by plaintiffs, opens the association to suit by individual owners. Finally, the court recognized that where the harm is direct and not derivative, the individual owner may sue the developer. In the instant case, Justice Schreiber noted that the trial court had failed to recognize that the alleged facts included damage involving not only the common elements, but also the individual units. He commented that where the harm alleged was to the individual's estate in fee, direct suit is an appropriate action. The supreme court, therefore, while affirming the statutory interpretation of the trial court, remanded the case for an itemizing of the individual claims based on direct harm. *Id.* at 381-82, 384, 461 A.2d at 574-75.

The court's analogy to the law of corporations is a good one. While the statutory scheme of centralized control precipitates the

efficient management of common assets, a policy that benefits all, the power must not be exercised to the detriment of the fragmented, less powerful majority. Where the association is independent and exercises its statutory duty mindful of its relationship to its members, its power should be plenary. Where the converse is true, or the harm is direct, the individual owner is properly allowed to independently protect his rights. Thus, the court strikes a proper balance between promoting the legislative scheme and protecting the interests of the individually aggrieved.

Noel Lawrence Hillman

CRIMINAL LAW—SEARCH AND SEIZURE—SUPREME COURT DETERMINATION THAT THE RANDOM STOPPING OF AUTOMOBILES BY LAW ENFORCEMENT OFFICERS IS UNCONSTITUTIONAL SHOULD NOT BE GIVEN RETROACTIVE EFFECT—*State v. Gervasio*, 94 N.J. 23, 462 A.2d 144 (1983).

On September 25, 1978 a car driven by Ralph Gervasio and occupied by Dana Ann Michie was stopped on the New Jersey Turnpike by State Police. The routine stop was made in order to check compliance with driver's license and vehicle registration laws. In the course of checking Gervasio's license and registration, one of the troopers detected the smell of marijuana emanating from the car. The driver was informed that the officers suspected that contraband was contained within the car and accordingly, it would be necessary to take the car to the police station and obtain a search warrant unless voluntary consent was given for an immediate search. Gervasio allowed the officers to look in the car's trunk where five bales of marijuana were found. Both the driver and passenger were subsequently indicted on drug charges. 94 N.J. at 25 & n.1, 462 A.2d at 145-46 & n.1.

Defendants filed a motion with the trial court to suppress the evidence seized as a consequence of the stop. The motion was based on a retroactive application of a United States Supreme Court holding in *Delaware v. Prouse*, 440 U.S. 648 (1979), in which the Court held that the random stopping of vehicles on public roads was unconstitutional. 94 N.J. at 24, 462 A.2d at 145. The trial court heard the defendants' motion, but reserved judgment pending a decision by the New Jersey Supreme Court on the retroactivity of *Prouse*. After the state supreme court determined that *Prouse* should apply only prospectively to random stops which occurred after March 27, 1979, the

trial court upheld the constitutionality of the stop of defendants' car. *Id.* at 25, 462 A.2d at 146. Defendants pled guilty to drug possession charges but appealed the denial of their suppression motion. The appellate division affirmed and the New Jersey Supreme Court granted certification. *Id.* at 26, 462 A.2d at 146.

The supreme court affirmed, reasoning that pursuant to guidelines enunciated in *United States v. Johnson*, 457 U.S. 537 (1982), the *Prouse* decision could not be applied retroactively because it represented a clear break with past constitutional decisions involving the routine stop of automobiles. 94 N.J. at 32, 462 A.2d at 150. Justice Handler, writing for the majority, noted that *Johnson* indicated a clear break with the past has occurred if a ruling expressly overrules a prior United States Supreme Court holding, disapproves of a practice which has been arguably sanctioned by the Supreme Court in prior cases, or overturns a longstanding, widespread practice about which the Supreme Court has not spoken, but about which a nearly unanimous number of lower courts have expressly approved. *Id.* at 26, 462 A.2d at 146. Justice Handler reasoned that two of the three criteria set forth in *Johnson* had been met in *Prouse*. He observed that the random stopping of vehicles to check for license and registration arguably had been sanctioned by the United States Supreme Court in *United States v. Brigroni-Ponce*, 422 U.S. 873 (1975), a pre-*Prouse* decision concerning random stops by border patrols. *Id.* at 28, 462 A.2d at 147. Justice Handler additionally noted that *Prouse* overturned a widespread practice in a majority of jurisdictions, including New Jersey. *Id.* at 30-31, 462 A.2d at 148-49. He concluded that since *Prouse* met two of *Johnson*'s criteria, the decision represented a clear break with the past and could not be given retroactive application. *Id.* at 27-28, 462 A.2d at 147.

In his dissenting opinion, Justice O'Hern also utilized the three-prong analysis set forth in *Johnson*. He concluded, however, that *Prouse* did not clearly fit within any of the three categories which would indicate that the decision constituted a clear break with past authority. *Id.* at 42, 462 A.2d at 155 (O'Hern, J., dissenting). He therefore reasoned that *Prouse* should be applied retroactively, even if there was an element of unfairness in affording defendants such an application. *Id.* at 45, 462 A.2d at 157 (O'Hern, J., dissenting).

This decision was based on public policy objectives which favored the good faith reliance of law enforcement officers on the state law which existed at the time of their actions. In holding as it did, the court avoided the administrative problems and the detrimental effects to the administration of justice which would have resulted if *Prouse* had been given retroactive effect. Nevertheless, even a prospective

application of *Prouse* will probably operate to exclude important evidence seized by law enforcement officials.

Marianne M. De Marco

TORTS—PUBLIC EMPLOYEES—DISMISSAL OF CLAIM AGAINST PUBLIC EMPLOYEE NOT REQUIRED WHEN FINAL JUDGMENT ENTERED IN FAVOR OF PUBLIC ENTITY FOR CLAIMANT'S FAILURE TO COMPLY WITH NOTICE REQUIREMENTS OF TORT CLAIMS ACT—*Williams v. Adams*, 189 N.J. Super. 196, 459 A.2d 707 (Law Div. 1983).

On April 22, 1980, plaintiff was involved in a car accident with a vehicle owned by Atlantic County and operated by the defendant, Mr. Silvern, a county employee. Plaintiff filed a claim against the county and Silvern on April 20, 1982 for injuries sustained in the accident. It is, however, a statutory prerequisite under the Torts Claim Act that one bringing suit against a public entity file a notice of claim with said entity within 90 days of accrual action. As plaintiff never filed a notice of claim with Atlantic County, the county's motion for dismissal was granted. 189 N.J. Super. at 197, 459 A.2d at 707-08. The county moved to have the dismissal certified as a final judgment, and the court agreed to do so primarily on the ground that the failure to file a timely notice of claim forever barred plaintiff from bringing a claim against the county. *Id.* at 197-98, 459 A.2d at 708. The county then moved for a dismissal of the action against Silvern, relying on N.J. STAT. ANN. § 59:9-6(a) (West 1982), which provides as follows:

> Where a claimant has pursued his remedy against a public entity for a claim arising out of the act or omission of a public employee entity, a judgment or settlement shall be a complete bar to suit against the employee in a claim arising from the same subject matter.

Id., 189 N.J. Super. at 197-98, 459 A.2d at 708. The county argued that a "judgment" as intended by this section includes a final judgment dismissing a claim against a public entity for plaintiff's failure to file a notice of claim as required by the Tort Claims Act.

The law division disagreed with the county's argument and held that under these circumstances, a dismissal of claim against a public employee is not mandated by N.J. STAT. ANN. § 59:9-6(a). Judge

Perskie emphasized that a decision not to sue a public entity does not bar suit against the employee, and he noted that the notice of claim requirement applies only to public entities and not their employees. 189 N.J. Super at 198, 459 A.2d at 708. Judge Perskie recognized N.J. STAT. ANN. § 59:9-6(a) as a codification of the principles of *res judicata* and collateral estoppel, neither of which applied in the absence of a substantive determination of the claim. *Id.* at 199, 459 A.2d at 708-09. The court found support for this construction within the fabric of the Torts Claims Act, a basic purpose of which was to reestablish sovereign immunity with certain exceptions. *Id.* at 199-200, 459 A.2d at 709. Judge Perskie considered sovereign immunity a jurisdictional bar to suit, and reasoned that the notice of claim requirement removes this bar and is thereby a condition of a plaintiff's "right of action, not his remedy." *Id.* Judge Perskie therefore concluded that just because plaintiff, by failing to file a notice of claim, is precluded from bringing an action, it cannot be held that she has pursued her remedy as contemplated by the statute. *Id.* at 200, 459 A.2d at 709.

The court found additional support for its construction of N.J. STAT. ANN. § 59:9-6(a) by comparing it to the analagous provision of the California Torts Claims Act, the model for the New Jersey enactment. The California Act disallows claims against public employees if an action against the public entity is barred for any reason. The bar extends not only to situations where there was a failure to file a timely notice of claim, but also to situations where no claim was filed against the public entity. Judge Perskie reasoned that if the New Jersey Legislature had intended to follow the California lead in this regard, it would have employed the broader language used by the California Legislature rather than making a judgment or settlement a prerequisite to a bar to suit. *Id.*

The court's decision is based on a well-reasoned interpretation of the relevant statutes. The case is significant for its identification of the conflict contained within the Tort Claims Act, since the ruling does nullify the strict notice of claim requirement with respect to those public entities which have adopted a policy of indemnification. The ultimate effect is to deprive those entities of the protection of sovereign immunity, contrary to the stated purpose of the act. The *Williams* decision is likely to have the consequence of discouraging indemnification of employees by public entities where such indemnification is not required by law.

Joel L. Botwick

ELECTIONS—STATUTORY CHALLENGES TO LOCAL ELECTIONS—VIOLATIONS OF STATUTORY REQUIREMENTS SUBJECTS ABSENTEE BALLOTS TO INVALIDATION—*In re Battle*, 190 N.J. Super. 232, 462 A.2d 1291 (App. Div. 1983).

In the November, 1982 election for a seat on the Township Committee of Neptune Township, Joseph Pepe defeated Almerth Battle by 24 votes. Of the 9,961 votes cast, 342 were by absentee ballot. 190 N.J. at 233, 462 A.2d at 1292. A New Jersey statute provides that the voter shall not release his absentee ballot to a messenger "unless the ballot is sealed in the outer envelope and the person who shall transport . . . it first signs and prints his name on the outer envelope." N.J. STAT. ANN. § 19:57-37.1 (West Cum. Supp. 1983-1984). State law also requires the messenger who delivers the absentee ballot to "sign a record which the county shall maintain of all absentee ballots personally delivered to it." N.J. STAT. ANN. § 19:57-23 (West Cum. Supp. 1983-1984). Battle challenged the validity of 74 absentee ballots which came from voters residing in nursing homes. 190 N.J. at 233-34, 242, 462 A.2d at 1292, 1297. She claimed that since the questioned votes did not comport with the statutory requirements pertaining to the delivery of absentee ballots, they were void and uncountable. *Id.* at 233-34, 462 A.2d at 1292.

At a hearing to determine the validity of Battle's claims, Pepe made a motion for summary judgment. *Id.* at 234, 462 A.2d at 1292. Pepe argued that the statutory requirements were directory and a violation of them could not operate to disenfranchise a voter. *Id.* The trial court granted Pepe's request, concluding that the purpose of the provisions was to protect the voter and that the purpose of the provisions was to protect the voter and that only a showing that the ballots had been tampered with could disqualify them. *Id.* at 234-35, 462 A.2d at 1292-93.

The appellate division vacated the entry of summary judgment. *Id.* at 244, 462 A.2d at 1298. Judge McElroy, writing for the court, disagreed with the trial judge's conclusion that the applicable statutes were merely directory. *Id.* at 235, 462 A.2d at 1293. He held that the requirements of the provisions were mandatory, and that any nonconforming absentee ballots were subject to invalidation. *Id.* at 242, 462 A.2d at 1297-98. In reaching this decision, the court noted that the provisions in issue were enacted as a result of an election law reform aimed at protection the absentee voting process from fraud. *Id.* at 235-41, 462 A.2d at 1293-97. Judge McElroy observed that the imper-

ative language the legislature used in drafting the provisions placed the burden of complying with the requirements on both the voter and the messenger. *Id.* at 241-43, 462 A.2d at 1297-98. He commented that when, as in the present case, these requirements are ignored and the votes are nevertheless counted, the effectiveness of the statute is diluted. While noting that disenfranchisement of a voter is a drastic remedy, the court reasoned that this result was necessary in order to effectuate the legislative goals. *Id.* at 243, 462 A.2d at 1298. Judge McElroy remanded the case to the trial court for a hearing to determine the legality of the votes in question. *Id.* at 244, 462 A.2d at 1299.

In *Battle*, the court determined that prevention of fraud in the absentee voting process was a paramount concern of the legislature in enacting absentee voting legislation. This purpose can only be effectuated, according to the court, if the statutory delivery requirements are strictly complied with. Such a holding provides guidelines for future courts in settling election challenges.

Nancy A. Zajac

CONSTITUTIONAL LAW—STATE BOARD OF HIGHER EDUCATION'S DENIAL OF LICENSE TO AWARD COLLEGE DEGREE TO RELIGIOUS SCHOOL IS NOT VIOLATIVE OF FIRST AMENDMENT—*New Jersey State Bd. v. Board of Directors*, 90 N.J. 470, 448 A.2d 988 (1982).

Shelton College is operated by the Bible Presbyterian Church. All academic subjects are taught from a Christian fundamentalist perspective. 90 N.J. at 473-74, 448 A.2d at 989-90. In 1965, the New Jersey Board of Higher Education (the Board) proposed to terminate Shelton College's power to confer baccalaureate degrees because certain minimum requirements had not been met. Shelton College challenged the constitutionality of N.J. STAT. ANN. §§ 18A: 68-3,-6 (West 1968), and the provisions which regulate the granting of baccalaureate degrees. 90 N.J. at 474, 48 A.2d at 990. In 1971, the Board revoked Shelton college's license to award degrees in New Jersey. *Id.* at 475, 448 A.2d at 990.

In February 1979, Shelton College submitted a new application for authorization to award baccalaureate degrees in certain fields of study. Before receiving authorization, the college began offering degree track courses. On November 15, 1979, the Board brought suit in chancery division alleging that N.J. STAT. ANN. §§ 68–3,–6, which

allows only Board licensed institutions to confer degrees, were violated by Shelton College's operations in New Jersey. On November 19, Shelton College and various students and faculty members brought an action in United States District Court for the District of New Jersey seeking declaratory and injunctive relief. The federal plaintiffs alleged that their first, ninth, and fourteenth amendment rights were violated by the application of New Jersey licensing statutes to Shelton College's educational operations. *Id.* at 475-76, 448 A.2d at 991.

The district court issued a preliminary injunction that enjoined the state from taking any action to prevent Shelton College from engaging in its educational activities, but refrained from ruling on the licensing statute's applicability to religious institutions in order to permit New Jersey courts to resolve the issue. *Id.* at 476, 448 A.2d at 991. The Board appealed the district court's order, and the federal plaintiffs cross-appealed. Meanwhile, the chancery court upheld the constitutionality of the licensing statutes as applied to Shelton College and entered a permanent injunction that restrained the college from awarding degrees or course credits in New Jersey without a license. On April 14, 1981, the Third Circuit upheld the district court's order that granted injunctive relief. In addition, the Third Circuit approved the district court's decision to stay further federal proceedings until state court action was completed. *Id.* On May 18, 1981, the district court entered a revised preliminary injunction that prevented enforcement of the superior court's order until the Supreme Court of New Jersey addressed the validity of the statute in question. *Id.* at 476-77, 448 A.2d at 991.

The New Jersey Supreme Court modified and affirmed that judgment of the chancery court. *Id.* at 490-91, 448 A.2d at 990-91. The court held that application of N.J. STAT. ANN. §§ 18A:68-3,-6 to sectarian institutions does not unduly interfere with the first amendment right to the free exercise of religion, nor does it create an excessive state entanglement with religion. *Id.* at 487, 448 A.2d at 998. In reaching this determination, Justice O'Hern, writing for the court, first noted that the legislature intended the statutes to apply to all institutions, including those with religious affiliations. *Id.* at 477-81, 448 A.2d at 991-93. Justice O'Hern then observed that to determine if the state's licensing process unconstitutionally infringes upon the free exercise of defendant's religion, the court must decide if the state's interest in regulating academic degrees constitutionally justifies the burden that it would impose on defendants' rights. *Id.* at 481, 448 A.2d at 993. Justice O'Hern argued that the legislation at issue was intended to advance the state's substantial interest in maintaining the integrity of the baccalaureate degree and in ensuring minimum edu-

cational standards. *Id.* at 484, 448 A.2d at 995. He reasoned that although the defendants' exercise of religion may suffer some indirect burden from applications of the statutes, the constitutional balance nonetheless favors the state's substantial interest since accommodation of defendants' beliefs would erode respect for the educational system, undermine the integrity of the baccalaureate degree, and encourage other institutions to seek exemptions from licensing requirements. *Id.* at 487, 448 A.2d at 996. Justice O'Hern further remarked that the states' licensing requirements did not require extensive state entanglement with religion in violation of the establishment clause of the first amendment. *Id.* at 488-89, 448 A.2d at 998. The court concluded that, notwithstanding the constitutionality of the statutes, fairness compelled that all eligible students receive credits through the 1982-1983 academic year, and that those scheduled to graduate in 1984 be allowed to complete their degrees. *Id.* at 490, 448 A.2d at 999.

The Supreme Court of New Jersey followed the established rule of balancing state interests against defendants' first amendment right to free exercise of religion. If the state's interest is substantial, then defendants' free exercise of religion may be circumscribed. In this case, the supreme court recognized that the state's interest in regulating the authority to confer baccalaureate degrees would be significantly impaired by exemptions given to sectarian colleges. The decision of the court makes it clear that minimum educational standards will be maintained by institutions of higher learning and no exemptions will be tolerated on the basis of free exercise of religion where the state action does not unduly burden the free exercise of religion.

John M. Simon

CONSTITUTIONAL LAW—PRIVILEGES AND IMMUNITIES CLAUSE—DISCRIMINATORY TAXATION OF NONRESIDENT COMMUTERS CONSTITUTES A DENIAL OF LIVELIHOOD WHEN TAX NOT REASONABLY RELATED TO JUSTIFICATION FOR DISCRIMINATION—*Salorio v. Glaser*, 93 N.J. 447, 461 A.2d 1100 (1983).

New Jersey, in order to develop, construct, and maintain an efficient commuter system between itself and New York, adopted a tax scheme to supplement the cost. The plan, known as the Emergency Transportation Tax (ETT), placed the burden of tax contribution on New York residents choosing to work within New Jersey. The

nonresident who commuted to the Garden State was subject to both the ETT and the New Jersey Gross Income Tax, which is assessed against every individual on earnings derived within the state. 93 N.J. at 450, 461 A.2d at 1101. State income tax paid by the nonresident was credited toward the ETT obligation and if there was remaining ETT liability, the revenue was collected and transferred to a special transportation fund. *Id.* at 450-51, 461 A.2d at 1101. Since the ETT had no effect on the tax liability of New Jersey residents, the additional burden placed on nonresidents was alleged to be discriminatory. The plaintiffs, three New York residents who travelled into New Jersey for work, brought action against the Director of Taxation for New Jersey seeking declaratory and injunctive relief against imposition of the ETT. *Id.* at 449, 461 A.2d at 1101.

The trial court summarily found for the State and the New Jersey Supreme Court granted immediate certification. *Id.* The court held in *Salorio v. Glaser*, 82 N.J. 482, 461 A.2d 1111, *cert. denied*, 449 U.S. 874 (1980)(*Salorio I*), that the tax was not violative of the equal protection clause. 93 N.J. at 449, 461 A.2d at 1101. The court, however, also examined the ETT's constitutionality with reference to the privileges and immunities clause. *Id.* at 451, 461 A.2d at 1102. The court noted that a statute is violative of that clause if it unequally affects nonresidents unless the state can prove that the nonresidents were a peculiar source of the evil which the statute is designed to remedy and that the disparate treatment bore a substantial relationship to this evil.

The *Salorio I* court acknowledged that the ETT discriminated against New York residents, but because the record before it was insufficient to determine either the extent of the problem attributable to the nonresidents or if there was a substantial relationship between the ETT and the problem, the case was remanded back to the trial court. *Id.* On remand, the trial court held for the State, concluding that the burden the ETT placed on New York commuters was substantially commensurate with the benefit they derived from New Jersey's commutation system. *Id.* at 452, 461 A.2d at 1102-03.

Justice Schreiber, writing for the New Jersey Supreme Court, reversed, holding that the ETT was violative of the privileges and immunities clause. *Id.* at 452, 469, 461 A.2d at 1108, 1112. Justice Schreiber first observed that the ETT affects the pursuit of livelihood, a fundamental activity protected by the clause, and he proceeded to apply the standards enunciated in *Salorio I*. *Id.* at 456 , 461 A.2d at 1104. The court initially determined that because of the ETT, the tax liability of a nonresident was greater than that of a resident with the same income and that therefore the tax was discriminatory. *Id.* at

456-58, 461 A.2d 1104-05. Justice Schreiber then examined the State's justification for the discriminatory impact. He noted that the state's excuse for inflicting the tax was the need for facilities to handle the increased commuter crunch between New Jersey and New York generated by New York residents who worked in New Jersey. *Id.* at 458, 461 A.2d at 1105-06. Justice Schreiber explained, however, that even if this justification was valid, the amount charged nonresidents had to bear a substantial relation to the increased need. *Id.* at 458-59, 461 A.2d at 1106. After conducting a detailed statistical analysis based on evidence presented by the state's experts, Justice Schreiber concluded that the amount of ETT paid by New York residents was far in excess of their burden on the transportation system. *Id.* at 459-62, 461 A.2d at 1106-08. He determined, therefore, that since the ETT failed to properly correspond to the evil it was supposed to cure, it was invalid. *Id.* at 462, 461 A.2d at 1108.

The court, however, rejected plaintiff's argument that damages should be awarded based on the amount of taxes paid. *Id.* at 462-66, 461 A.2d at 1108-10. To support this judgment, Justice Schreiber observed that New Jersey's continued administrative and fiscal stability demanded a prospective application of the decision. *Id.* at 467, 461 A.2d at 1110. He additionally noted that since plaintiffs received New York income tax credits for ETT paid, they had suffered no financial injury, and therefore a prospective application was equitable. *Id.* at 466, 461 A.2d at 1110. The court resolved that to force New Jersey to return ETT receipts would be unreasonable, and concluded that all interests would be best served by enjoining enforcement of the ETT beginning January 1, 1984. *Id.* at 467-68, 461 A.2d at 1111.

The decision of the *Salorio* court was somewhat limited in scope. The burden that nonresidents placed on the transportation system was balanced against the exact revenue raised by the ETT. *Salorio* leaves open the question of whether a tax commensurate with the evil which nonresidents place on the commuter system would be valid. The ETT may not have passed judicial muster even if its tax bite on nonresidents had been less severe. The court, by allowing the state to justify the disparate treatment of nonresidents, has not made a definitive statement as to the constitutionality of ETT-type schemes.

Charles Naselsky