Q. Do you remember any specific small talk that may have taken place?

A. He asked him if he had any family or any family would be showing up, and I believe he said yes.

The when we were done, had him all cleaned up and sutured up and stuff, the doctor sent me to get his family.

Q. Did he identify any members of his family who might be there?

When I say him, I mean Tim Horn.

A. No, because he wouldn't have been able to see them.

Q. When you are saying Dr. Laing would have asked him whether he had family members --

A. He just asked him if maybe a wife or brother or sister or mom or dad would be coming into the Emergency Room, and Mr. Horn said that there would be somebody coming, family.

Q. Do you recall did Mr. Horn say that, there would be someone coming like family, or would he have said a sentence is what I am getting at?

A. I'm sure he just said family. I don't think he made a real blown out statement."

Steven R. Walls, an ambulance attendant, at page 23-24 of his deposition, testified that at the accident scene he observed Tim Horn stand up and say that he "wanted to get away."

The court has grave reservations in light of Dr. Laing's testimony, whether any of the statements made by Horn in the emergency room would have been admissible. Assuming the admissibility of the statement, the court does not believe that much weight would be given to this statement considering the physical condition of Tim Horn at the time the statement was given.

The two expert reports arrive at diametrically opposed conclusions regarding who was driving at the time of the accident. Although, each side believes their expert to be superior, the court has found that juries often disregard conflicting experts' opinions.

There was testimony by Carla Stevens Horn that both Doug Johnson and Tim Horn were at the party and drinking beer served from a keg; that Doug and Tim left to go to the Horn residence to bring back his fireworks and that Doug was driving Tim's car when they left the Clopper residence.

Several intangible factors were cited by the district attorney as influencing his decision to withdraw the charges. First, the evidence would reveal that Doug and Tim were very close friends who had been drinking beer together at a party for several hours before the accident. The blood alcohol levels taken after the accident would reveal that both individuals were legally intoxicated, Mr. Johnson's blood alcohol being .15 and Mr. Horn's blood alcohol being .20. Certainly, the district attorney may consider the sympathy factor when two parties are both drinking and one is charged with the unintentional death of his close friend.

In all criminal cases the law presumes the defendant is innocent until the district attorney introduces evidence that proves the defendant's guilt beyond a reasonable doubt. Also, the jury always retains the inherent pardoning power and can refuse to return a guilty verdict.

After reviewing all the evidence and considering the standard to be applied in reviewing the district attorney's reasons for withdrawing his previous approval of the charge, this court does not find an abuse of discretion by the district attorney in his withdrawal of the criminal charges.

ORDER OF COURT

May 10, 1989, the court dismisses the petition for review of the private criminal complaint.

NORLAND FAMILY PRACTICE, P.C. VS. YUREK, C.P. Franklin County Branch, No. AD 1989 - 209

Equity - Convenant Not to Compete - Lack of Consideration - Preliminary Injunction

1. Where an employment relationship previously exists, a convenant not to compete must be supported by new consideration or it will not be enforceable.

2. Eighteen months duration and a 25-mile radius in a non-competition clause is not unreasonable as a matter of law.

3. Tender of consideration for a non-competition clause is not valid after notice of termination has been given.

Courtney J. Graham, Esquire, Attorney for Plaintiff

Thomas J. Finucane, Esquire, Attorney for Defendant

KELLER, P.J., August 11, 1989:

OPINION AND ORDER

Mark F. Yurek filed a complaint against Norland Family Practice, P.C. on June 13, 1989 seeking a declaratory judgment concerning a non-competition clause in his employment contract with Norland. The complaint was served upon Norland Family Practice, P.C. on June 13, 1989. An answer containing new matter was filed to the declaratory judgment complaint July 12, 1989. On July 18, 1989 Norland Family Practice, P.C. filed a counterclaim alleging Mark F. Yurek's violation of a covenant not to compete and seeking a preliminary and permanent injunction restraining further violation. On July 19, 1989 counsel for the parties stipulated that the counterclaim is procedurally correct and permissible and neither party would make or file any objections to the same. On the same date a motion for preliminary injunction and an order directing the defendant, Mark F. Yurek, to show cause on July 24, 1989 at 10:30 o'clock a.m. why a preliminary injunction should not issue during the pendency of said action. The stipulation, motion and order were filed July 19, 1989.

Hearings on the preliminary injunction were held July 24, 1989, and August 3, 1989. Pursuant to the request of the Court, counsel filed memoranda of Law August 4, 1989 on the issue whether a preliminary injunction shall issue. The matter is ripe for disposition.

FINDINGS OF FACT

1. Norland Family Practice, P.C. hereafter "Norland" is a Pennsylvania Professional Corporation engaged in the family practice of medicine at its office at 3000 Philadelphia Avenue, Chambersburg, Franklin County, Pennsylvania.

2. Mark F. Yurek, hereafter "Yurek" is a doctor licensed in

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LEGAL NOTICES, cont.

KUHL: First and final account, statement of proposed distribution and notice to the creditors of Citizens National Bank of Southern Pennsylvania, Waynesboro, Pennsylvania, Executor of the Estate of J. Elizabeth Kuhl, late of Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

SCHAFF: First and final account, statement of proposed distribution and notice to the creditors of Chloris V. Barnes, Executrix of the Estate of Georgie P. Schaff, late of Greene Township, Franklin County, Pennsylvania, deceased.

STULL: First and final account, statement of proposed distribution and notice to the creditors of Cecil E. Seekford, Catherine V. Myers, Blanche E. Cauffman, Executors of the Last Will and Testament of Susan C. Stull, late of Quincy Township, Franklin County, Pennsylvania, deceased.

VARDEN: First and final account, statement of proposed distribution and notice to the creditors of James C. Varden, Jr. and Thomas M. Varden, Executors of the Estate of James C. Varden, late of the Borough of Mercersburg, Franklin County, Pennsylvania, deceased.

Robert J. Woods, Clerk
Rhonda R. King, Deputy
Clerk of Orphan's Court
Franklin County, Pennsylvania

10/6, 10/13, 10/20, 10/27/89

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Pennsylvania to engage in the family practice of medicine with a residence at 6453 Valley Camp Road, Greencastle, Franklin County, Pennsylvania.

3. Norland and Yurek were in late 1983 and early 1984 discussing Yurek's joining Norland in the practice of medicine.

4. On March 14, 1984 Dr. David W. Kistler, hereafter "Kistler", president and sole stockholder of Norland wrote to Yurek proposing terms for him to become an employee of Norland. The letter inter alia provided:

   > If you decide to leave employment by the corporation, you agree that you will not practice medicine for an 18-month period within 25 miles of Chambersburg except by written consent.
   >
   > . . . . .
   >
   > Please let me have your thoughts on any changes or additions to the above so we can get a final agreement quickly.

5. The March 14, 1984 letter is referred to by the parties and their counsel as a letter of intent. It was not signed by Yurek (Plaintiff's Exhibit 3).

6. Yurek acknowledged receipt of the letter of intent; reviewed it with his attorney, Brad Griffie, and does not contend he did not accept the proposal.

7. Yurek was completing his residency program at Polyclinic Hospital, Harrisburg, PA at the time of the negotiations with Norland.

8. Yurek commenced his practice with Norland in early July 1984. Yurek had not completed his residency program, and Kistler served as his preceptor during July. Polyclinic Hospital paid Yurek for that month.

9. Yurek's employment with Norland commenced August 1, 1984.

10. Norland's attorney prepared an employment contract between Norland and Yurek, hereafter Agreement No. 1. Yurek met with Brad Griffie, his attorney, August 23, 1984 to review and discuss Agreement No. 1 (Plaintiff's Exhibit 4).

11. Agreement No. 1 is dated October 25, 1984, and provides inter alia:

    > 2. . . . the term of this Agreement shall begin on July 30, 1984, and shall continue from year to year thereafter until terminated in accordance with paragraph 8 hereof.
    >
    > 3. . . . for an annual base salary of $50,000 and as additional salary 33.3% of all gross professional income in excess

of $100,000 per annum attributed to his efforts.

13. . . . for termination of the Agreement by either party on three months written notice or by Norland without notice at any time for various causes specified.

18. NON-COMPETITION CLAUSE: Employee agrees that after the termination of this Agreement he will not practice medicine within twenty-five miles of the Borough of Chamberburg, for eighteen months after such termination. Employee agrees that he has received from Employer the sum of five hundred ($500.00) dollars as additional compensation for this non-competition clause.

12. Yurek testified he received Agreement No. 1 at the end of July or early August 1984, and discussed it, including the non-competition clause, thoroughly with Attorney Griffie. His attorney told him it would be a "legal battle" to enforce the clause.

13. Yurek objected to the non-competition clause and was informed by Kistler that it was an integral part of the agreement and he would not bend on it.

14. Yurek signed Agreement No. 1 without receiving the $500.00 consideration referred to in the non-competition clause because he had already moved to the area and assumed the mortgage on his home.

15. Yurek testified he never received the $500.00 consideration referred to in the non-competition clause of Agreement No. 1, and when he mentioned it to Kistler he was told not to worry about it, that it wasn't important.

16. Kistler testified Norland paid the $500.00 consideration by paying $436.30 to Charlotte Joy on July 16, 1984 to reimburse her for damage done to her automobile by Yurek while moving his furniture to Chambersburg, and by paying $88.00 on Yurek's behalf to rent a truck to help move his furniture.

17. Since Kistler's letter of March 14, 1984 states, "I will provide assistance in moving as we have discussed" and no reference was made to a $500.00 consideration until Agreement No. 1 was drafted and presented to Yurek in late July or early August, 1984, it is unlikely that the consideration was paid on or about July 16, 1984.

18. Norland paid Yurek gross income in 1984 of $20,192.23, and in 1985 of $49,696.24.

19. In late 1985 or early 1986, Yurek notified Kistler he was not making it financially, and would have to leave if he couldn't make

more money. They entered into negotiations to improve Yurek's financial problems and the professional concerns of Kistler culminating in Kistler's handwritten proposal of January 13, 1986 (Plaintiff's Exhibit 6).

20. Norland's attorney drafted a new employment agreement, hereafter Agreement No. 2 (Plaintiff's Exhibit 7). It was executed by the parties August 1, 1986, and became effective that date.

21. Agreement No. 2 differed from Agreement No. 1 in numerous respects, including but not limited to:

    a. ". . . Employer shall pay the Employee one-half (50.0%) of all gros professional income actually received by Employer which is attributed to Employee's efforts."

    b. Non-participation of employee in employer's group insurance plans (previously coverage provided by employer).

    c. Employee entitled to a vacation not to exceed five weeks. (Previously two weeks).

    d. Removal of provisions for Yurek to acquire corporate stock, and interest in the partnership and financing of acquisition options.

22. Agreement No. 2 includes precisely the same terms as Agreement No. 1 as to termination and non-competition.

23. Paragraph 14, the non-competition clause in Agreement No. 2 specifically provides inter alia:

    "Employee agrees that he has received from Employer the sum of five hundred ($500.00) dollars as additional compensation for this non-competition clause."

24. Nowithstanding the requirement of paragraph 7 of Agreement No. 2 that Yurek pay the full cost of his medical malpractice insurance premiums, by agreement between Kistler and Yurek, Norland provided over $15,000 between September 1986 and August 1988 to be applied to Yurek's malpractice insurance premiums.

25. Norland paid Yurek $74,470.24 in 1986; $79,219.07 in 1987; and $74,663.41 in 1988.

26. On May 26, 1989 Kistler gave Yurek written three-months' notice of termination of the employment agreemet as provided in paragraph 9 of Agreement No. 2 (Defendant's Exhibit 3).

27. Kistler and Yurek agreed the $500.00 consideration referred to in paragraph 14 of Agreement No. 2 was not paid to Yurek.

28. Norland tendered the $500.00 consideration by mailing its check 9922 dated June 8, 1989 to Yurek with a covering letter dated June 9, 1989. (Plaintiff's Exhibits 8, 9, 10). The check was not signed.

29. Yurek did not accept the tendered check and returned the envelope unopened to Norland. It was opened in court during the July 24th hearing.

30. On June 30, 1989 Norland gave Yurek written notice of immediate termination for cause as provided in paragraph 9 of Agreement No. 2. (Joint Exhibit 1).

31. Affidavits of Dr. Kenneth W. Rictor and Dr. James C. Barton stated that their offices were accepting new patients if their expertise permits the doctors to treat them.

32. Chambersburg Hospital Emergency Room Dr. Lawrence J. Bayler's affidavit provides the names and telephone numbers of 19 doctors, including Kistler and Yurek, who indicated to the Emergency Room that they are accepting new patients.

33. The granting of Norland's prayer for a preliminary injunction would not impact adversely on the medical care of the general public in the twenty-five mile area around the Borough of Chambersburg, Pennsylvania.

34. Kistler testified that he told Yurek he would not object to him engaging in the practice of medicine in Hagerstown, MD, McConnellsburg, PA, Camp Hill, PA or Gettysburg, PA but would not tolerate him violating the non-competition clause by practicing in the Chambersburg, area because it would adversely impact on Norland's practice.

35. Dr. Paul Klink commenced practicing at Norland on June 26, 1989.

36. The affidavit of Mabel Baker, office manager for Norland, in addition to providing financial information stated that Yurek was consistently 15 to 30 minutes late coming to the office to prepare to see patients beginning at 9:00 a.m. and thereafter.

37. The affidavit of Debra Johnson, a licensed practical nurse employed by Norland, stated that:

> Yurek was consistently 15 to 45 minutes lat to see patients scheduled for 9:00 a.m. and thereafter, which resulted in consistent complaints from patients.
>
> Yurek informed her not later than February of 1989 that he was looking for another place to practice, and repeated that statement on several occasions.

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Yurek informed her of the 90-day termination letter and stated, "If you want to go with me, I have a position for you."

38. Yurek denied that there was any accuracy or validity to the causes alleged by Norland for his immediate termination.

39. Yurek testified that after he received the three-month termination notice, he did in response to questions of patients whether he was leaving Norland, advise that he was.

40. Yurek denied that he has ever done anything by way of direct contact with former patients to encourage them to follow him.

41. Yurek received a termination for cause notice on Friday, June 30, 1989. He had a vacation scheduled to commence the following day, and had airline tickets for that vacation.

42. On June 30, 1989 he told Dr. George Baker that he had been terminated that day by Norland. Dr. Baker offered him the opportunity to set up a medical practice with him in his office at Fayetteville, Pennsylvania.

43. While on vacation, Yurek caused an advertisement to be placed in the Public Opinion, a newspaper of general circulation in the Chambersburg area, which announced:

    MARK F. YUREK, M.D.
    Wishes to announce that he will be seeing patients in the office of George Baker, M.D., Fayetteville, on a temporary basis until a permanent facility is established. Hours starting July, 16th, by appointment only.
    352-3463 (Joint Exhibit 2).

44. The advertisement has appeared in the Public Opinion three or more times.

45. Fayetteville is within twenty-five miles of the Borough of Chambersburg.

46. Yurek testified that he commenced the practice of medicine in Dr. Baker's office on July 16, 1989 because he was left with no source of income and because he had patients who needed his continuing medical care.

47. Kistler testified that from the time Yurek commenced practicing medicine with Dr. Baker to July 1, 1989, Norland had received requests for the transfer of 139 patient charts, i.e., all patient records, except billing records, to Yurek. The charts were transferred by leaving them in Yurek's box at the Chambersburg Hospital.

48. As of the date of the hearing Drs. Klink and Kistler were practicing as Norland Family Practice, P.C., and a Dr. Mills had been hired to commence in the practice in September 1989.

49. Kistler testified that in June 1989 Norland had enough patients to keep two doctors busy, but not enough patients to keep three doctors busy. He felt medical coverage in the Chambersburg area has changed dramatically due to the many new doctors who have commenced practice in the area. He used to see 650 to 700 patients per month, and now sees 550 patients.

50. Kistler testified that Norland suffered immediate and irreparable harm by reason of Yurek's violation of the non-competition clause because Norland patients have transferred their files to Yurek, and there is no reasonable and practical way to determine what monetary loss Norland has suffered.

51. Yurek testified that in 1989 while employed by Norland, his gross income, i.e., net to him before taxes and his personal expenses, was between $7,000 and $8,000 per month and his gross income from the Fayetteville office from July 16, 1989 to July 31, 1989 was somewhat under $3,000. He testified that his patient load has dramatically decreased with him seeing an average of 5 to 7 patients per day.

52. Yurek testified that he is presently paying no overhead expenses to Dr. Baker, but recognizes that will have to come to an end.

53. Considering the clarity of the language of the "non-competition clause" in Agreement No. 1 and No. 2, the fact that Yurek thoroughly discussed both the letter of intent and Agreement No. 1 with his attorney, and that his attorney advised him it would be a "legal battle" to enforce the non-competition clause, renders Yurek's testimony that he believed that clause was only applicable if he chose to leave Norland, unbelievable.

54. Kistler testified that prior to Yurek's termination for cause, he had told Yurek that they should send a joint letter to patients explaining the present status of the doctors with Norland.

55. Yurek recalled Kistler suggested sending out a joint letter such as had been sent to patients when Dr. Levine left in February 1989, but he never presented him with a proposed letter.

56. Doctors Klink, Mills and Kistler mailed a "Dear Patient" letter dated July 19, 1989 to patients who had been seen by Yurek or who were not specifically indentified with a specific physician advising inter alia that Yurek was no longer an employee of Norland. (Defendant's Exhibit 1).

DISCUSSION

Initially, we observe that the issue here presented for resolution is whether Dr. Mark F. Yurek should be preliminarily enjoined from engaging in the practice of medicine within twenty-five (25) miles of the Borough of Chambersburg until a final full hearing can be scheduled and held with the customary submission of briefs thoroughly reviewing with appropriate citations each issue of law supporting or responding to the contentions of the plaintiff and the defendant. Our Supreme Court has observed where the necessary elements appear to exist, a preliminary injunction may properly be granted where substantial legal questions must be resolved to determine the rights of the respective parties. *Fischer v. Department of Public Welfare*, 497 Pa. 267, 439 A.2d 1172 (1982).

In *Singzon v. Commonwealth of Pennsylvania, Department of Public Welfare*, 496 Pa. 8, 436 A.2d 125 (1981) the Pennsylvania Supreme Court held:

> . . . The 'essential prerequisites" for a preliminary injunction are sometimes stated in the following manner:
>
> (F)irst, that it is necessary to prevent immediate and irreparable harm which could not be compensated by damages; second, that greater injury would result by refusing it than by granting it; and third, that it properly restores the parties to their status as it existed immediately prior to the alleged wrongful conduct. (citation omitted). Even more essential, however, is the determination that the activity sought to be restrained is actionable, and that the injunction issued is reasonably suited to abate such activity. And unless the plaintiff's right is clear and the wrong is manifest, a preliminary injunction will not generally be awarded: *Keystone Guild, Inc. v. Pappas*, 399 Pa. 46, 159 A.2d 681 (1960), and *Herman v. Dixon*, 393 Pa. 33, 141 A.2d 576 (1958).

(Singzon v. Com., Dept. of Public Welfare, 496 Pa. at page 11.)

Thus, the plaintiff in the case at bar has the heavy burden of persuasion that:

1. The preliminary injunction is necessary to prevent immediate and irreparable harm to Norland, which could not be compensated by monetary damages.
2. Greater injury would result to Norland by refusing it than granting it would to Yurek.

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3. It properly would restore Norland and Yurek to their status as it existed immediately prior to Yurek's alleged wrongful conduct.
4. The activity sought to be restrained, i.e., Yurek's practice of medicine, is actionable.
5. An injunction is reasonably suited to abate such activity, i.e., discontinue the offending medical practice.
6. Norland's right to the injunction is clear, and Yurek's wrong is manifest.

We will focus on the issue whether Norland's right to the injunction is clear.

Kistler's letter of March 14, 1984 constituted an offer by Norland to hire Yurek to practice medicine as an employee of Norland pursuant to the terms therein proposed. Yurek's move to the Chambersburg area and commencing to practice medicine at Norland constituted the acceptance of the March 14th offer, and created an oral contract of employment between the two parties.

Agreement No. 1, dated October 25, 1984, represents the reduction of the parties oral agreement to writing with its effective date when Yurek commenced his employment on July 30, 1984. Despite the inclusion of terms not set forth in Norland's offer, it is evident that both parties were fully cognizant of the terms and voluntarily entered into Agreement No. 1. With the exception of the non-competition clause there is no question but that Agreement No. 1 is binding on both parties.

The non-competition clause must be considered separately from the other terms of Agreement No. 1, because it is well-established law in Pennsylvania that where an employment relationship previously exists, a covenant not to compete must be supported by new consideration or it will not be enforceable. *George W. Kistler, Inc. v. O'Brien,* 464 Ps. 475 (1975). *Maintenance Specialties v. Gottas,* 455 Pa. 327 (1974).

In the case at bar, Yurek had been employed by Norland for more than two months before Agreement No. 1 was executed. However, paragraph 18, the Non-Competition Clause, specifically provides: "Employees (sic) agrees that he has received from Employer the sum of five hundred ($500.00) dollars as additional compensation for this non-competition clause." In our judgment the $500.00 is the

requisite new consideration to make the clause legally effective.

Yurek was dissatisfied with his compensation under Agreement No. 1 and Kistler, on behalf of Norland, also desired certain changes and to improve Yurek's financial position. Agreement No. 2 was developed from these negotiations and executed by the parties on August 1, 1986. Agreement No. 2 differed substantially from Agreement No. 1 in that:

1. Agreement No. 1 was terminable on 90 days notice prior to the end of each year; whereas No. 2 was terminable on 90 days notice.
2. Agreement No. 1 provided health benefits whereas No. 2 does not.
3. Agreement No. 1 provided paid vacations. No. 2 does not.
4. Agreement No. 1 provided two months paid disability. No. 2 provides none.
5. Agreement No. 1 provided for a salary of $50,000 plus 33.3% of the gross income Yurek produced over $100,000. Agreement No. 2 provides compensation based on 50% of all gross income produced by Yurek.
6. Agreement No. 1 provided Yurek the option to acquire corporate stock, a partnership interest and financing options. No. 2 does not.

Both agreements included the same terms governing Yurek's duties and as to the non-competition clause.

The parties disagree as to whether Agreement No. 2 constituted a novation, i.e., a substituted contract replacing and extinguishing an existing valid contract or a new bilateral integrated contract. For the purposes of this opinion, we find the distinction to be without a difference. We conclude the parties voluntarily and intentionally entered into Agreement No. 2, and are legally bound by its terms. We also conclude that the parties specifically agreed in paragraph 14 that in consideration of the payment of the additional sum of $500.00, Yurek was barred from the practice of medicine within twenty-five (25) miles of the Borough of Chambersburg for 18 months after termination of the agreement.

Having determined Agreement No. 2 is binding upon the parties, no further consideration need be given to the issue whether Norland ever paid Yurek the $500.00 additional consideration due

him for the non-competition clause in Agreement No. 1.

We find that the duration of the non-competition clause and the area it encompasses are not unreasonable, and, therefore, not invalid as a matter of law. We also conclude that the evidence does not establish that the granting of the preliminary injunction impacts adversely upon the public to the extent that it may not be granted.

We do find that the parties did contemplate and did bargain for a specific and separate consideration for the non-competition clause, and that $500.00 is not insignificant. We also find that the consideration was not paid by Norland to Yurek. We find no merit in Norland's contention that its tender on June 26, 1989, after the three months termination notice was given, satisfied the consideration required by the non-competition clause, for that would be analogous to permitting a team another play after the final whistle had blown.

By way of comment we recognize that the expression "clear right" may not be construed to mean that a party seeking a preliminary injunction must prove at that stage his ultimate right to relief is clear and absolute, for that would essentially vitiate the necessity for a full and final hearing. *Lauria v. Kaye*, 14 D&C 3rd 604, *Valley Forge Histroical Society v. Washington Memorial Chapel*, 493 Pa. 491, 426 A.2d 1123 (1981); *Fischer v. Department of Public Welfare*, 497 Pa. 267, 439 A.2d 1172 (1982). In *County of Allegheny v. Commonwealth of Pennsylvania*, 507 Pa. 360, 490 A.2d 402 (1985), the Supreme Court observed:

> "In addition a preliminary injunction containing mandatory provisions which will require a change in the position of the parties should be granted even more sparingly than one which is merely prohibitory." (*Supra*, at page 383).

In *Valley Forge Historical Society v. Washington Memorial Chapel*, the court held: "Appellant is correct in asserting that speculative considerations cannot form the basis for issuing a preliminary injunction." (*Supra*, at page 502). In *Fischer v. Department of Public Welfare*, the court held: "In determining the propriety of the entry of an order granting a preliminary injunction, the question is whether there were any apparently reasonable grounds in the record to justify its issuance." (*Supra*, at page 270).

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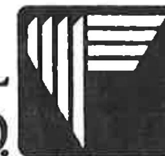

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In the case at bar, the preliminary injunction sought by Norland would be mandatory in that it would compel Yurek to discontinue his present and on-going practice of medicine. Consequently, a higher standard of proofs is imposed on Norland. We conclude the "clear right" test requires Norland to demonstrate a probability of success on the merits.

In our judgment the evidence presented establishes that there was a total failure of consideration for Yurek's promise not to practice medicine in the area defined by paragraph 14 of Agreement No. 2. Therefore, we also conclude that at this time and on-the-record before us, there is no clear right in Norland to a preliminary injunction. Having reached this conclusion, we will not discuss the other prerequisites to the issuance of a preliminary injunction.

ORDER OF COURT

NOW, this 11th day of August, 1989, the motion of Norland Family Practice, P.C., for a preliminary injunction is denied.

Trial on all matters at issue in the above-captioned matter shall commence on 9:00 a.m. on October 16, 1989.

Exceptions are granted Norland Family Practice, P.C.

VALLEY QUARRIES, INC. v. BOARD OF SUPERVISORS OF GREENE TOWNSHIP, C.P. Franklin County Branch, Misc. Docket Y, Page 569

Zoning Appeal - Pennsylvania Municipalities Planning Code Additional Evidence to the Court

1. On an appeal from a zoning hearing board, the Court may not conduct a limited hearing for the purpose of admitting additional photographic exhibits.
2. Section 11005-A of the Pennsylvania Municipalities Planning Code of

1988 provides the Court *shall* make its own findings of fact based on the record *below* and the Court may not ignore such a strong statement.

Phillip S. Davis, Esq., Counsel for Appellant

Richard W. Davis, Esq., Counsel for Appellant

Robert E. Graham, Jr., Esq., Counsel for Appellant

Paul F. Mower, Esq., Counsel for Greene Township, Board of Supervisors

Welton J. Fischer, Esq., Counsel for Greene Township Zoning and Hearing Board

David C. Cleaver, Esq., Counsel for Greene Township Environmental Association

KELLER, P. J., September 19, 1989:

This matter commenced January 16, 1986 when Valley Quarries, Inc., hereafter appellant, filed an application with Greene Township for a conditional use permit seeking approval to surface mine sand in an R-1 Zoning District (low density residential) with approximately three-fourths of the land located in a flood hazard district. The appellant's land is bounded by Woodstock Road, Brindle Road, Walker Road and privately owned agricultural land. The Greene Township Board of Supervisors on March 18, 1986 denied appellant's application and on April 12, 1986 a notice of zoning appeal to this Court was filed. On July 7, 1987 this Court filed its Opinion and Order disposing of two legal issues posed by the parties, and remanding the case to the Board of Supervisors of Greene Township, Pennsylvania for further proceedings consistent with its Zoning Ordinance and applicable law.

On or about September 15, 1987 the appellant's application for a conditional use permit was re-submitted. After public hearing November 2, 1987 the Greene Township Planning Commission recommended that the Board of Supervisors disapprove the application. The Greene Township Board of Supervisors after public hearing December 1, 1987 denied the appellant's request for a variance and for issuance of a conditional use permit. An appel to the Greene Township Zoning Hearing Board was perfected and hearings were held March 28 and 30, 1988; April 4, 25 and 28, 1988;