

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN RE: CHARLES CULLEN	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
APPEAL OF: ST. LUKE'S HOSPITAL AND	:	
ST. LUKE'S HOSPITAL AND	:	
HEALTH NETWORK	:	
	:	No. 1587 EDA 2011
	:	

Appeal from the Order Entered May 16, 2011
In the Court of Common Pleas of Lehigh County
Civil No(s): 2005-C-3330

BEFORE: BENDER, OTT, and FITZGERALD, * JJ.

MEMORANDUM BY FITZGERALD, J.: Filed: January 11, 2013

Appellants, St. Luke's Hospital and St. Luke's Hospital and Health Network [hereinafter St. Luke's], appeal from the order entered in the Lehigh County Court of Common Pleas. The order restricted the speech of the parties and counsel. We remand pursuant to Pa.R.A.P. 1925(c)(1) for a determination by the trial court within forty-five days on whether St. Luke's timely complied with the court's order to file a Pa.R.A.P. 1925(b) statement, which was due on July 14, 2011, but filed on July 18, 2011.

The instant matter arises out of the spate of litigation that resulted after Charles Cullen, a nurse employed by St. Luke's, confessed to killing

* Former Justice specially assigned to the Superior Court.

numerous patients.¹ **See generally *Krapf v. St. Luke's Hosp.***, 4 A.3d 642, 645-48 (Pa. Super. 2010) (setting forth factual background). Consequently, Appellees² filed over twenty lawsuits against St. Luke's, which were ultimately consolidated under the instant caption.

Subsequently, the trial court granted summary judgment and dismissed two of the consolidated cases: ***Hall v. St. Luke's Hosp.***, No. 2004-C-2048V (C.C.P. Lehigh July 1, 2009) (order granting summary judgment) and ***Miller v. St. Luke's Hosp.***, No. 2004-C-2052V (C.C.P. Lehigh July 1, 2009) (order granting summary judgment). This Court affirmed the dismissal of both cases. ***See Miller I, supra.***

On September 4, 2009, the court entered an agreed-upon order stating the following, in relevant part:

Counsel and the parties in these consolidated cases are hereby enjoined from making, or causing to be made, any public comment about the within matters, and any violation thereof may result in sanctions by the Court.

Order, 9/4/09.

On March 25, 2011, St. Luke's filed two lawsuits against the plaintiffs in ***Miller*** and ***Hall*** and their attorneys. The complaints raised claims for

¹ Mr. Cullen is presently serving numerous life sentences in New Jersey. ***See Miller v. St. Luke's Hosp.***, 3463 EDA 2009 (unpublished memorandum at 2) (Pa. Super. June 30, 2010) [hereinafter ***Miller I***].

² For brevity, we do not identify all the plaintiffs and only refer to the individual plaintiffs as necessary.

wrongful use of civil proceedings,³ abuse of process, fraudulent misrepresentation, civil conspiracy, and violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962.

On March 28, 2011, St. Luke's issued a press release announcing the filing of the *Dragonetti* suits. In response, on May 13, 2011, the plaintiffs in two of the consolidated cases, *Price v. St. Luke's Hosp.*, No. 2004-C-2028V, and *Heller v. St. Luke's Hosp.*, No. 2004-C-2049, presented a motion for sanctions⁴ against St. Luke's for allegedly violating the September 4, 2009 order.

On May 16, 2011, after argument, the court denied the plaintiffs' motion for sanctions and issued the following order, which we reproduce in pertinent part:

(1). All parties and counsel are hereby enjoined from making, or causing to be made, any public comment about any of the lawsuits filed against St. Luke's Hospital/St. Luke's Hospital and Health Network arising out of the alleged actions of Charles Cullen that remain pending before this Court;

(2). All parties and counsel are hereby enjoined from making, or causing to be made, any public comment about any party or counsel involved in any of the lawsuits filed

³ This claim alleges a violation of what is popularly known as the *Dragonetti* Act. *Cruz v. Princeton Ins. Co.*, 972 A.2d 14, 19 n.5 (Pa. Super. 2009) (*en banc*). We henceforth refer to these two lawsuits as the *Dragonetti* suits.

⁴ The certified docket does not reflect any such filing, but no party disputes that a motion for sanctions was properly before the trial court.

against St. Luke's Hospital/St. Luke's Hospital and Health Network arising out of the alleged actions of Charles Cullen that remain pending before this Court; and

(3). All parties and counsel are hereby enjoined from making, or causing to be made, any public comment on any matter that could be construed as reasonably calculated to affect the jury selection process in any of the lawsuits filed against St. Luke's Hospital/St. Luke's Hospital and Health Network arising out of the alleged actions of Charles Cullen that remain pending before this Court.¹

It is further ordered that violation of this Order shall result in sanctions by the Court.

¹ Counsel are reminded of their ethical responsibilities under Pennsylvania Rule of Professional Conduct 3.6(a), which states as follows:

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement[] that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

Order, 5/16/11 (capitalization omitted).

The trial court reasoned:

the language of the September 4, 2009, order—framed, as it was, in terms of prohibiting “public comment about the within matters [*i.e.*, In Re Charles Cullen Litigation under Docket No. 2005-C-3330]”—technically could be read as not reaching the subsequently filed actions alleging wrongful use of civil proceedings, or ***Dragonetti*** actions. However, the May 13, 2011, proceedings rendered it evident that the intent of the press release offered in relation to the subsequently filed ***Dragonetti*** actions was to influence public opinion more generally and, more particularly, in respect to the continuing and ongoing

actions in the ***In Re Charles Cullen Litigation*** pending before this Court. Accordingly, at the conclusion of the proceedings, and to obviate any further confusion or misunderstanding as to the import of the previously filed order of September 4, 2009, the Court issued a revised gag order, enjoining not only public comment "about the within matters," *per se*, but also comments about counsel and parties involved in the ***In re Cullen*** litigation that remains pending before the Lehigh County Court of Common Pleas as well as any public comment that could be construed as reasonably calculated to affect the jury selection process in any of the ***In re Charles Cullen Litigation*** matters that remain pending before the Lehigh County Court of Common Pleas. In short, the Court's revised order made it clear that the guise of another action could not be used as a subterfuge to influence the prospective jury panel in the ongoing ***In Re Charles Cullen Litigation*** pending before the Court.

Trial Ct. Op., 8/25/11, at 3-4. St. Luke's filed a timely notice of appeal on June 10, 2011.

On June 23, 2011, the trial court ordered St. Luke's to, *inter alia*, file a Pa.R.A.P. 1925(b) statement of errors complained of on appeal by Thursday, July 14, 2011:

[St. Luke's] shall, no later than twenty-one (21) days after the entry of this order, file of record a concise statement of the rulings or errors complained of on appeal and serve it on the undersigned judge

Order, 6/23/11.⁵

On Wednesday, July 13, 2011, St. Luke's served, via mail, a Rule 1925(b) statement on the other parties and the trial judge. The

⁵ The order complies with Pa.R.A.P. 1925(b)(3) (identifying required contents of order).

prothonotary docketed St. Luke's Rule 1925(b) statement on Monday, July 18, 2011—after the July 14th deadline.

As a general matter, Pa.R.A.P. 121(a) provides:

Filing may be accomplished by mail addressed to the prothonotary, but except as otherwise provided by these rules, filing shall not be timely unless the papers are received by the prothonotary within the time fixed for filing.

Pa.R.A.P. 121(a).

Rule 1925(b)(1), however, sets forth an exception:

(1) *Filing **and** service.*—Appellant shall file of record the Statement **and** concurrently shall serve the judge. Filing of record **and** service on the judge shall be in person or by mail as provided in Pa.R.A.P. 121(a) and **shall be complete on mailing if** appellant obtains a United States Postal Service Form 3817, Certificate of Mailing, or other similar United States Postal Service form from which the date of deposit can be verified, in compliance with the requirements set forth in Pa.R.A.P. 1112(c).

Pa.R.A.P. 1925(b)(1) (emphases added). The comment to Rule 1925(b)(1) states:

This paragraph maintains the requirement that the Statement be both filed of record in the trial court and served on the judge. Service on the judge may be accomplished by mail or by personal service. The date of mailing will be considered the date of filing and of service upon the judge only if counsel obtains a United States Postal Service form from which the date of mailing can be verified, as specified in Pa.R.A.P. 1112(c). Counsel is advised to retain date-stamped copies of the postal forms (or pleadings if served by hand), in case questions arise later as to whether the Statement was timely filed or served on the judge.

Pa.R.A.P. 1925(b)(1) cmt.⁶

In this case, the record does not contain any “United States Postal Service Form 3817, Certificate of Mailing, or other similar United States Postal Service form” from which this Court can determine whether St. Luke’s Rule 1925(b) statement was timely placed in the mail for filing with the trial court. **See** Pa.R.A.P. 1925(b)(1). The certificate of service reflects service on the trial judge on July 13, 2011. The trial court, however, docketed St. Luke’s Rule 1925(b) statement on July 18, 2011, or four days after the July 14, 2011 deadline. Generally, an untimely Rule 1925(b) statement results in waiver of all issues on appeal. ***Feingold v. Hendrzak***, 15 A.3d 937, 939 (Pa. Super. 2011). Because the record does not contain any document upon which the “date of deposit [into the mail] can be verified,” we remand to the trial court for a determination within forty-five days on whether St. Luke’s timely filed its Pa.R.A.P. 1925(b) statement. **See** Pa.R.A.P. 1925(c)(1).

⁶ Pa.R.A.P. 121(e) does not apply because the June 23, 2011 order is a court order:

(e) Additional time after service by mail and commercial carrier. Whenever a party is required or permitted to do an act within a prescribed period after service of a paper upon that party (other than an order of a court or other government unit) and the paper is served by United States mail or by commercial carrier, three days shall be added to the prescribed period.

Pa.R.A.P. 121(e). ***Contra*** Fed.R.Civ.P. 6.

J. A04044/12

Matter remanded for further proceedings consistent with this memorandum. Panel jurisdiction retained.