

No. _____

In The Supreme Court of
the United States of America

MICHAEL RAMON OCHOA,
Petitioner, pro se,
v.
DR. ARTHUR LEVINE, *et al.*
Respondents.

On Petition for a Writ of *Certiorari*
To The Pa. Supreme Court at 270 WAL 2022;
The Pa. Superior Court at 240 WDA 2022;
and The Allegheny County Court of Common Pleas
at GD-13-011757

APPENDICES AND EXHIBITS

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September 24, 2023

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MICHAEL RAMON OCHOA | IN THE
Appellant | SUPERIOR
| COURT OF
| PENNSYLVANIA
V. | No. 240 WDA
| 2022

DR. ARTHUR LEVINE; UNIVERSITY OF PITTSBURGH BOARD OF TRUSTEES;
UPMC BOARD OF DIRECTORS; DAVID S.
POLLOCK, BRIAN C. VERTZ; BENJAMIN E. ORSATTI; POLLOCK BEGG KOMAR
GLASSER VERTZ LLC; DR. GEORGE K. MICHALOP[O]ULOS; DR. ANTHONY JAKE
DEMETRIS; PRESTON G. ATHEY; ZACHARY LEHMAN; THE HILL SCHOOL; DR.
ANNE THOMPSON; DR. PARMJEET S. RANDHAWA; DR. MICHAEL A. NALESNIK;
DR. MARTA I. MINERVINI; DR. TONG WU; THOMAS E. STARZL TRANSPLANTATION
INSTITUTE; DR. MUKESH SAH; DR. PIERRE AZZAM; DR. ROLF G. JACOB; DR.
DUANE SPIKER; DR. SAMUEL WES[T]MORELAND; WESTERN PSYCHIATRIC
INSTITUTE AND CLINIC; DR. ERIN RUBIN.

Appeal from the Order Dated February 7, 2022
In the Court of Common Pleas of Allegheny County
Civil Division at No(s): GD-13-011757

BEFORE: DUBOW, J., MURRAY, J., and PELLEGRINI, J.¹

MEMORANDUM BY PELLEGRINI, J.: **FILED: September 30, 2022**

J-S34033-22

Michael Ramon Ochoa (Ochoa) appeals, *pro se*, an order of the Court of Common Pleas of Allegheny County (trial court) dismissing his claims against the above-captioned Appellees.² We affirm.

The procedural history of the present matter is lengthy and convoluted. Essentially, Ochoa commenced this case in 2013, alleging, among other things, that a group of physicians and medical institutions had mistreated him and then withheld information about his hospitalizations. In 2018, Ochoa filed a complaint which included a total of 43 counts and 25 defendants. All of those counts were dismissed in 2019 except

¹ Retired Senior Judge assigned to the Superior Court.

² Ochoa filed a separate appeal (docket number 241 WDA 2022) as to the trial court's simultaneous order denying Ochoa's motion *in limine*, and the appeal was quashed due to being interlocutory and duplicative of the present appeal.

for Count 26, which concerned a request for medical records, and these documents are the sole point of contention in the present appeal.³

In 2021, the parties agreed that the request for relief in Count 26 would be satisfied if the subject records were released to Ochoa upon his submission of an authorization of their release. Ochoa submitted an authorization for the release of the records to the Health Information Management Department of

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The UPMC Western Psychiatric Institute and Clinic (WPIC) on August 21, 2021. Lynn Conway (Conway), the records custodian of WPIC, submitted an affidavit averring that all medical records in WPIC's possession had been released to Ochoa. Subsequent to his receipt of those records, however, Ochoa continued to request additional materials pertaining to 57 days of inpatient treatment in WPIC facilities and 9 days spent at the Allegheny County Jail. These dates ranged roughly from 2006 to 2009.

The Appellees filed a motion to dismiss Ochoa's complaint on November 12, 2021, on the ground that Ochoa's claim for outstanding medical records had been mooted by his receipt of those records. Conway's affidavit was attached to the motion. Ochoa, in turn, filed a motion *in limine* on December 21, 2021, seeking to question Conway as to WPIC's record keeping and challenging the admissibility of Conway's affidavit if such questioning were not permitted. On February 7, 2022, the trial court entered an order denying Ochoa's motion *in limine*, as well as a separate order granting Appellees' motion to dismiss.

Ochoa timely appealed, and the trial court then directed Ochoa to submit a Rule 1925(b) statement.⁴ In response, Ochoa filed a statement which included 25 purported errors. However, Ochoa appeared to misapprehend the purpose of the filing, as almost all the points were factual or

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argumentative rather than specific instances of error on the part of the trial court.

In its 1925(a) opinion, the trial court reasoned that Ochoa had waived all claims on appeal because his 1925(b) statement was so incoherent that it was "the functional equivalent of no [s]tatement at all." Trial Court 1925(a) Opinion at 5. Moreover, the trial court noted that even if Ochoa had submitted an adequate 1925(b) statement, no relief would be due because Ochoa seeks to obtain medical records which he has already received or which simply do not exist. The trial court further explained that it acted within its discretion in crediting evidence that Ochoa had received all of the documentation of his medical treatment with he sought from the Appellees.

³ Judgement was entered as to the remaining 42 counts on April 15, 2019, after Ochoa failed to file an amended complaint to cure the deficiencies in those counts. The named defendants as to remaining claim in Count 26 are Dr. Mukesh Sah; Dr. Arthur Levine; Dr. Anne Thompson; the Department of Critical Care Medicine University of Pittsburgh; the University of Pittsburgh Board of Trustees; and the UPMC Board of Directors.

⁴ Pa.R.A.P. 1925(b)

Ochoa's brief does little to clarify the specific points of fact and law which he believes entitle him to appellate relief. The brief's statement of the questions involved reads as follows:

1. Do[es] evidence in the original record, data analysis, and factual admissions of opposing counsel prove beyond any reasonable doubt that the UPMC defendants remain in violation of 28 Pa. Code 115.29 = YES
2. Did [the trial court's] abuse of [its] discretion by disregarding that evidence in the original record, data analysis, factual admissions by opposing counsel, the Rules of Evidence, controlling case law, and the precedents of the trial court to justify false conclusions of fact and law with unexamined, unsupported and contradictory testimony? = YES
3. Does Judge Ward's order end this case = NO

Appellant's Brief, at 2-3.

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After reviewing the record and the applicable law, we agree with the entirety of the trial court's analysis. *First*, Ochoa has indeed waived his appellate claims by failing to file an adequate 1925(b) statement. The Pennsylvania Rules of Appellate Procedure mandate that the statement must "concisely identify each error that the appellant intends to assert with sufficient detail to identify the issue to be for the judge." Pa.R.A.P. 1925(b)(4)(ii). "The Statement should not be redundant or provide lengthy explanations as to the error." Pa.R.A.P. 1925(b)(4)(iv). "Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived." Ochoa's 1925(b) statement does not conform to any of these requirements and the resulting waiver of his appellate claims now precludes appellate relief.⁵

Second, Ochoa has failed to submit an appellate brief to this Court which conforms to the procedural rules. The arguments in the brief must be developed enough for the reviewing court to discern the essence of the issues and allow the opposing party to offer a reasonable response. *See* Pa.R.A.P. 2109(a); *see also Norman for Estate of Shearlds v. Temple Univ. Health Sys.*, 208 A.3d 1115, 1119 (Pa. Super. 2019) (holding that claims were waived)

⁵ Due to Ochoa's frivolous and burdensome litigation in his divorce proceedings, a panel of this Court, on May 24, 2014, in appellate docket number 1766 WDA 2013, entered an order barring further appeals.

because the arguments in the brief were “undeveloped and lack[ed] citation to pertinent legal authority.”⁶

The brief submitted by Ochoa is incoherent, preventing this Court from undertaking meaningful appellate review. While Ochoa states that the Appellees have violated a provision entitling him to medical records (28 Pa. Code § 115.29), he does not cogently identify which records are outstanding or why a provision of law entitles him to such materials.

To the extent that Ochoa has asserted coherent legal arguments as to the dismissal of his claim (Count 26 of the complaint) and the denial of his motion *in limine*, it would be of no avail. Both issues would turn on whether that trial court had discretion⁷ to credit the affidavit of Conway as the factual basis for determining that Ochoa’s record request was moot. We find the trial court’s reasoning persuasive in this regard:

[A] record of an act constitutes competent evidence if:

- (1) the custodian testified to its identity and the mode of its preparation;
- (2) it was made in the regular course of business at or near the time of the act; and
- (3) if the source of information, method and time of preparation justify its admission according to the tribunal’s opinion.

[42 Pa.C.S. § 6108.]

In addition, a custodian of original medical charts or records may only be required to testify on an issue in dispute “if the subpoena duces tecum so specifies[.]” 42 Pa.C.S. § 6158. Even if a health care facility fails to produce all records specified in a subpoena, “the custodian of the charts or records shall so state in a notarized affidavit[.]”. 42 Pa.C.S. § 6154.

Here,..Ms. Conway was not required to testify in person [because WPIC and Conway were never subpoenaed]. **See In Re Ulrich**, 109 A. At 924; 42 Pa.C.S. § 6158. Rather, Lynn Conway’s affidavit constitutes competent evidence that provided support to [the]

⁶ “Briefs and reproduced records shall conform in all material respects of these rules as nearly as the circumstances of the particular case will admit, otherwise they may be suppressed, and, if the defects are in the brief or reproduced records of the appellant and are substantial, the appeal or other matter may be quashed or dismissed.” Pa.R.A.P. 2101. These rules are applicable to attorneys as well as *pro se* litigants. **See Bolick v. Commonwealth**, 69 A.3d 1267 (Pa. Super. 2013) (barring *pro se* appellant from filing future appeals due to years of filing frivolous appellate claims).

⁷ An order granting a motion to dismiss is reviewed for an abuse of discretion. **See Sigall v. Serrano**, 17 A.3d 946, 949 (Pa. Super. 2011). An abuse of discretion is not merely an error of judgement, but rather, it exists when the trial court has rendered a judgement that is “manifestly unreasonable, arbitrary, or capricious, has failed to apply the law, or was motivated by partiality, prejudice, bias or ill will.” **Wall Rose Mut. Ins. Co. v. Manross**, 939 A.2d. 958, 962 (Pa. Super. 2007) (holding that the court did not abuse its discretion where the record adequately supports the trial court’s reasons and factual basis).

Motion to Dismiss, amidst other documents including those submitted by [Ochoa] himself. In Lynn Conway's affidavit, Ms. Conway attested to the record's identity and mode of preparation, the requirements for a valid authorization and the steps taken to process a valid authorization, and that [Ochoa's] request was processed pursuant to the same.

Trial Court 1925(a) Opinion, at 8-9 (footnotes omitted).⁸

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Ochoa has submitted no legal authority for the proposition that Conway's affidavit could not be considered competent evidence in this case. Nor has he submitted legal authority for the proposition that he was entitled to question Conway before her affidavit could be considered as competent evidence in support of the motion to dismiss. Thus, Ochoa has waived all potential issues on appeal due to the deficiencies in his 1925(b) statement and his brief, and even if he had adequately raised issues as to whether there was competent evidence to support the dismissal, such claims would have no legal merit.

Order affirmed.

Judgement Entered.

[S/*Joseph D. Seletyn*]
Joseph D. Seletyn, Esq
Prothonotary

Date: 9/30/2022

⁸ The trial court added that WPIC was only statutorily required to retain Ochoa's records for 7 years (28 Pa.C.S. § 563.6), and that more than that period of time had elapsed between 2009 (the final year in which Ochoa received treatment) and 2021 (the year in which Ochoa submitted the necessary authorization for the release of those materials).

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MICHAEL RAMON OCHOA | IN THE
Appellant | SUPERIOR
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v. | No. 240 WDA
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DR. ARTHUR LEVINE; UNIVERSITY OF PITTSBURGH BOARD OF TRUSTEES;
UPMC BOARD OF DIRECTORS; DAVID S. POLLOCK, BRIAN C. VERTZ; BENJAMIN
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RUBIN.
|

Appeal from the Order Dated February 7, 2022
In the Court of Common Pleas of Allegheny County
Civil Division at No(s): GD-13-011757

BEFORE: DUBOW, J., MURRAY, J., and PELLEGRINI, J.¹

J-S34033-22

AND NOW this 20th day of October 2022, Appellant's Application for Reconsideration of Order is DENIED.

PER CURIAM

¹ Retired Senior Judge assigned to the Superior Court.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MICHAEL RAMON OCHOA, CIVIL DIVISION
Plaintiff, No.: GD 13-011757

v.

DR. ARTHUR LEVINE, et al.,
Defendants.

ORDER OF COURT

AND NOW, to wit, this [7th] day of [February], 2022, upon due consideration of the Defendant's Motion to Dismiss, any filings relevant thereto, and after hearing oral argument on the same, it is hereby ORDERED, ADJUDGED, and DECREED, that said motion is GRANTED.

BY THE COURT:

[s/Christine Ward] J.
Hon. Christine A. Ward

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MICHAEL RAMON OCHOA, CIVIL DIVISION
Plaintiff, No.: GD 13-011757

v.

DR. ARTHUR LEVINE, et al., HON. CHRISTINE
WARD
Defendants. OPINION

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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MICHAEL RAMON OCHOA, CIVIL DIVISION
Plaintiff, No.: GD 13-011757
v.
DR. ARTHUR LEVINE, et al., HON. CHRISTINE
WARD
Defendants.

OPINION

I. BACKGROUND

On June 24, 2013, Michael Ramon Ochoa (“Plaintiff”), *pro se* filed a Praecept for Writ of Summons naming Dr. Arthur Levine, University of Pittsburgh Board of Trustees (“Board of Trustees”), and UPMC Board of Directors (“Board of Directors”) as Defendants. Throughout the years, Plaintiff joined 22 additional defendants, including Western Psychiatric Institute and Clinic (“WPIC”).¹ On November 5, 2018, Plaintiff filed a 43-count complaint.² Following preliminary objections and Plaintiff’s failure to properly file an amended complaint, all counts were ultimately dismissed, aside from Count 26 against WPIC, which is the focus of this appeal.³ More specifically, Plaintiff brought Count 26 against WPIC to section 115.29 of the Medical Records Services Act governing patient access to medical records. In doing so, Plaintiff requested that this Court order “the full release of all [Plaintiff’s] medical records.”⁴

Following Plaintiff’s numerous unavailing appeals seeking to reinstate dismissed claims, Plaintiff presented a Motion to Amend Complaint for argument before this Court on August 5, 2021, during which the parties agreed to release Plaintiff’s medical records following a proper record request. Plaintiff submitted an Authorization for Release of Protected Health Information⁵ dated August 20, 2021, and WPIC now asserts that all medical records within its possession have

¹ Praecept for Writ to Join Additional Defendants, August 15, 2014: Joining David Pollock, Brian Vertz, Benjamin Orsatti, and Pollock Begg Komar Glasser Vertz, LLC as Additional Defendants; Praecept for Writ to Join Additional Defendants, April 16, 2014: Joining Dr. George Michalopoulos and Dr. Anthony Demetris; November 06, 2017: Joining Chairman of the Board of Trustees Preston Athey, Headmaster Zachary Lehman, and the Hill School; Praecept to Reissue Writ of Summons, January 23, 2018: Joining Dr. Anne Thompson, Dr. Parmjeet Randhawa, Dr. Michael Nalesnik, Dr. Marta Minervini, Dr. Tong Wu, and Thomas E. Starzl Transplantation Institute (“TSTI”); May 1, 2018: Joining Dr. Mukesh Sah, Dr. Pierre Azzam, Dr. Rolf Jacob, Dr. Duane Spiker, Dr. Samuel Westmoreland, and WPIC.

² Plaintiff’s Complaint appears to be wildly deficient, asserting 40+ criminal charges pursuant to Title 18 of the Pennsylvania Consolidated Statutes, amongst others.

³ Order of Court, January 23, 2019; Order of Court, April 12, 2019.

⁴ PI’s Compl., ¶126.

⁵ Defs’ Mot. To Dismiss, Ex. E.

been released, as supported by Custodian Lynn Conway's sworn affidavit.⁶ Despite WPIC's assertion that all records were turned over in satisfaction of Plaintiff's request for relief, Plaintiff continued to file discovery motions seeking additional records that Plaintiff alleges to exist.⁷ Plaintiff specifically asserts that WPIC failed to provide 57 days of inpatient records and 9 days of Allegheny County Jail Medical Records spanning from treatment beginning in 2006 and ending in 2009.^{8,9}

Fifteen defendants, including WPIC, subsequently filed a Motion to Dismiss Complaint on November 12, 2021, asserting that "it would be frivolous for plaintiff to pursue his remaining claim after it has been mooted by the receipt of his medical records."¹⁰ Plaintiff then filed a Motion *In Limine* on December 20, 2021.¹¹ Following argument on the Motion to Dismiss, this Court entered three Orders—one granting the Motion to Dismiss, one denying Plaintiff's Motion to Enforce Discovery and Motion to Compel, and another denying Plaintiff's Motion *in Limine*.¹²

On February 17, 2022, two days after Plaintiff filed a Motion for Reconsideration, Plaintiff filed two notices of appeal specifically regarding this Court's granting the Motion to Dismiss¹³ and denying Plaintiff's Motion *in Limine*.¹⁴ On February 23, 2022, this Court issued an order directing Plaintiff to file a Concise Statement of Errors Complained of on Appeal within 21 days of that order.¹⁵ On March 10, 2022, Plaintiff timely filed his Concise Statement of Errors Complained of on Appeal.

II. ERRORS COMPLAINED OF ON APPEAL

⁶ Lynn Conway is the Director of UPMC's Health Information Management Department and oversees the process for releasing patient information and medical records from facilities including WPIC. Defs' Mot. To Dismiss, Ex. F.

⁷ PI's Mot. To Enforce Disc., filed October 1, 2021; PI's Mot. To Compel Disc., filed November 5, 2021.

⁸ Nothing in the record suggests that Plaintiff requested medical records directly from the Allegheny County Jail.

⁹ PI's Mot. To Compel Disc., Ex. A.

¹⁰ Defs' Mot. To Dismiss, ¶¶18.

¹¹ The 15 defendants include Dr. Levin[e], Board of Trustees, Board of Directors, Dr. Michalopoulos, Dr. Demetris, Dr. Westmoreland, Dr. Azzam, Dr. Jacob, WPIC, Dr. Thompson, Dr. Ranhaw[a], Dr. Nalesnik, Dr. Minervini, TSTI, and Dr. Sah.

¹² Orders of Ct., February 10, 2022.

¹³ No. 240 WDA 2022. On May 16, 2022, the Superior Court directed Plaintiff to show cause as to why the appeal should not be quashed. In response on May 20, 2022, Plaintiff suggested that the docket be combined with that at No 241 WDA 2022, conceding that the appeal is repetitive.

¹⁴ No. 241 WDA 2022.

¹⁵ Pursuant to Pa.R.A.P. 1925(b).

Plaintiff's Concise Statement of Errors Complained of on Appeal ("Statement") pursuant to Rule 1925 provides that this Court has erred as follows:

1. This appeal *references* Docs 133-142 as well as the 2022-01-21 hearing.
2. A table of authorities was provided and local rules were cited throughout.
3. The parties made directly contradictory factual assertions.
4. I claimed that UPMC has not provided access to my complete medical records, and that it is time for Judge Ward to compel discovery; the UPMC defendants claimed that they have turned over all of my records and that there is nothing left to settle.
5. My factual assertion was supported by quantitative analysis of a properly presented and authenticated data *model* which conforms to the Rules of Evidence; while my conclusions of law conform to 28 Pa. Code Ch. 115. Medical Record Services.
6. UPMC Medical Records is a partial *model* of the 250 Root Facts.
7. The *model* shows us which of those 250 Root Facts are true, it doesn't *say* which.
8. The *model* is the set of symbol strings themselves, which can be duplicated on printed paper, in a collection of .pdfs, or entirely online in the cloud.
9. The version of the *model* I received from UPMC's service providers was in the form of hundreds of scrambled printed pages and a few electronic records.
10. Page-by-page inspection would show that that version of the *model* is identical to the .pdf UPMC Portfolio *model* attached to Doc 135, and also identical to the cloud *model* linked to UPMC Medical Records Dashboard.
11. Less obvious is that the UPMC Medical Records Log attached to Doc 134 is itself a *submodel* of UPMC Medical Records.
12. Each version of the *model* shows the identical set of symbol strings using different rudimentary tools of information science, thereby allowing us to *see* different properties shared by each and every version.
13. The incomplete UPMC Medical Records Log makes it easy to identify hospital admission and discharge dates, which *shows* us for which dates UPMC was required by law to record and maintain records.
14. UPMC Medical Records Dashboard *shows* obvious gaps in those records.
15. UPMC Portfolio has a built-in search functionality, which means that typing ʌ⌘F "Azzam" *shows* that there are no entries in the record by Defendant 3.
16. It is a matter of record that *all* of the parties received identical copies of each version of the *model*, and were given ample opportunity to examine them, ask questions, or resolve technical access or usage issues.
17. The *model* *shows* that UPMC has not complied with to 28 Pa. Code 115.29.
18. This is a *mathematical proof* of Count 1 of the 2021-08-05 Amended Complaint.
19. Instead of providing a *model*, or any evidence that can be examined objectively, the UPMC defendants presented a lengthy *theory* depicting me as a deranged menace who should be stripped of my constitutional right to voice complaint in open court.
20. Defendants' contrary factual assertion is based entirely on a missing witness.
21. This Court was prohibited from regarding the affidavit of that witness by the Rules of Evidence; by properly cited Pa. Supreme Court case law; as well as by the emphatic argument of another sitting Allegheny County Common Pleas judge.

22. Factors extrinsic to the cause of action which precluded an impartial hearing were also documented at Docs 134, 135, 138.
23. So, given the choice between tangible evidence and an inadmissible affidavit, we can all see that Judge Ward disregarded the facts and the laws to pick the harebrained *theory* which conforms to this Court's observed pattern of bias.
24. Today is הַרְמָן's birthday; בָּיְנָה's was 2 weeks ago.
25. Judge Ward must now either reconsider the moderate and effective remedies which I proposed or explain her reasoning pursuant to Pa. R.A.P Rule 1925(a) without straying from the record or resorting to *ad hominem* attack on a *pro se* plaintiff.

III. DISCUSSION

a. Waiver

The Pennsylvania Rules of Appellate Procedure provide that a Concise Statement of Errors Complained of on Appeal ("Statement") shall concisely identify each errors that appellant intends to assert with sufficient detail to identify the issue to be raised for the judge," "set forth only those errors that the appellant intends to assert," and "should not be redundant or provide lengthy explanations as to any error."¹⁶ Here, Plaintiff's Statement fails to conforms to section 1925(b) of the Pennsylvania Rules of Appellate Procedure, and thus the issues raised within must be deemed waived.¹⁷

A Statement which is vague or includes rambling narration, preventing a court from identifying issues on appeal, is the functional equivalent of no Statement at all. *Commonwealth v. Dowling*, 778 A.2d 683, 686-87 (Pa. Super. 2001); *S.S. v. T.J.*, 212 A.3d 1026 (Pa. Super. Ct. 2019). In *S.S.*, the Superior Court held that a *pro se* appellant failed to preserve issues where any issues raised in his Statement were lost amid a rambling narration. *Id.* at 1033-34. Rather than asserting alleged errors, the Statement included a recitation of the appellant's testimony, interpretation of evidence presented, and conclusions as to what he thought the testimony and evidence proved. *Id.* at 1032; *see also Lineberger v. Wyeth*, 894 A.2d 141, 143-44 (Pa. Super. 2006)(holding that the appellant waived issues on appeal for vagueness and over-breadth where the Statement alleged that the court erred 'by granting a motion for summary judgement based on lack of approximate cause and dismissing [appellant's] case with prejudice')).

Here, Plaintiff provides 25 not-so-concise alleged errors in his largely incoherent Statement. Instead of identifying alleged errors, Plaintiff's Statement recites his "factual assertions" and "conclusions of law" while referring to hyperlinked databases. In error 24, Plaintiff writes in Hebrew and refers to unknown birthdates, seemingly having absolutely no relevant to this matter. Simply put, it is difficult to imagine a more emblematic occasion of

¹⁶ Pa.R.A.P. 1925(b)(4)(i),(ii),(iv).

¹⁷ Pa.R.A.P. 1925(b)(4)(vii).

inconformity to the requirements of Pa.R.A.P. 1925(b)(4). In comparison to the alleged error deemed vague and broad in *Lineberger*, which even stated the court's contested action of granting a motion for summary judgement and dismissing appellant's case, *see Lineberger*, 894 A.2d at 143-44, here, Plaintiff's Statement does not even mention any specific legal action alleged to be in error. Plaintiff's fourth purported error, which appears to be the most specific of Plaintiff's Statement, only provides that "it is time for Judge Ward to compel discovery." As such, the issues raised within Plaintiff's Statement must be deemed waived seeming that this Court is left with no option but to guess as to the issues being raised on appeal.

b. Alleged Failure to Compel Discovery

Because alleged errors 1 through 3, 5 through 19, and 24 through 25 do not identify any error, this Court will address the inklings of purported error found in alleged errors 4 and 20 through 23.

The fourth alleged error provides that "UPMC has not provided access to my complete medical records, and that it is time for Judge Ward to compel discovery..." However, Plaintiff ignores that there was nothing to compel following the dismissal of the case. In the event that the issue is not deemed waived, this portion of Plaintiff's appeal should be dismissed as moot or quashed as an improper appeal from an interlocutory, non-final order. See *Fried v. Fried*, 501 A.2d 211, 212-13 (Pa. 1985) ("It is axiomatic that an appeal will lie only from a final order unless otherwise permitted by statute or rule."); *Kovalchick v. B.J.'s Wholesale Club*, 774 A.2d 776, 777 (Pa. Super. 2001) ("A ruling on a motion *in limine* is not a final order.")

c. Alleged Improper Consideration of Affidavit in Support of Defendants' Motion to Dismiss

For ease of disposition, alleged errors 20 through 23 will be addressed together. Alleged errors 20 and 21 appear to assert that this Court improperly considered a witness's affidavit stating that "Defendants' contrary factual assertion is based entirely on a missing witness" and "[t]his Court was prohibited from regarding the affidavit of that witness by the Rules of Evidence; by properly cited Pa. Supreme Court case law; as well as by the emphatic argument of another sitting Allegheny County Common Pleas judge." While Plaintiff fails to mention neither the name of the witness referred to, nor any Rule of Evidence or case law prohibiting the Court's consideration of affidavits, the Court presumes that Plaintiff is referring to Lynn Conway's affidavit in support of Defendant's Motion to Dismiss.

Courts must consider evidence in the light most favourable to the non-movant when deciding a motion to dismiss. An order granting a motion to dismiss is reviewed for an abuse of discretion and the scope of review is plenary. *See Sigall v. Serrano*, 17 A.3d 946, 949 (Pa. Super. 2011). An abuse of discretion is not merely an error of judgement, but rather, it exists when the trial court has rendered a judgement that is "manifestly unreasonable, arbitrary, or capricious, has

failed to apply the law, or was motivated by partiality, prejudice, bias or ill will.” *Wall Rose Mut. Ins. Co. v. Manross*, 939 A.2d. 958, 962 (Pa. Super. 2007)(holding that the court did not abuse its discretion where the record adequately supports the trial court’s reasons and factual basis).

Alleged error 22 states “[f]actors extrinsic to the cause of action which precluded an impartial hearing were also documented at Docs 134, 135, 138.”¹⁸ Again, Plaintiff fails to identify “factors extrinsic” to which he refers. When reading alleged error 22 in tandem with alleged error 23, which states “[s]o, given the choice between **tangible evidence and an inadmissible affidavit**, we can all see that Judge Ward disregarded the facts and the laws to pick the harebrained *theory* which conforms to this Court’s observed pattern of bias,” the Court again presumes that Plaintiff means to asserts that the Court erred in considering Lynn Conway’s affidavit.

While affidavits deemed to be a “mere ex parte declaration made without opportunity to cross-examine” consisting of “practically nothing more than heresy, and not competent evidence” should not be considered amidst a proper objection, *In re Ulrich*, 109 A. 922, 924 (1920), a record of an act constitutes competent evidence if:

- (1) the custodian testified to its identity and the mode of its preparation;
- (2) it was made in the regular course of business at or near the time of the act; and
- (3) if the source of information, method and time of preparation justify its admission according to the tribunal’s opinion.¹⁹

In addition, a custodian of original medical charts or records may only be required to testify on an issue in dispute “if the subpoena duces tecum so specifies...” 42 Pa.C.S.A. § 6158. Even if a health care facility fails to produce all records specified in a subpoena, “the custodian of the charts or records shall so state in a notarized affidavit...” 42 Pa.C.S.A. § 6154.

Here, Lynn Conway’s affidavit was not a “mere ex parte declaration”, and Ms. Conway was not required to testify in person. *See In re Ulrich*, 109 A. at 924; 42 Pa.C.S.A. § 6158. Rather, Lynn Conway’s affidavit constitutes competent evidence that provided support to Defendants’ Motion to Dismiss, amidst other documents including those submitted by Plaintiff himself. In Lynn Conway’s affidavit, Ms. Conway attested to the record’s identity and mode of preparation, the requirements for a valid authorization and the steps taken to process a valid authorization, and that Plaintiff’s request was processed pursuant to the same.²⁰

¹⁸ Docs 134, 135, and 138 include PI’s Mot. to Enforce Disc., and Mot. To Compel Disc., and Mot. *In Limine*.

¹⁹ 42 Pa.C.S.A. § 6108(b).

²⁰ Defs’ Mot. To Dismiss, Ex. F.

Further, the right to medical records is not absolute - medical facilities have the right to follow the present practice of destroying medical records following a minimum of 7 years. *See Clouser v. Johns Manville corp.*, 48 Pa.D. & C.3.d 667, 668-69. (Pa. Com. Pl. 1988); *see also* 28 Pa.C.S.A. §563.6 (“Medical records...shall be kept on file for a minimum of 7 years following the discharge of a patient.”)

Here, Plaintiff continues to assert that WPIC failed to provide 57 days of inpatient records and 9 days of Allegheny County Jail Medical Records, the most recent being from 2009.²¹ Even though WPIC has not been subpoenaed to produce Plaintiff’s medical records, Lynn Conway produced and affidavit that “[a]ll records in possession of WPIC for [Plaintiff] were assembled and sent to him via secure email” and “WPIC does not possess any additional records for [Plaintiff] and no records were withheld.”²² In light of section 563.6 of Title 28 of the Pennsylvania Code, WPIC had no obligation to retain Plaintiff’s medical records beyond 2014, given that Plaintiff did not make a proper request until August 20, 2021. In addition, WPIC does not have an obligation to retain third-party records, such as those originating within the Allegheny County Jail.

Though no facts are quite on point, the case in issue can be analogized using procedure in worker’s compensation cases involving right-to-know law where, similarly, records are being sought pursuant to a right to such records. Although authority applicable to worker’s compensation and right-to-know law are not binding in this instance, they are certainly persuasive. A worker’s compensation claimant may take a custodian’s deposition for use in locating, authenticating, and obtaining copies of medical records, 34 Pa.Code § 131.68(a), but such deposition “shall be in the form of a written affidavit of the custodian of records as deponent without interrogation.” 34 Pa.Code § 131.68(f). The custodian’s deposition affidavit “will be admissible into evidence in the proceeding before the judge in the same manner as if the deponent appeared before the judge and testified to the authenticity of the records or items.” 34 Pa.Code § 131.68(g). Likewise, under the right-to-know law, a sworn affidavit may serve as sufficient evidentiary support for the non-existence of records. *See Sherry v. Radnor Twp. Sch. Dist.* 20 A.3d 515, 520-21 (Pa. Cmwlth. 2011); *Moore v. Off. Of Open Recs.*, 922 A.2d 907 (Pa. Cmwlth. 2010).

While Plaintiff is neither pursuing a worker’s compensation claim nor public records via right-to-know laws, Plaintiff’s efforts to obtain “missing” medical records are analogous such attempts to worker’s compensation claimants and those seeking records pursuant to right-to-know laws. This Court did not merely consider Lynn Conway’s affidavit in a vacuum, but rather

²¹ PI’s Mot. To Compel Disc., Ex. A.

²² Defs’ Mot. To Dismiss, Ex. F

considered the affidavit in the totality of the circumstances as support to Defendant's Motion to Dismiss.

As such, this Court was well within its authority and did not err in considering Lynn Conway's affidavit in support of Defendants' Motion to Dismiss pursuant to sections 6108(b) and 6158 of Title 42 of the Pennsylvania Code, which provide that a custodian's testimony is not necessary unless specified in a subpoena and that a business record may constitute competent evidence.

IV. CONCLUSION

Considering the above and Plaintiff's failure to follow proper appellate procedure, the instant appeal should be quashed, at least in part, and furthermore denied on its merits.

BY THE COURT:

[s/Christine Ward]

Dated: May 23, 2022

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MICHAEL RAMON OCHOA, CIVIL DIVISION
Plaintiff, No.: GD 13-011757
v.
DR. ARTHUR LEVINE, et al.,
Defendants.

ORDER OF COURT

AND NOW, to wit, this [26th] day of [May], 2022, upon due consideration of Plaintiff's Motion for Reconsideration, any filings relevant thereto, and after hearing oral argument on the same, it is hereby ORDERED, ADJUDGED, and DECREED, that said motion is DENIED.

BY THE COURT:

[s/Christine Ward] J.
Hon. Christine A. Ward

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

MICHAEL RAMON OCHOA : No. 270 WAL 2022

Petitioner : |

v. : |

: Petition for Allowance

: of Appeal

: from the Order of the

: Superior Court

: |

DR. ARTHUR LEVINE; UNIVERSITY OF PITTSBURGH BOARD OF TRUSTEES;
UPMC BOARD OF DIRECTORS; DAVID S. POLLOCK, BRIAN C. VERTZ; BENJAMIN
E. ORSATTI; POLLOCK BEGG KOMAR GLASSER VERTZ LLC; DR. GEORGE K.
MICHALOP[O]ULOS; DR. ANTHONY JAKE DEMETRIS; PRESTON G. ATHEY;
ZACHARY LEHMAN; THE HILL SCHOOL; DR. ANNE THOMPSON; DR. PARMJEET S.
RANDHAWA; DR. MICHAEL A. NALESNIK; DR. MARTA I. MINERVINI; DR. TONG WU;
THOMAS E. STARZL TRANSPLANTATION INSTITUTE; DR. MUKESH SAH; DR.
PIERRE AZZAM; DR. ROLF G. JACOB; DR. DUANE SPIKER; DR. SAMUEL
WES[T]MORELAND; WESTERN PSYCHIATRIC INSTITUTE AND CLINIC; DR. ERIN
RUBIN,

Respondents : |

ORDER

PER CURIAM

AND NOW, this 2nd day of May, 2023, the
Petition for Allowance of Appeal is **DENIED**.

Justice Wecht did not participate in the consideration or decision of this matter.

[A true copy Nicole Traini]

[As of 05/02/2023.]

[Attest s/Nicole Traini]

[Chief Clerk]

[Supreme Court of Pennsylvania]

IN THE SUPREME COURT OF PENNSYLVANIA
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WES[T]MORELAND; WESTERN PSYCHIATRIC INSTITUTE AND CLINIC; DR. ERIN
RUBIN

:

Respondents :

ORDER

PER CURIAM

AND NOW, this 26th day of June, 2023, the
Application for Reconsideration is **DENIED**.

Justice Wecht did not participate in the consideration or decision of this matter.

[A true copy Nicole Traini]
[As of 06/26/2023.]
[Attest s/Nicole Traini]
[Chief Clerk]
[Supreme Court of Pennsylvania]