**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY**
**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**
**CIVIL TRIAL DIVISION**

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| KAREN M. McSHANE, et al., | : | FEBRUARY TERM, 2003 |
| | : | |
| Plaintiffs, | : | No. 01117 |
| | : | |
| v. | : | Control No. 070576 |
| | : | |
| RECORDEX ACQUISITION CORP. et al., | : | Class Action |
| | : | |
| Defendants. | : | |

**ORDER AND OPINION**

**AND NOW**, this 14TH day of November, 2003, upon consideration of defendants' Preliminary Objections to plaintiffs' Second Amended Class Action Complaint, plaintiffs' response thereto, the briefs in support and opposition, and all other matters of record, and in accord with the Memorandum Opinion entered contemporaneously herewith, it is hereby

**ORDERED** that said Preliminary Objections are **SUSTAINED** in part and **OVERRULED** in part and Counts I, II, III, and IV are hereby **DISMISSED** with prejudice, and it is further

**ORDERED** that defendants shall file an Answer to the remaining allegations of the Second Amended Class Action Complaint within twenty (20) days of the date of entry of this Order.

**BY THE COURT:**

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**C. DARNELL JONES, II, J.**

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**MEMORANDUM OPINION**

The court hereby considers defendants' Preliminary Objections to plaintiffs' Second Amended Class Action Complaint (the "Complaint"). Plaintiffs are personal injury plaintiffs and their counsel who wish to represent a class of persons who have subpoenaed medical records from various medical facilities in connection with certain litigation unrelated to this action. Defendants are allegedly record copy services that charged fees to plaintiffs for producing copies of the medical records that plaintiffs subpoenaed.

Plaintiffs claim that the fees that defendants charged were unreasonable and excessive under the provisions of the Medical Records Act (the "MRA"). As a result, plaintiffs assert claims against defendants for violation of the MRA, negligent misrepresentation and/or fraud, violation of the Unfair Trade Practices and Consumer Protection Law (the "UTPCPL"), breach of fiduciary duty, and breach of implied contract and the covenant of good faith and fair dealing. Defendants have demurred to all such claims, and they also object that no claims have been asserted against defendant SourceCorp, Inc.

## I. Defendant SourceCorp, Inc.

Defendant SourceCorp, Inc. objects that it is not a proper party because all of plaintiffs' claims are against defendant Recordex Acquisition Corp. only. However, the invoices on which this action is based purport to be from Recordex Acquisition Corp. d/b/a SourceCorp Healthserve, and both defendant entities are alleged to have the same address, which is the address on the invoice. As a result, it is impossible for the Court, on the record presented so far, to determine if the two entities are truly separate and distinct, or if they are merely alter-egos of one another. Therefore, the court declines, at this juncture, to dismiss the claims against SourceCorp, Inc.

## II. Plaintiffs' Medical Records Act Claim.

The MRA is part of the Rules of Evidence, and it also implicates the Rules of Civil Procedure regarding discovery. *See* 42 Pa. C. S. § 6152. The court is unaware of any private causes of action established by the Rules of Evidence or Civil Procedure for violation thereof. Instead, any violation of such rules in normally brought to the attention of the judge presiding over the case in which the violation occurred. For example, a personal injury plaintiff who believes he/she has been overcharged for medical records produced pursuant to subpoena could file a motion for contempt against the medical records service in the personal injury action. The court recognizes that, given the amounts at issue, it is unlikely that it would be cost effective for plaintiffs to file such motions, but that is the only remedy available to plaintiffs under the MRA itself.
In order to bring their claims outside of the underlying actions in which the alleged MRA violations occurred, plaintiffs must look to the common law for relief. Therefore, plaintiffs' claim in Count I for violation of the MRA must be dismissed.

## III. Plaintiffs' Contract Claim

Although plaintiffs' may not prosecute a claim under the MRA for violation thereof, plaintiffs may bring a breach of contract claim for violation of the MRA. "[T]he laws in force when a contract is entered into become part of the obligation of contract with the same effect as if expressly incorporated in [the contract's] terms." DePaul v. Kauffman, 441 Pa. 386, 398, 272 A.2d 500, 507 (1971). *See also* James J. Gory Mechanical Contracting, Inc. v. PHA, 2001 WL 1807905 *10 (Phila Co. July 11, 2001) (statute, which gives contractor working on a public contract interest on a final payment, was read into construction contract.)

To establish a claim for breach of contract, plaintiffs must plead: "1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages." CoreStates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. 1999). In this case, plaintiffs have alleged that there was a contract between them and defendants pursuant to which defendants were to provide copies of medical records for the fees set forth in the MRA (which was a term of the contract imposed by law.) Plaintiffs further assert that defendants breached their duty to charge the fees set forth in the MRA and, as a result, plaintiffs were overcharged and suffered damages. Therefore, plaintiffs have sufficiently pled a claim for breach of contract against defendants.

However, the court finds that the alleged wrongs that form the basis for plaintiffs' breach of contract claim against defendants are not all legal wrongs, and the court hereby limits plaintiffs' claim accordingly. Contrary to plaintiffs' assertions in paragraphs 22 and 23 of the Complaint, there is no law requiring hospitals, or their designated medical

records service companies, to preserve paper originals of a patient's medical records. The Rules of Evidence provide that:

> "If any business institution . . . in the regular course of business or activity, has kept or recorded any memorandum, writing, entry, print, representation, or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed, in the regular course of business, unless its preservation is required by law.

42 Pa. C.S. § 6109. Such reproductions of the original records are "as admissible in evidence as the original itself." *Id.*

The preservation of hospital records is not required by law. The Pennsylvania Department of Health, which is charged with regulating hospitals and other medical facilities, expressly permits such entities to do away with storing massive amounts of paper.

> Medical records may be microfilmed immediately after completion . . . The original of microfilmed medical records shall not be destroyed until the medical records department has had an opportunity to review the processed film for content.

28 Pa. Admin. Code § 115.24. Furthermore, "[i]nnovations in medical records formats, compilation, and data retrieval are specifically encouraged." *Id.* § 115.26

Viewed in light of these related statutes and regulations, there is nothing in the MRA that requires that the original, paper, records be kept, nor that copies be made therefrom. Instead, the MRA recognizes that paper records may not always exist because it requires the subpoenaed health care facility to certify that "[t]he copies of records for which this certification is made are true and complete reproductions of the original *or microfilmed* medical records . . ." 42 Pa. C.S. § 6152(d) (emphasis supplied). Since

there is nothing wrong with a hospital storing its medical records in microfilm format only, there is nothing wrong with medical records services, such as defendants, making copies from microfilm and charging accordingly. *Id.* § 6152((a)(2)(i) (setting forth the original fees that could be charged for microfilm copies). Contrary to plaintiffs' assertion in paragraph 24 of the Complaint, defendants are entitled to charge the fees laid down by the Secretary of Health for microfilmed copies when defendants make copies from microfilm. *Id.*

On the other hand, defendants may not do the following, which plaintiffs apparently believe defendants did do: 1) defendants may not charge more for copies of records than the amounts prescribed by the Secretary of Health under the MRA; 2) defendants may not charge for microfilm copies when they make copies from paper originals; 3) defendants may not charge unauthorized and/or unreasonable fees when they make copies from media not specifically provided for in the MRA; and 4) defendants may not, under the guise of charging for "shipping and handling," charge more than the "actual cost of postage, shipping and delivery." If defendants have violated any of these prohibitions, then plaintiffs may succeed on their breach of contract claim against defendants.

**IV. Plaintiffs' Misrepresentation Claims**

Plaintiffs' intentional and negligent misrepresentation claims must be dismissed under the gist of the action doctrine which "precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims." Etoll, Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10, 14 (Pa. Super. 2002). "[A] contract action may not be converted into a tort action simply by alleging that the conduct in question was done wantonly." Phico Ins.

Co. v. Presbyterian Medical Services Corp., 444 Pa. Super. 221, 229, 663 A.2d 753, 757 (1995). A tort claim is barred "where the duties allegedly breached were created and grounded in the contract itself . . .[or] the tort claim essentially duplicates a breach of contract claim or the success of [the tort claim] is wholly dependent on the terms of the contract." Etoll, Inc., 811 A.2d at 19 (dismissing claims for fraud in performance of contract against defendants.)

In this case, plaintiffs claim that defendants made their representations in the invoices they provided to plaintiffs and that defendants then failed to perform in accordance with their representations. Such invoices memorialize the contracts entered into between the parties, so plaintiffs' intentional and negligent misrepresentation claims are really claims that defendants intentionally and negligently breached their contracts with plaintiffs. It does not matter in what manner defendants committed the alleged breach; it is still simply a breach of contract, and the gist of plaintiffs' action in this case clearly sounds in contract. Therefore, plaintiffs fraud and negligent misrepresentation claims in Count II must be dismissed.[1]

**V. Plaintiffs' UTPCPL Claim**

In order to assert a private cause of action under the UTPCPL, a plaintiff must have purchased or leased the goods or services, about which plaintiff complains, "primarily for personal, family or household purposes." 73 P.S. § 201-9.2. The copies of

[1] Plaintiffs negligent misrepresentation claim must be dismissed for another reason as well. "Where a plaintiff asserts negligent misrepresentation and seeks only damages for economic loss, the defendant is entitled to judgment as a matter of law." David Pflumm Paving & Excavating, Inc. v. Foundation Services, Co., 816 A.2d 1164, 1171 (Pa. Super. 2003). In this case, plaintiffs claim as their only damages the overpayments they made to defendants for copies of medical records, which is simply economic loss. *See* Complaint, ¶ 32.

medical records that plaintiffs purchased in this case were necessarily subpoenaed in connection with on-going litigation.[2] Litigation, even personal injury litigation, is not a personal, family or household occurrence, but is instead a public and/or commercial event. Therefore, plaintiffs' claim in Count III for violation of the UTPCPL must be dismissed.

**VI. Plaintiffs' Breach of Fiduciary Duty Claim**

Defendants had no fiduciary duty to plaintiffs with respect to obtaining medical records for plaintiffs. *See* Etoll, Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10, 24 (Pa. Super. 2002) (a fiduciary relationship does not arise "merely because one party relies on and pays for the specialized skill or expertise of the other party.) Therefore, plaintiffs' claim in Count IV for breach of fiduciary duty must be dismissed

**CONCLUSION**

For all of the foregoing reasons, defendants Preliminary Objections to plaintiffs' Second Amended Class Complaint, are sustained in part and overruled in part.

**BY THE COURT:**

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**C. DARNELL JONES, II, J.**

Dated: 11/14/03

[2] The MRA applies to subpoenaed medical records only. 42 Pa. C. S. § 6152(a)(1). The court expresses no opinion as to whether a patient requesting his/her medical records without a subpoena may assert a claim under the UTPCPL, but, of course, his or her request would not also fall within the purview of the MRA.