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IN THE CIRCUIT COURT OF THE NINETEENTH  
JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS

PULERA COLLISION, INC., a )  
Wisconsin Corporation; )  
ARMANDO'S COLLISION CENTER, )  
INC., a Wisconsin )  
Corporation; JAY-BEE )  
COLLISION REPAIR CENTER, )  
INC., a Wisconsin )  
Corporation, )

Plaintiffs, )

vs. )

STATE FARM MUTUAL )  
AUTOMOBILE INSURANCE )  
COMPANY, an Illinois Mutual )  
Insurance Company, )

Defendant. )

REPORT OF PROCEEDINGS at the hearing of  
the above-entitled cause before the Honorable  
Luis Berrones, Judge of said Court, on the 9th  
day of June, 2017, at the hour of 9:42 a.m.

Page 1  
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1 APPEARANCES:

2 NOVOSELSKY LAW OFFICES, P.C.

(25 North County Street

3 First Floor

Chicago, Illinois 60085

4 847.782.5800

dnovo@novoselsky.com), by

5 MR. DAVID NOVOSELSKY,

6 On behalf of the Plaintiffs;

7 EIMER STAHL LLP

(224 South Michigan Avenue

8 Suite 1100

Chicago, Illinois 60604

9 312.660.7665

mmccluggage@eimerstahl.com), by

10 MR. MICHAEL L. McCLUGGAGE,

11 On behalf of the Defendant.

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13  
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16  
17  
18  
19  
20 REPORTED BY: ANGELA M. INGHAM, CSR, RPR

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1 THE COURT: Pulera vs. State Farm. I  
2 have a motion to dismiss.

3 MR. McCLUGGAGE: Good morning, your  
4 Honor, Mike McCluggage for the defendant, State  
5 Farm.

6 MR. NOVOSELSKY: David Novoselsky for  
7 the plaintiffs, your Honor, good morning.

8 THE COURT: Good morning. Go ahead,  
9 it's your motion.

10 MR. McCLUGGAGE: Your Honor, when we  
11 were last here, the Court dismissed plaintiff's  
12 complaint, the tortious interference, breach of  
13 contract, common law fraud claims because none  
14 of the three plaintiffs had set out facts to  
15 support the elements of those cause of action,  
16 as each of them is required to do under Illinois  
17 fact pleading standards. And I don't think  
18 there's any dispute that fact pleading standards  
19 apply. If you look at the cases cited by the  
20 plaintiffs, Grund, Schuster, Feigner (phonetic),  
21 clear fact pleading is the standard.

22 I'll try to be brief, avoid  
23 repeating a lot of what's in our papers, but the  
24 bottom line is that the first amended complaint

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1 doesn't cure the legal insufficiency in the  
2 claims made by these individual plaintiffs.

3 We submitted a red line that  
4 attempts to show the ways in which the first  
5 amended complaint differs from the prior  
6 complaint.

7 I think it's fair to say there are  
8 no changes that overcome the insufficiencies, so  
9 I'll address each of these counts, contract,  
10 fraud, and tortious interference; but there's  
11 one overarching shortcoming, and that's that the  
12 facts are absent. The facts still aren't there.

13 Each of these plaintiffs as the  
14 Court may recall -- and I know you've looked at  
15 the papers -- is a body shop which formerly had  
16 a Select Service contract with State Farm; and  
17 according to these allegations they had these  
18 contracts for a number of years.

19 First amended complaint alleges  
20 that they were no longer participants in the  
21 Select Service program as of sometime in 2015,  
22 but there aren't any allegations as to how the  
23 Select Service contracts ended.

24 Under the agreements, they agreed



1 to a number of provisions including provisions  
2 as to how the rates and pricing for paints and  
3 materials would be set in return for being  
4 identified as a State Farm Select Service  
5 facility.

6 An example of the Select Service  
7 contract is an exhibit to their complaint; and  
8 as such, it's part of the pleadings, and we've  
9 agreed with Mr. Novoselsky that that particular  
10 Select Service contract can be representative of  
11 the contracts of all three.

12 MR. NOVOSELSKY: That's correct, your  
13 Honor.

14 THE COURT: Okay. That was one of my  
15 questions. I only had one contract.

16 MR. NOVOSELSKY: That's correct. We've  
17 stipulated to kind of reduce the paperwork. We  
18 apologize for that.

19 THE COURT: No, that's fine. I assume  
20 they were all the same.

21 MR. NOVOSELSKY: Pretty much the same  
22 all over the country.

23 MR. McCLUGGAGE: There may be some minor  
24 differences, but I think for the purposes for

1 what we're talking about they're the same.

2 MR. NOVOSELSKY: We can so stipulate,  
3 your Honor.

4 MR. McCLUGGAGE: And it's notable, by  
5 the way, these agreements are terminable at any  
6 time by either party, and also there's no  
7 allegation here that a body shop has to be in  
8 the Select Service program to do business with  
9 people insured by State Farm.

10 Let me return to the contract  
11 claim. Basics, to state a claim for breach of  
12 contract, they have to identify a provision of  
13 the contract that was breached and the facts  
14 that show the breach.

15 They didn't satisfy those elements  
16 in their original complaint, and they haven't  
17 done so here. They don't identify any  
18 particular provision of the contracts that State  
19 Farm supposedly breached, and that in and of  
20 itself makes their contract claims insufficient.

21 And when they start talking about  
22 the conduct that they contend was a breach of  
23 the complaint, reduction of rates for labor,  
24 reduction of prices for paint and materials,

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1 lowering of the rating on the State Farm  
2 website, discouraging State Farm from using  
3 their services, they don't cite any provision of  
4 the contract that was violated by this conduct.

5 And it's pretty clear from the  
6 contract itself that the conduct they allege is  
7 either explicitly permitted under the contract  
8 or it's not even addressed under the contract;  
9 and, of course, if it's not addressed under the  
10 contract, it can't be the basis for a contract  
11 claim.

12 And under Illinois law, the  
13 language of the contract takes precedence over  
14 the allegations of the complaint based on the  
15 contract.

16 Here, the contract explicitly  
17 provides that the plaintiffs agree to accept the  
18 labor rates and paint and materials pricing  
19 identified through a State Farm survey. That's  
20 in Section 4.

21 There was no contractual obligation  
22 for State Farm to consult with the plaintiffs to  
23 conduct a survey in a particular way. Of  
24 course, they could depart the arrangement if

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1 they found the rates unacceptable.

2 The agreement also allows -- and  
3 this is Section 5(c), allows State Farm to  
4 evaluate the performance, communicate  
5 performance rankings in advertising,  
6 publications, or other media for customers.

7 So as to those --

8 MR. NOVOSELSKY: Would you repeat that  
9 again? I apologize.

10 MR. McCLUGGAGE: Yes. What I was  
11 saying, David, is that Section 5(c) allows State  
12 Farm to evaluate the performance of shops and to  
13 communicate the performance rankings in  
14 advertising, publications, and otherwise to  
15 customers and others.

16 So those provisions of the contract  
17 clearly provide that these allegations of  
18 misconduct are, in fact, not inconsistent with  
19 the language of the contract and permitted by  
20 the contract.

21 They also allege State Farm  
22 encouraged vehicle owners to use the services of  
23 other State Farm Select Service shops after they  
24 left the Select Service program. None of these

1 plaintiffs has identified a single customer who  
2 was steered away, and I'll come back to that in  
3 connection with the tortious interference claim.

4 And perhaps more importantly for  
5 purposes of the contract claim, there isn't any  
6 provision that obligated State Farm to direct  
7 customers to plaintiffs' shops. In fact, the  
8 very first line of the agreement tells a shop  
9 that signs up into the Select Service program  
10 that vehicle owners have the right to determine  
11 which shop they want to use.

12 And then the other point is, once  
13 the contracts were over, the plaintiffs didn't  
14 have contract rights. So to the extent they're  
15 focusing their contract claim on State Farm's  
16 conduct after the contracts ended, it can't form  
17 a basis for a breach of contract claim.

18 MR. NOVOSELSKY: Do you want to do this  
19 count by count?

20 THE COURT: No. We'll go through the  
21 whole thing.

22 MR. NOVOSELSKY: Because I get confused  
23 sometimes. I'm getting older.

24 THE COURT: We're all getting older, but



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1 go ahead and finish your argument.

2 MR. NOVOSELSKY: Some of us are. Other  
3 people just die and they don't get old.

4 MR. McCLUGGAGE: Moving on to the fraud  
5 claim, fraud claim is related to and dependent  
6 on the breach of contract.

7 If you look at paragraph 75, they  
8 base their fraud claim on an allegation that  
9 State Farm fraudulently represented to the  
10 plaintiffs that it would abide by the terms of  
11 the Select Service agreement. They don't  
12 specify any provision of the contract that was  
13 the subject of the representation. So you don't  
14 have a specific allegation of a  
15 misrepresentation.

16 And then, of course, to state a  
17 legally adequate fraud claim, they have to plead  
18 specifics. They have to plead the specific  
19 facts of the misrepresentation, why it was  
20 false, who made it, when it was made, to whom it  
21 was made; and none of the plaintiffs have  
22 supplied any fact allegations to satisfy those  
23 elements.

24 In the original complaint, they

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1     allege that State Farm, the corporation, had  
2     made a representation that it would abide by  
3     some provisions of the contract without  
4     specificity. That obviously wasn't a  
5     particularized allegation that somebody had made  
6     a misrepresentation.

7                     I think their only attempt to  
8     improve the fraud allegation was to add the  
9     words "through its agents and employees." In  
10    other words, State Farm through its agents and  
11    employees had made the representation, but that  
12    doesn't identify any person who made a relevant  
13    statement to any plaintiff, nor are there any  
14    allegations when these misrepresentations were  
15    made or to whom they were made.

16                    And since the plaintiffs have not  
17    stated facts to establish a breach of contract  
18    claim, keeping in mind the fraud claim was  
19    focused on contract, they can't assert with  
20    facts how a misrepresentation concerning the  
21    contract was false.

22                    Then apart from the lack of  
23    particular facts, the lack of specificity, the  
24    fraud claim also should fail because they're

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1 basically trying to disguise a contract claim in  
2 the language of fraud, and under Illinois law  
3 that doesn't work. Smith vs. Prime Cable case  
4 so holds.

5 The cases the plaintiffs cite in  
6 their arguments on tortious interference make it  
7 very clear that a tortious interference  
8 complaint fails if it doesn't contain factual  
9 allegations in support of each element of the  
10 claim, and I'm referring to the Grund case and  
11 the Schuster case.

12 The first element of the tortious  
13 interference claim is the plaintiff had a  
14 reasonable expectation of a valid business  
15 relationship; and in Illinois, a valid business  
16 expectancy involves an allegation of  
17 relationships with specific third parties. The  
18 DuPage Aviation Corps case makes that clear, but  
19 there are also others.

20 None of the plaintiffs has  
21 identified a single party with which it had a  
22 business relationship, much less a reasonable  
23 expectation that it would have more business  
24 from that specific third party in the future.

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1                   In the context of the collision  
2     repair business, I would suggest that given  
3     vehicle accidents are infrequent, it's  
4     implausible to believe that there's going to be  
5     any reasonable business expectation as to any  
6     particular vehicle owner.

7                   Even if they had identified  
8     specific customers, they would also have to  
9     state facts to support intentional interference  
10    with their relationships on the part of State  
11    Farm.

12                  In the language of the Schuster  
13    case, the plaintiff would have to allege that  
14    the defendant acted toward a third party.  
15    There's none of that here. No plaintiff has  
16    alleged State Farm conduct that would satisfy  
17    this Shepherd intentional interference  
18    allegation claim.

19                  One of the benefits of the Select  
20    Service participation is that vehicle owners  
21    could view the names of these Select Service  
22    shops on State Farm's website, and that's an  
23    advantage to the shop. Once those names  
24    disappear from the website, it's entirely

1 possible that the vehicle owner will go  
2 elsewhere, but that's not tortious interference.  
3 That's not even interference.

4 That leads to the additional reason  
5 why the tortious interference claim fails, and  
6 that is that you can't bring tortious  
7 interference claims against parties like State  
8 Farm in this instance that have a financial  
9 interest in the transaction.

10 Under the insurance policy State  
11 Farm is responsible to reimburse the repairs,  
12 has an interest in the insured's selection of  
13 the repair facility.

14 THE COURT: Is that a 2-615 argument or  
15 an affirmative matter that's under 2-619?

16 MR. McCLUGGAGE: I think it's a 2-615  
17 argument as well; but even if it isn't, that's  
18 one of multiple reasons why the tortious  
19 interference claim should fail.

20 THE COURT: But that would come at a  
21 later point in time because, if it's a 2-619  
22 argument, I can't discern that from the  
23 complaint itself. You're telling me that's the  
24 situation, so really it's not before me.



1 MR. McCLUGGAGE: I don't think there's  
2 any doubt that State Farm has a financial  
3 interest in the relationships with its insureds  
4 and in the rates, for example, it has to pay  
5 body shops for repairs. I don't know that  
6 there's any -- I don't know that we need to go  
7 outside the pleadings for that.

8 I think the Select Service in  
9 itself basically brings those facts; but short  
10 of that, we don't have any identification of  
11 third parties; and we don't have any  
12 identification by any individual plaintiff,  
13 keeping in mind that they all have to satisfy  
14 these elements here, of conduct by State Farm  
15 that would constitute intentional interference.

16 Finally, the declaratory count,  
17 this is similar to the permanent -- or  
18 preliminary and permanent injunction counts that  
19 the Court dismissed first time around, and they  
20 have not come back.

21 But declaratory relief is a remedy.  
22 It's not a substantive cause of action. It has  
23 to be based on a substantive cause of action,  
24 and here they don't have legally sufficient

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1 causes of action, so it would fall for that  
2 reason alone, but the point is it's not a  
3 separate stand-alone cause of action.

4 The other point is that to the  
5 extent they're seeking declaratory relief based  
6 on rate issues for which they are seeking  
7 damages -- they're seeking declaratory relief  
8 for a complaint that's based on an action for  
9 damages that's already accrued, declaratory  
10 relief is appropriate to address threats of  
11 future harm.

12 So, your Honor, we think that this  
13 complaint once again fails. Plaintiff's  
14 principal argument that the complaint is  
15 sufficient is that they're not required to plead  
16 evidence.

17 We might agree with that depending  
18 on what they're talking about, but they do have  
19 to plead facts. In the Feighner case on which  
20 they principally rely makes it clear that  
21 factual allegations are necessary.

22 They haven't gotten it down this  
23 time, and so this complaint should also be  
24 dismissed.

1                   They seek further right to amend.  
2     I think the Court gave pretty clear direction  
3     the last time dismissing the original complaint  
4     and allowing leave to amend. This was an  
5     opportunity for them to satisfy the  
6     shortcomings, and they haven't done it.

7                   THE COURT: Mr. Novoselsky?

8                   MR. NOVOSELSKY: Judge, thank you; and,  
9     again, if I'm losing track, it's because of the  
10    age, not the ability to reason.

11                   I listen today, and this is frankly  
12    where I think this has always been going. If  
13    you listen to the argument, the issue on  
14    pleading ultimate facts in both the Feighner  
15    case and the Scott case that came up in the  
16    antitrust context which we actually discussed in  
17    the other earlier cases about insufficiency, it  
18    says that the purpose of a complaint is to  
19    identify the cause of action in such a manner  
20    that the party responding, frankly to coin a  
21    phrase, knows what they're being asked to  
22    respond to.

23                   What we've heard now -- let me go  
24    through the first part of what was argued. You

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1 had a lengthy discussion this morning -- and, if  
2 necessary, I suggest the Court order the  
3 transcripts and the Court can read while you're  
4 taking notes.

5 Well, the contract says we can do  
6 this. Basically what their defense is under  
7 6-15, we complied with the contract. State Farm  
8 complied with the contract; therefore, it  
9 doesn't state a cause of action.

10 That may be true under 6-19 or a  
11 summary judgment. They clearly understand where  
12 in their own contract this is based on,  
13 primarily the question of they concede -- and  
14 it's in the contract -- that labor rates can be  
15 changed by appropriate criteria.

16 Counsel says, well, we have the  
17 right to change these rates and it's in the  
18 contract. That begs the question they obviously  
19 know exactly what this complaint focuses on and  
20 their position is -- and I listened to it  
21 carefully this morning -- Judge, look at the  
22 contract, we can -- I think his phrase is we can  
23 do every one of these things.

24 So, in other words, we know exactly

1 what you're saying. We have satisfied --  
2 whether it's Carriageway West or the Scott case,  
3 but you haven't given us evidence to show that  
4 you can prevail on our breach of contract.

5 I paint your car. We agree that  
6 they paint your car you give me \$100. We come  
7 in and say, Judge, they didn't paint our car  
8 properly. They say, well, Judge, look at the  
9 contract. It says if we did it right we get our  
10 money, so where is the cause of action? Judge,  
11 it's very eloquently dressed up, but that's  
12 basically what it is.

13 And, again, I invite the Court, if  
14 I'm misstating this, to go back, take a look at  
15 what you just heard. It's exactly what was  
16 heard.

17 So State Farm knows precisely using  
18 the Carriageway West argument the allegations as  
19 to what they're being charged with breaching in  
20 this contract.

21 They respond by acknowledging that  
22 they know it, which is far different from all  
23 the other cases on a 6-15, but they say to you  
24 explicitly and in their pleadings we have a



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1 right to change the rate; therefore, you can't  
2 sue us for it.

3 That may be possible if they did it  
4 the correct way. The contract, I point out,  
5 doesn't say we can arbitrarily or on our own  
6 volition change the rate. It says based on  
7 certain criteria.

8 Our position is -- and it's in the  
9 complaint very detailed -- the criteria they use  
10 was inappropriate. They used a demographic  
11 survey basically saying Kenosha is similar to  
12 Lake County, which is similar to Chicago, which  
13 I think would surprise a lot of people who live  
14 in those three areas. And, therefore, since the  
15 demographics are similar, the rates should be  
16 similar because body work in those areas should  
17 be treated the same way. That's an issue of  
18 fact.

19 I want to focus on the fact that  
20 they've identified it in their own motions to  
21 dismiss. They don't say we don't know what  
22 you're talking about, which in theory is what a  
23 6-15 says, because the other thing they ignore  
24 if it isn't specific enough, the same thing with

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1 who are the identity of each customer. That is  
2 a request to admit or a motion for more  
3 definitive pleading.

4 We keep coming back -- everything  
5 I've heard today is lack of evidence. Every  
6 single allegation they know exactly what they're  
7 charged with, so that's as to the contract.

8 Now as to this tortious  
9 interference, it's interesting. I just heard  
10 today given the fact that vehicle collisions  
11 occur only spasmodically we really can't be sued  
12 for interference because you would have to  
13 identify a person who is going to have another  
14 accident. I listened very carefully to that.

15 In other words, no insurance  
16 company could ever be sued for interference.  
17 Why? Because in order to do that, you would  
18 have to establish that Person X who you fixed  
19 his car once before will never have another  
20 accident.

21 That comes back to the Oakleaf case  
22 which your Honor read which is pretty  
23 interesting in Illinois. Sometimes I put my own  
24 failures, where a franchisee, the person who

1 gets the franchise, the franchisee sued the  
2 franchiser who never allowed them to complete  
3 their franchise. In other words, so they sued  
4 them for loss of business.

5 And the franchiser successfully  
6 argued, well, wait a minute, you didn't have any  
7 business. You only have to prove that John  
8 Smith would have come in and hired you -- they  
9 were a computer company -- to set up their  
10 computer network; and since you never got  
11 started in your business, you cannot prove  
12 damages. It's a spin on this.

13 The Appellate Court said that's  
14 like saying the wrongdoer by committing the  
15 wrongful act, i.e., canceling contract or not  
16 supplying another contract, can obviate any  
17 claim for damages even though if the  
18 relationship had gone ahead they would have had  
19 damages or at least a cause of action and profit  
20 from their own conduct. That's just a variation  
21 on this.

22 And I didn't cite, and I apologize.  
23 When I was listening to the argument, it came to  
24 my mind. It's called Oakleaf of Illinois vs.

1 Oakleaf. It's a First District --

2 THE COURT: But isn't there a difference  
3 between a startup who is trying -- I mean, isn't  
4 the distinction a business that's trying to get  
5 started as opposed to an ongoing business who  
6 has regular customers and has contracts?

7 I mean, that's what his argument is  
8 is that you're an ongoing business and you're  
9 saying we tortiously interfered with your  
10 customers, but you haven't identified what  
11 customers you've lost because of it. I don't  
12 know what your client does other than body shop  
13 repair. He may have other automotive  
14 services --

15 MR. NOVOSELSKY: These are all body  
16 shops.

17 THE COURT: If he has other automotive  
18 services or whatever. But he says Mr. John Doe  
19 used to come in here for oil changes all the  
20 time but since he saw the rating on State Farm I  
21 don't even have him.

22 MR. NOVOSELSKY: Here's the problem with  
23 that, your Honor. I agree there's a  
24 distinction. I think in our case it's even

1 clear.

2 I just heard the argument that you  
3 can't tell if any particular person will ever  
4 have another accident. Therefore, there can't  
5 be tortious interference because it doesn't make  
6 any difference if John Smith came in to me and  
7 said, you know, I'm not going to bring my car  
8 back to you if there's another accident because  
9 State Farm has dropped you.

10 Let's say I say that, which is what  
11 they say we have to say. The response would be,  
12 well, Mr. Smith isn't going to bring his car in  
13 because it never got injured -- didn't get  
14 damaged, pardon me, damaged. I'm thinking of  
15 people, not cars, although a lot of people love  
16 their cars.

17 And that's really the problem with  
18 this argument. They're saying frankly -- and  
19 it's right in the record; counsel said it --  
20 well, given the service this insurance company  
21 provides for its insureds, unless a specific  
22 insured would have gone to that body shop and  
23 you can prove that they didn't, there's no cause  
24 of action. But it's even better than that



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1 because then you only have a cause of action as  
2 to the loss of business of that one consumer out  
3 of hundreds of thousands.

4 So it's kind of a circular argument  
5 which says basically there is an immunity for a  
6 particular cause of action in the State of  
7 Illinois based on -- and it's the same thing as  
8 Oakleaf. You have to show us the actual loss;  
9 but since no one came to you with the damage, no  
10 one came to you to buy the computer, you have no  
11 damage.

12 So I think the fact that they're an  
13 existing business makes it even less  
14 questionable than in Oakleaf because in Oakleaf  
15 the Court said I don't know if you would have  
16 stayed in business, how do you know you would  
17 have succeeded.

18 And the Appellate Court said that's  
19 the problem here. You cut somebody's water off,  
20 and then you say prove to me that you would have  
21 had the opportunity to cook with it, and that's  
22 what they're saying to you right now: Unless  
23 there has been a specific customer that comes in  
24 saying I just had another accident, Steve or

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1 Bob, and I would love to bring it to you because  
2 you do good work but State Farm says they won't  
3 pay for it here, you charge the wrong labor  
4 rates, that is in essence what they're saying.

5 Now they may be in a position of  
6 providing evidence on a 6-19 or a summary  
7 judgment showing based on their own statistics  
8 because they're the ones that have it that the  
9 flow of business to the other shops in the area,  
10 which would be an indication of people are going  
11 elsewhere because of this, has not increased  
12 and, therefore, it's not caused by it. That's  
13 the way to do it. I've found another case  
14 dealing with --

15 THE COURT: Just a drop in accidents,  
16 people not having accidents.

17 MR. NOVOSELSKY: That's my point.  
18 People have accidents every day but not the same  
19 people because, candidly, I used to have State  
20 Farm and somebody hit me and they dropped me  
21 because the other guy had State Farm and I had a  
22 bigger policy. I'm sorry, but that's typical of  
23 insurance companies. It's not State Farm.  
24 They're actually a pretty good carrier.

1 THE COURT: I don't think he took  
2 offense.

3 MR. NOVOSELSKY: No, I didn't think he  
4 did, as long as they pay his bill.

5 But the point is, your Honor, it's  
6 an argument that basically says -- and I'm not  
7 trying to beat this to death -- we can never be  
8 sued because of the nature of our business.

9 A body shop, we can cut them off,  
10 put them out of business in essence but since  
11 they can't show that their business is based on  
12 repeat customers by specific customer -- and I  
13 assure the Court we can go back and show that we  
14 had a steady stream of business. Were some of  
15 them repeat customers? Yes. Can I say that  
16 Customer Smith -- and that's the problem.  
17 That's what they said last time, and your Honor  
18 said why don't you take a crack at it. We did.  
19 But if you listen to the argument today, that's  
20 the flaw in this argument.

21 We have a wonderful type of  
22 business that we can do something no other  
23 business -- most other businesses can't by the  
24 nature of our business.

1 I guess it was a doctor who said --  
2 if your Honor remembers the NorthShore case  
3 which you ruled against me on. The issue there  
4 was, well, Dr. Smith, who has an independent  
5 practice, would have to show that Mr. Allen who  
6 came to him before went to NorthShore and it's  
7 only the specific person, then your damages are  
8 limited to losing Mr. Allen. That's contrary to  
9 the entire antitrust concept. Your Honor didn't  
10 say that, by the way, but that would be --

11 THE COURT: I don't remember saying  
12 that, but go on.

13 MR. NOVOSELSKY: You didn't. No, you  
14 didn't. We have a disagreement on other issues,  
15 and we'll see what the Appellate Court says, but  
16 that's neither here nor there. But that's my  
17 point, your Honor. We're creating arguments  
18 which, if you look at them, at best they're  
19 factual.

20 The contract argument is clearly  
21 facts, we didn't breach the contract. And your  
22 Honor very candidly admits a 6-15 on that basis.  
23 6-19, yes. Summary judgment, yes. That's the  
24 contract.

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1           The tortious interference we just  
2 walked through. We've said everything we can  
3 say factually, so the issue is not do they  
4 understand the cause. The issue is how much  
5 proof do we have, i.e., evidence. That is  
6 something that, if they're asked for specifics,  
7 you can get that in a request to admit or you  
8 can get it in a motion for more definite  
9 statement.

10           Again, they're saying as a matter  
11 of law -- and I hate to keep going back -- we  
12 don't understand the cause of action. That's  
13 what Carriageway West does, that -- or there is  
14 no recognized cause of action. Those are the  
15 two things under 6-15.

16           They're saying something completely  
17 different. You haven't given us names of  
18 specific people, which also they're saying very  
19 candidly is you really can't because you would  
20 to have a person who was a repeat person who  
21 went to a different body shop which would then  
22 limit damages to one person and, I guess, would  
23 open the gates to conducting discovery to see  
24 how many other State Farm insureds went to his



1 body shop. Again, that's a fact issue.

2 Now the declaratory judgment, I  
3 think, is pretty straight forward, your Honor,  
4 and I know you've got questions for me, so I'll  
5 finish it up.

6 The case they cite simply doesn't  
7 say what they say. It's in our response at  
8 Page 3 and 4. Barringer simply says that a  
9 declaratory judgment is remedial in nature.  
10 Agreed. That doesn't mean a cause of action  
11 doesn't exist.

12 The complaint requests declaratory  
13 relief based on our belief that the contract was  
14 violated. I agree they say, well, it's based on  
15 the assumption that there's a valid contract.  
16 Well, if there's no valid contract, your Honor,  
17 you're not going to get declaratory rights in  
18 any situation. So I think that argument is not  
19 well taken. I know the Court was writing down  
20 some questions, and I'm happy to listen to the  
21 Court.

22 THE COURT: No, go ahead, finish.

23 MR. NOVOSELSKY: I think, your Honor,  
24 we're dealing really with a motion to dismiss

1 which illustrates that under Illinois law there  
2 are more than sufficient facts to allow this  
3 defendant to know precisely what the cause of  
4 action is.

5 Let me point this out: Unlike most  
6 6-15 motions that say no such cause of action  
7 exists based on these facts, the motion here  
8 says we don't think there's enough facts to  
9 prove that we violated, particularly in the  
10 contract count.

11 You know, if they talk specific --  
12 they don't say the allegations as to how it was  
13 violated are unclear. They deal specifically  
14 with the changes in the labor rate based on the  
15 contractual clause that that change in rating is  
16 supposed to be key to a certain way of doing  
17 things.

18 Counsel said, well, we can do this  
19 under the contract; therefore, it's a dismissal.  
20 And, again, I would like the record to reflect  
21 that I think what we're dealing with here may be  
22 a case that will be tough for me to prove  
23 eventually but a case that has been set forth in  
24 sufficiency that the Court should allow the

1 matter to go ahead.

2 If I was defense counsel, I would  
3 be in here on a summary judgment or a motion  
4 under 6-19, as your Honor pointed out on that  
5 issue, which is clearly a 6-19 issue and not a  
6 6-15, and ask the Court to deny the motion to  
7 dismiss and let the case proceed.

8 THE COURT: Go ahead.

9 MR. McCLUGGAGE: Mr. Novoselsky is  
10 essentially making an argument that Illinois  
11 pleading standards are notice pleading  
12 standards, much as the federal standards are  
13 notice pleading standards.

14 But our contract argument is clearly a  
15 2-615 argument because, number one, they haven't  
16 specifically identified a provision of the  
17 contract that was violated. Even if he gets  
18 beyond that, they attach the contract to the  
19 complaint. It becomes part of the complaint and  
20 thereby controls --

21 THE COURT: But then he said that you  
22 basically violate the rate provision of the  
23 contract because you changed it and you  
24 inappropriately, improperly changed it. That

1 may or may not be true.

2           Saying that I have a right to  
3 change it doesn't address the issue that these  
4 allegations said that you improperly changed it,  
5 that you used criteria you shouldn't use, and it  
6 was wrong and you breached the contract. How  
7 can I resolve that issue at this point?

8           MR. McCLUGGAGE: Well, the provision  
9 simply says that the shop agrees to the rates  
10 that will be determined in accordance with the  
11 survey. There's nothing in the contract  
12 concerning --

13           THE COURT: He said your survey was  
14 wrong. You could take a survey and say, you  
15 know what, the rates down in southern Illinois  
16 are "x," which is not a large metropolitan area,  
17 and that's what we're going to base the rates  
18 on.

19           Isn't that an issue, a factual  
20 issue, whether, in fact, what you did was  
21 appropriate? And he's saying what you did isn't  
22 appropriate because you put his client into a  
23 certain geographic area that he shouldn't be  
24 placed in to determine the rates.

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1 MR. McCLUGGAGE: Well, number one --

2 THE COURT: And ultimately you may be  
3 right to say, you know what, I can use whatever  
4 survey I want. I don't know if you can or not,  
5 but at this point it's a 2-615.

6 MR. McCLUGGAGE: Well, I understand, but  
7 Lake County and Kenosha County are pretty close  
8 together --

9 THE COURT: I don't know if I can take  
10 judicial notice of that.

11 MR. McCLUGGAGE: Just on the face of it,  
12 there's nothing inappropriate, and there's  
13 nothing in the contract that requires that the  
14 survey be conducted in a particular way. I  
15 think his argument is really an argument that  
16 there is some obligation of good faith and fair  
17 dealing.

18 THE COURT: Well, that's what I was  
19 going to say. This is probably a true good  
20 faith and fair dealing with one another because  
21 it is within your discretion as to how you're  
22 going to do the survey.

23 MR. McCLUGGAGE: I don't think this  
24 would fit into the narrow category of complaints



1 that would fit into the good faith and fair  
2 dealing concept in Illinois. It's been limited.  
3 But in any event, he hasn't pleaded that. He's  
4 pleaded breach of contract.

5 THE COURT: But that is a breach of  
6 contract. The violation of the doctrine of good  
7 faith and fair dealing is a breach of contract  
8 claim.

9 MR. McCLUGGAGE: Well, you have to have  
10 that as well, but it's only recognized in  
11 certain circumstances that aren't really in  
12 play. We haven't briefed that issue  
13 specifically because they haven't made that  
14 claim in their amended complaint.

15 So in any event, the contract  
16 doesn't require that the survey be conducted in  
17 any particular way; and, of course, the shop has  
18 the option to get out of the contract if they  
19 don't like the rates that they're able to charge  
20 State Farm, terminable at will.

21 As to the tortious interference  
22 claim, Illinois law is clear. You have to  
23 identify specific third parties with which there  
24 was interference.

1           The argument he's making, as I  
2 understand it, is at any time a buyer of a  
3 service doesn't come back to the seller of the  
4 services that seller can pursue a tortious  
5 interference claim. I'm not sure what the  
6 boundaries of his argument would be.

7           THE COURT: But he alleges in  
8 paragraph 57 a loss of approximately 80 percent  
9 of their State Farm business. Isn't the  
10 inference that there was something -- again, the  
11 issue is, based on the face of the complaint,  
12 has he alleged sufficient facts or has he  
13 alleged enough to get past this point.

14           Ultimately he's right. You may  
15 succeed because he can't prove it, but right now  
16 I'm really restricted with what's in the  
17 complaint; and when he says 80 percent of our  
18 State Farm clientele business is no longer there  
19 since State Farm did this, giving him the  
20 benefit of all the inferences, doesn't that  
21 raise an inference that maybe there's some  
22 connection between what you did and his loss of  
23 business and that you tortiously interfered with  
24 it?

1 MR. McCLUGGAGE: I don't think that  
2 satisfies the necessity of identifying specific  
3 persons with whom there's been interference.  
4 But I would also say -- and I think the  
5 requirement is pretty clear -- they haven't  
6 alleged any acts by State Farm to intentionally  
7 interfere with those relationships. That's just  
8 not there.

9 THE COURT: Anything else?

10 MR. McCLUGGAGE: No, I think that's it,  
11 your Honor.

12 THE COURT: All right. I've reviewed  
13 the briefs. I read the complaint. With respect  
14 to counts -- well, Count I, the declaratory  
15 judgment claim, that count is dismissed with  
16 prejudice. I don't think you have a declaratory  
17 judgment claim. I think at this point the claim  
18 is ripe, and it's accrued. You have a breach of  
19 contract, and the Declaratory Judgment Act is  
20 meant to have the parties come into court the  
21 step right before your cause of action has  
22 accrued, and I think at this point we're way  
23 past that status. So the Count I, which is the  
24 declaratory judgment action, is dismissed with

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1 prejudice.

2 Count II, which is the tortious  
3 interference, I think at this stage he's alleged  
4 sufficient facts to state a cause of action. I  
5 think ultimately it sounds like a difficult case  
6 to prove, but I don't know how the evidence is  
7 going to come out; but at this point I think the  
8 allegations are sufficient to state a cause of  
9 action.

10 With respect to Count III, the  
11 contract claim, again, I think that the fact  
12 that the contract says that these rates can be  
13 changed pursuant to survey, I don't think that  
14 addresses the issues that he's raised in the  
15 allegations in the complaint. So I think he's  
16 stated a cause of action with respect to breach  
17 of contract.

18 I agree with you that I think  
19 Count IV, the fraud claim, is a breach of  
20 contract claim disguised as a fraud claim. I  
21 don't think there's sufficient allegations that  
22 show that there was a fraud claim based on  
23 what's in the complaint, so that count is  
24 dismissed with prejudice, too.

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1                   You have 28 days to file an answer.

2                   MR. NOVOSELSKY: I assume the Court is  
3 not going to put the magic words -- or maybe the  
4 Court was --

5                   THE COURT: No, I'm not going to put in  
6 the 304(a) language.

7                   MR. NOVOSELSKY: I don't want to agree  
8 with it on the record, but I understand.

9                   THE COURT: So you have 28 days to  
10 answer Count III and Count II, it looks like,  
11 the tortious interference and breach of  
12 contract.

13                   MR. NOVOSELSKY: Thank you very much for  
14 your time, your Honor.

15                   MR. McCLUGGAGE: Thank you, your Honor.

16                               (Which were all proceedings had  
17                               in the above-entitled cause at  
18                               this time.)

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1 STATE OF ILLINOIS )  
 ) SS:  
2 COUNTY OF COOK )

3 I, ANGELA M. INGHAM, a Notary Public  
4 within and for the county of Cook, State of  
5 Illinois, and a Certified Shorthand Reporter of  
6 said state, do hereby certify that I reported in  
7 shorthand the proceedings had at the taking of  
8 said hearing and that the foregoing is a true,  
9 complete, and correct transcript of my shorthand  
10 notes as taken as aforesaid, and contains all  
11 the proceedings given at said hearing.

12 In witness whereof, I have hereunto set my  
13 hand and affixed my notarial seal this 25th day  
14 of June, 2017.

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