

## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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## IN THE COURT OF APPEALS OF INDIANA

David A. Schelle,  
*Appellant-Plaintiff,*

v.

ProMotor Engines and  
Components, Inc.,  
*Appellee-Defendant.*

September 21, 2021

Court of Appeals Case No.  
21A-PL-853

Appeal from the Elkhart Superior  
Court

The Honorable Stephen R.  
Bowers, Judge

Trial Court Cause No.  
20D02-1908-PL-221

**Altice, Judge.**

### Case Summary

- [1] Unsatisfied with automotive work done on his 1998 Pontiac Firebird Trans Am (the vehicle) by Promotor Engines and Components, Inc. (Promotors), David

A. Schelle filed suit against Promotors for breach of contract. Thereafter, Promotors moved for summary judgment and specifically designated evidence in support of its motion. Schelle failed to properly designate any evidence in opposition, and the trial court granted summary judgment in favor of Promotors. On appeal, Schelle argues that summary judgment was improper because disputed issues of material fact exist.

[2] We affirm.

### **Facts & Procedural History**

[3] In the spring of 2017, Schelle took the vehicle to Promotor seeking to increase its horsepower. At the time, Promotor determined that the vehicle had a wheel horsepower (WHP) measured at 297 and 302.<sup>1</sup> Schelle initially went to Promotor wanting to have a Hawks Motorsports horsepower enhancement kit (the Hawks kit) installed but, after speaking with Todd Cripe, Promotor's lead machinist, Schelle agreed to have different work done on the vehicle to increase its horsepower. Cripe "never provided a written or oral guaranty regarding how much horsepower the engine would produce following the work[.]" *Appendix Vol. II* at 68.

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<sup>1</sup> WHP is measured with a device called a chassis dynamometer (dyno). The reported figure from a particular dyno run is "subject to variability as a result of one or a combination of the following factors: environmental conditions, tuner capability, dyno calibration, selected correction factors and smoothing." *Appendix Vol. II* at 82.

[4] Thereafter, Cripe performed the improvements to the vehicle using “correct and appropriate parts” that were “installed properly.” *Id.* The work resulted in the vehicle having increased horsepower, measured by Promotor’s dyno at 390 WHP on June 20, 2017, and the modified engine was “operating as expected” following the work. *Id.* “The increase in horsepower ... was as expected given the type of vehicle, parts used, the presence of an automatic transmission, and wear and tear on existing components due to age and mileage.” *Id.*

[5] Apparently dissatisfied with the work performed, Schelle eventually took the vehicle to several other mechanic businesses. Car Tech II completed a wire harness repair in August 2017 and then, in April 2018, Schelle had Norris Motorsports perform dyno runs, which measured the vehicle’s WHP at 339 and 342. Schelle then had National Transmission Service overhaul the vehicle’s transmission in June 2018. The following month, the dyno runs at Indiana Muscle Car measured 332 and 329 WHP. In early August 2019, he had Modern Muscle Car Factory, Inc. remove and inspect the vehicle’s engine and install the Hawks kit and additional parts. Another dyno run by Indiana Muscle Car in September 2019 measured 398 WHP.

[6] In the meantime, on August 29, 2019, Schelle filed a complaint against Promotor “for damages caused by Promotor’s alleged breach of the contract to design and install a horsepower enhancement kit comparable to the proven Hawks design.” *Appellant’s Brief* at 8. Specifically, Schelle alleged that the vehicle was delivered with a “malfunctioning motor,” that Promotor “used parts not properly fitted for [the vehicle’s] motor and engine,” that Promotor

had breached an oral guarantee to increase the vehicle's horsepower to around 450 WHP, and that Promotor falsified the results or failed to calibrate their dyno testing machine. *Id.* at 21.

[7] On February 12, 2021, Promotor filed a motion for summary judgment, along with a memorandum in support and a specific designation of evidence.

Promotor designated precise portions of each of the following: Schelle's November 19, 2020 deposition, Schelle's answers to Promotor's first set of interrogatories, Promotor's amended answers to Schelle's first set of interrogatories, Cripe's February 12, 2021 affidavit, and the February 10, 2021 expert affidavit of Emmanuel (Noel) Jay F. Manuel, along with Exhibits A (curriculum vitae) and B (investigative report) referenced in the affidavit.

[8] In addition to the facts set forth above, Promotor's designated evidence included the expert opinion of Manuel, who performed a technical investigation and engineering analysis of the vehicle. Manuel personally inspected the vehicle in August 2020 and reviewed all relevant dyno results and work invoices. Manuel averred in part:

8. Following the work by Defendant, the subject vehicle had additional work performed by a different mechanic, which replaced all the work done by Defendant and included additional parts not previously installed by or invoiced by Defendant.

9. The maximum horsepower achieved following the subsequent mechanical work was 405 WHP.

10. The work performed by Defendant had the intended effect on increasing the power output of the engine, and thus was done properly.

11. The work performed by the Defendant, as evidenced by the invoices and documentation reviewed, is consistent with enhancing the performance of the engine.

12. The parts utilized by the Defendant, as evidenced by the invoices and documentation reviewed, were appropriate, applicable, and designed for the subject 1998 Pontiac.

*Id.* at 70. Additionally, Manuel’s investigative report, appended to his affidavit and designated by Promotor in support of summary judgment, noted two additional dyno results of 405 and 386 WHP, dated March 14, 2020. In sum, regarding the various dyno results, the report noted: “None of the reported values measured by at least four separate chassis dynamometers reported 450 WHP. The highest WHP value following the Promotor modifications was 390 HP. The highest WHP value following the installation of the Hawks tuning kit was 405 WHP.” *Id.* at 83.

[9] On March 14, 2021, Schelle filed a response in opposition to Promotor’s motion for summary judgment. Because the evidence upon which Schelle relied was not properly designated with the specificity required by Ind. Trial Rule 56(C) and included inadmissible, unsworn, and unverified documents, Promotor filed a motion to strike Schelle’s designation of evidence in its

entirety. On April 9, 2021, the trial court granted the motion to strike.<sup>2</sup> That same date, the trial court also granted summary judgment in favor of Promotor.

[10] Schelle appeals from the grant of summary judgment. Notably, Schelle does not challenge the trial court's striking of his designated evidence. He argues only that the evidence designated by Promotor reveals that genuine issues of material fact exist making summary judgment improper.

## Discussion & Decision

[11] Our standard of review here is well-settled. Like the trial court, we are tasked with determining whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *See Goodwin v. Yeakle's Sports Bar & Grill, Inc.*, 62 N.E.3d 384, 386 (Ind. 2016).

The party moving for summary judgment has the burden of making a prima facie showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Once these two requirements are met by the moving party, the burden then shifts to the non-moving party to show the existence of a genuine issue by setting forth specifically

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<sup>2</sup> In the order granting the motion to strike, the trial court noted, among other things:

Schelle's Designation of Evidence is little more than an invitation to search the record....The documents submitted by Schelle are not verified, not sworn, and not part of any affidavit or deposition. No facts have been submitted to support admissibility of the designated materials. Schelle misses the point of T.R. 56(E) when he suggests that [Promotor] was made aware of documents in which Scott Kleppinger, who is apparently an expert consulted by [Schelle], offered opinions that contradicted those of [Promotor's] expert. Schelle had affirmative obligations under Trial Rule 56(E) that he has not met. His attempt to lay responsibility on [Promotor] for not deposing an expert witness he has not properly disclosed demonstrates a lack of understanding of the Trial Rules relating to discovery and summary judgment.

*Id.* at 139-40.

designated facts. Any doubt as to any facts or inferences to be drawn therefrom must be resolved in favor of the non-moving party.

*Id.* (citations omitted). Even when the facts are undisputed, summary judgment is improper if the facts lead to conflicting inferences. *See Oxley v. Lenn*, 819 N.E.2d 851, 856-57 (Ind. Ct. App. 2004).

[12] To reiterate, the initial burden is on the party moving for summary judgment to demonstrate the absence of any genuine issue of fact as to a determinative issue. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). The movant must affirmatively negate their opponent's claim. *Id.*

[13] Here, Promotor made a prima facia showing that it did not breach a contract with Schelle. The designated evidence establishes that no written agreement existed and that Cripe, on behalf of Promotor, made no oral guarantees to Schelle regarding how much increased horsepower the engine would be expected to produce following the work performed on the vehicle. Indeed, there is no designated evidence to support Schelle's bald assertion that an agreement existed between him and Promotor for Promotor to "install a horsepower enhancement kit equal or better than the Hawks kit." *Appellant's Brief* at 11. Further, the designated evidence establishes that Cripe performed the improvements correctly, using appropriate parts and proper installation, that the modified engine operated as expected following the work, and that the work resulted in the vehicle having increased horsepower. Cripe averred, "The increase in horsepower ... was as expected given the type of vehicle, parts used,

the presence of an automatic transmission, and wear and tear on existing components due to age and mileage.” *Appendix* at 68. Similarly, Promotor’s expert, Manuel, opined in his affidavit that the work performed by Promotor “had the intended effect on increasing the power output of the engine, and thus was done properly.” *Id.* at 70.

[14] With Promotor having established its prima facie case, the burden then shifted to Schelle to “come forward with contrary evidence showing an issue for the trier of fact.” *Hughley*, 15 N.E.3d at 1003 (internal quotations omitted). In order to raise a genuine issue of material fact, Schelle could not “rest upon the mere allegations or denials of his pleading.” *Id.* at 1004 (quoting T.R. 56(E)). Rather, he was required to set forth specific facts by affidavit or other admissible evidence showing that there was a genuine issue for trial. *See id.*

[15] Schelle failed in his responsive burden, as he did not properly designate any evidence to establish a genuine issue of material fact. He failed to provide an expert affidavit to counter Manuel’s expert opinion, and he did not designate his own affidavit or deposition testimony to support his claim that Promotor promised a certain increase in horsepower. Moreover, we find wholly improper Schelle’s attempt to rely on mere allegations in the complaint and portions of his own deposition that were not specifically designated below.<sup>3</sup> *See McDonald*

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<sup>3</sup> For example, Schelle directs us to page 15 of his deposition to support his claim that Cripe guaranteed 450 WHP or more, which testimony is found in lines 3 through 5 and 10 through 12, but the only lines from this page specifically designated on summary judgment were 18 through 22.



*v. Lattire*, 844 N.E.2d 206, 215 (Ind. Ct. App. 2006) (rejecting nonmovant’s attempt to piggyback movant’s designation and rely on portions not specifically designated and indicating that nonmovant was precluded from relying on mere allegations in complaint that “are not testimony, affidavits, sworn statements, or evidence of any kind”).

[16] T.R. 56(H) is clear. “No judgment rendered on the motion shall be reversed on the ground that there is a genuine issue of material fact unless the material fact and the evidence relevant thereto shall have been specifically designated to the trial court.” *Id.* While Schelle could have specifically designated competent evidence – such as his deposition testimony indicating that Cripe promised a particular increase in horsepower – he did not do so. Having failed to meet his responsive burden, the trial court properly rendered summary judgment. *See Sheehan Const. Co. v. Cont’l Cas. Co.*, 938 N.E.2d 685, 689 (Ind. 2010) (“If the opposing party fails to meet its responsive burden, the court shall render summary judgment.”).

[17] Judgment affirmed.

Bradford, C.J. and Robb, J., concur.