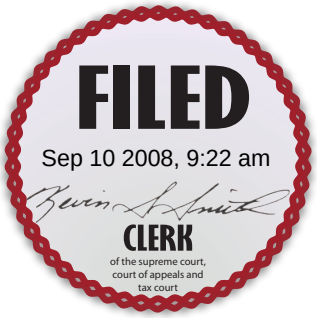

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IN THE COURT OF APPEALS OF INDIANA

LYNCH AND SON CONSTRUCTION, INC.,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 35A04-0802-CV-100
	)	
PACE AUTO CENTER, INC., d/b/a PACE CHEVROLET,	)	
	)	
Appellee-Defendant.[1]	)	

APPEAL FROM THE HUNTINGTON CIRCUIT COURT
The Honorable Jeffrey R. Heffelfinger, Judge
Cause No. 35C01-0605-CT-219

September 10, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

[1] Plaintiffs below also included William Arrivett, Ray Eppard, Dawn Eppard, Guilford Cline, and Judy Cline, none of whom is a party to this appeal. Defendants below also included Pace Ford, Inc., and General Motors Corp., neither of which is a party to this appeal.

BRADFORD, Judge

Appellant-Plaintiff Lynch and Son Construction, Inc. ("Lynch") appeals the trial court's grant of summary judgment to Appellee-Defendant Pace Auto Center, Inc., d/b/a Pace Chevrolet ("Pace"), in Lynch's action for damages against Pace. We reverse and remand.

FACTS AND PROCEDURAL HISTORY

In November 2005, David Lynch, who owns Lynch, went to Pace to inquire about buying a new truck. Lynch told Pace's salesperson Mr. Donaldson that he was interested in upgrading to a larger truck, specifically a three-quarter ton Duramax. Donaldson showed Lynch certain Duramax models and indicated that a new truck would cost him approximately $800 per month. Lynch indicated that he was not interested.

Less than a week later, Donaldson called Lynch and told him that Pace had a truck in which he might be interested. The truck was a 2005 Silverado and had approximately 9000 to 10,000 miles on it. The previous owners, whom Lynch later determined to be Ray and Dawn Eppard, had owned the truck for approximately one month. Donaldson told Lynch that the prior owner had purchased the truck in order to haul trailers for FEMA, but that he had lost his contract and no longer needed the truck.

On approximately December 24, 2005, Lynch went to Pace to look at the Silverado and discuss financing. Shortly thereafter, Lynch purchased the Silverado for the claimed price of $33,388.[2] In partial satisfaction of payment, Lynch traded in a truck, which Pace valued at $17,700. Lynch still owed $23,420 for the trade-in truck. The remaining amount

[2] The designated evidence specifies only that the price of the Silverado was "around $32,000." Appellee's Addendum p. 22.

Lynch owed on the trade-in truck, specifically $5720, was rolled into his financing on the Silverado. Lynch received financing through Citizens Automobile Finance, Inc. Lynch made one monthly payment to Citizens.

Immediately after purchasing the Silverado, Lynch began having problems with it, among them transmission problems, engine problems, and poor fuel economy. Lynch contacted General Motors ("GM") in early February 2006. An engineer for GM told Lynch that the Silverado had been "bought back." Appellee's Addendum p. 26. Lynch also contacted Eppard and discovered that Eppard had had many problems with the Silverado, some of them the same problems that Lynch had encountered. Eppard gave Lynch a copy of the GM Resale Disclosure Notice of Nonconformity signed by Eppard when he returned the Silverado. This notice was subsequently signed by Pace. The Notice contained the following provision:

> This vehicle was repurchased from the previous owner or lessee by General Motors on 7/27/05 in the state of IN. The repurchase was based on the following alleged or determined defect(s) or condition(s):
>
> Engine runs rough, wiring harness & fuel injector are inoperative.
>
> ***
>
> The signature of the GM Dealership representative constitutes agreement that the disclosure information on this form will be made to the next retail consumer prior to the sale or lease of this vehicle in the state where such transaction occurs.

Appellee's Addendum p. 35.

Pace does not dispute that it failed to disclose the Silverado's "buy-back" status to Lynch. Pace ultimately paid off all amounts due and owing to Citizens by Lynch associated

with the purchase of the Silverado, including the $5720 which Lynch owed on his prior truck.

On May 5, 2006, Lynch filed an action against Pace seeking damages arising out of its sale of the Silverado without proper disclosure to Lynch. Lynch sought the claimed value of the consideration in the amount of $33,388, costs of the action, attorney fees, and exemplary damages in the amount of $100,164. On October 25, 2007, Pace filed a motion for summary judgment which, following Lynch's response and a hearing, the trial court granted on January 18, 2008. This appeal follows.

DISCUSSION AND DECISION

I. Standard of Review

Upon appeal, Lynch challenges the trial court's grant of summary judgment by arguing that there is a genuine issue of material fact regarding whether Pace's payment of his debt to Citizens constitutes an accord and satisfaction or whether this is the sole remedy to which he is entitled. Under Indiana Trial Rule 56(C), summary judgment is appropriate when the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In reviewing summary judgment, this court applies the same standard as the trial court and construes all facts and reasonable inferences to be drawn from those facts in favor of the non-moving party. *Payton v. Hadley*, 819 N.E.2d 432, 437 (Ind. Ct. App. 2004). Where material facts conflict, or undisputed facts lead to conflicting material inferences, summary judgment is inappropriate. *Id*. at 438. The purpose of summary judgment is to terminate litigation about which there can be no material factual dispute and which can be resolved as a matter of

law. *Id*. The trial court is not required to enter specific findings and conclusions. *U-Haul Int'l., Inc. v. Nulls Mach. & Mfg. Shop*, 736 N.E.2d 271, 275 (Ind. Ct. App. 2000), *trans. denied*. We are not limited to granting or denying summary judgment upon the same basis that the trial court made its decision. *Id*. This court will affirm a grant of summary judgment if it can be sustained on any theory supported by the designated materials. *Id*.

II. Analysis

A. Applicable Law

In support of his challenge to the trial court's granting summary judgment in favor of Pace, Lynch points to Indiana Code section 24-5-13.5-10 (2005), which prohibits the resale of buyback motor vehicles in Indiana without proper notice of this "buyback" status. Section 24-5-13.5-10 provides as follows:

> A buyback motor vehicle may not be resold in Indiana unless the following conditions have been met:
>
> ***
>
> (2) The following disclosure language must be conspicuously contained in a contract for the sale or lease of a buyback vehicle to a consumer or contained in a form affixed to the contract:
>
> "IMPORTANT
>
> This vehicle was previously sold as new. It was subsequently returned to the manufacturer or authorized dealer in exchange for a replacement vehicle or a refund because it did not conform to the manufacturer's express warranty and the nonconformity was not cured within a reasonable time as provided by Indiana law.".

Indiana Code section 24-5-13.5-13 (2005) provides relief in cases where the above requirements are not met:

> (a) A person who fails to comply with section 10, 11, or 12 of this chapter is liable for the following:
>
> (1) Actual damages or the value of the consideration, at the election of the buyer.
> (2) The costs of an action to recover damages and reasonable attorney's fees.
> (3) Not more than three (3) times the value of the actual damages or the consideration as exemplary damages.
> (4) Other equitable relief, including restitution, as is considered proper in addition to damages and costs.

It is undisputed that Pace violated Indiana Code section 24-5-13.5-10.

B. Accord and Satisfaction

In granting summary judgment, the trial court determined that Pace's payment of Lynch's debt to Citizens operated as an accord and satisfaction and that Lynch was therefore precluded as a matter of law from seeking additional relief. "Accord and satisfaction is a method of discharging a contract, or settling a cause of action by substituting for such contract or dispute an agreement for satisfaction." *Mominee v. King*, 629 N.E.2d 1280, 1282 (Ind. Ct. App. 1994) (quotation omitted). The term "accord" denotes an express contract between two parties by means of which the parties agree to settle some dispute on terms other than those originally contemplated, and the term "satisfaction" denotes performance of the contract. *Id*. Under Indiana law, an accord and satisfaction occurs when (1) there is a good faith dispute, (2) the sum in dispute is not liquidated, (3) there is consideration, (4) there is a meeting of the minds or evidence that the parties intended to agree to an accord and satisfaction, and (5) there is a performance of the contract. *Sedona Dev. Group, Inc. v. Merillville Rd.*, 801 N.E.2d 1274, 1278 n.1 (Ind. Ct. App. 2004); *see Fifth Third Bank of S.E. Ind. v. Bentonville Farm Supply, Inc.*, 629 N.E.2d 1246, 1249 (Ind. Ct. App. 1994) ("As a

contract, accord and satisfaction requires a meeting of the minds or evidence that the parties intended to agree to an accord and satisfaction."), *trans. denied.* The question of whether the party claiming accord and satisfaction has met its burden is ordinarily a question of fact and becomes a question of law only when the requisite controlling facts are undisputed and clear. *See Wolfe v. Eagle Ridge Holding Co.*, 869 N.E.2d 521, 524 (Ind. Ct. App. 2007).

Here, while there is no dispute that Pace paid Lynch's debt to Citizens in full, there remains a factual dispute as to whether Pace and Lynch reached an agreement or a "meeting of the minds" that such payment was in full satisfaction of any and all of Lynch's claims for relief arising out of Pace's failure to inform him of the Silverado's "buyback" status. Under Indiana Code section 24-5-13.5-13, Lynch was entitled to seek relief not just for the value of the consideration, but also for costs of his action, attorney's fees, exemplary damages, and other equitable relief. As Pace acknowledges, Lynch's own affidavit demonstrates his contention that he returned the Silverado to Citizens at their direction, that the payment of his debt by Pace occurred pursuant to an agreement solely between Pace and Citizens, and that such payment did not result from any representation by him that it would constitute full satisfaction of his claim against Pace. Lynch's affidavit creates a clear factual dispute regarding whether Pace's payment of Lynch's debt to Citizens occurred pursuant to a "meeting of the minds" between Lynch and Pace.

In spite of this apparent factual dispute, Pace claims that "payment of a debt by a third party to a credit of another person operates as accord and satisfaction if the creditor accepts the payment as satisfaction of the debt." Appellee's Br. p. 8. In support of this proposition,

Pace cites to *Cook v. Am. States Ins. Co.*, 150 Ind. App. 88, 97, 275 N.E.2d 832, 837 (1971). *Cook* states merely that "payment or satisfaction of a deed may be made by a third person to a creditor and if accepted by him is satisfaction." Unlike in *Cook*, the question at issue in this case is not merely whether a debtor is liable or a debt has been satisfied, but whether the allegedly unsolicited satisfaction of a debt somehow releases the paying party from claims which the debtor is statutorily entitled to bring against it. There is no dispute that Pace paid Lynch's debt, but the question remains whether Lynch agreed to forgo all claims in exchange for such payment. We conclude that *Cook* is inapplicable and that Pace's reliance upon it is unpersuasive. Given the factual dispute regarding whether Pace's payment to Citizens occurred pursuant to a "meeting of the minds" between Lynch and Pace, we conclude that the instant summary judgment cannot be affirmed on "accord and satisfaction" grounds.

C. Election

Pace also claims that summary judgment is justifiable on the grounds that Lynch elected rescission of the contract as his remedy and that, as a matter of law, he may not pursue additional remedies. In support of this proposition, Pace cites to *A.J.'s Auto Sales, Inc. v. Freet*, 725 N.E.2d 955, 969 (Ind. Ct. App. 2000), *trans. denied*, which states that generally, a party bringing an action for fraud must elect between seeking to rescind the contract and seeking damages. Notably, the *A.J.'s* court observed that, in spite of this "election" provision, additional remedies were nevertheless permissible when statutorily prescribed. 725 N.E.2d at 969. Here, Indiana Code section 24-5-13.5-13 specifically provides for multiple remedies in actions based upon a defendant's failure to comply with

"buyback" vehicle disclosure, including (1) actual damages or the value of the consideration; (2) costs of the action and attorney fees; (3) exemplary damages; and (4) restitution and other equitable relief. In addition, to the extent that Indiana law requires a party to elect between contract rescission and damages, this appears to be the purpose of subsection (1) above, which requires a claimant-buyer to elect between actual damages or the value of consideration. In any event, given the statutory provisions which specifically provide for multiple remedies, we conclude summary judgment on the "election" ground urged by Pace is similarly untenable.

D. Damages

Pace also argues that summary judgment is proper on the grounds that Lynch failed to produce evidence of actual damages. Contrary to Pace's claim, the designated evidence demonstrated that Lynch lost income as a result of the Silverado's needing constant repair. Regardless of the presence or absence of this evidence, however, the question of actual damages appears to be immaterial to Lynch's claim for consideration, costs of the action, reasonable attorney's fees, and exemplary damages. Summary judgment is similarly inappropriate on this ground.

Having concluded that a genuine issue of material fact exists regarding whether Lynch agreed to forgo his claims against Pace in exchange for Pace's payment of his debt to Citizens, and having rejected Pace's arguments claiming summary judgment was appropriate on alternative grounds, we reverse the trial court's grant of summary judgment on this case and remand for a trial.

The judgment of the trial court is reversed, and the cause is remanded for trial.

RILEY, J., and BAILEY, J., concur.