STATE OF MICHIGAN

COURT OF APPEALS

MARTHA BAGOLY and LEWIS BAGOLY,

Plaintiffs-Appellants,

v

THE KROGER CO., individually and d/b/a KROGER SUPERMARKETS,

Defendant-Appellee,

and

MEADOWDALE FOODS, INC., individually and d/b/a GREAT SCOTT SUPERMARKETS, M-FOODS, INC., jointly and severally,

Defendant.

UNPUBLISHED
April 4, 1997

No. 191019
Macomb Circuit Court
LC No. 93-003742

Before: Wahls, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the order granting defendant The Kroger Co.'s (Kroger) motion for rehearing or reconsideration pursuant to MCR 2.119(F) and its renewed motion for summary disposition and dismissing plaintiffs' slip and fall claim. We affirm.

On July 25, 1990, Kroger and Meadowdale Foods, Inc. (Meadowdale) entered into a purchase agreement whereby Kroger would purchase various assets and liabilities of Meadowdale. Kroger assumed certain store and equipment leases and also certain liabilities of Meadowdale.

On August 4, 1990, plaintiff Martha Bagoly[1] slipped and fell in a Great Scott Supermarket owned by Meadowdale located on Groesbeck in Mt. Clemens. As a result, plaintiff injured her lower back. An accident report was completed and submitted to Meadowdale's insurance carrier.

On August 31, 1991, the purchasing agreement between defendant and Meadowdale was finalized. Kroger executed the Assignment of Sublease for the Great Scott Supermarket.

On August 3, 1993, three years later, plaintiff filed a complaint, alleging negligence, against Meadowdale, the owner of Great Scott Supermarket, and Kroger, as the successor of Meadowdale. Plaintiff alleged that Kroger assumed or became obligated to pay the debts or obligations of Meadowdale.

Kroger brought a motion for summary disposition, arguing that there was no genuine issue of material fact that it was not the owner, tenant or in control of the supermarket at the time plaintiff fell. Kroger further argued that it did not meet any of the expectations set forth in *Antiphon, Inc v LEP Transport, Inc*, 183 Mich App 377; 454 NW2d 222 (1990), to make it responsible for the debts and liabilities of Meadowdale.

The trial court denied Kroger's motion for summary disposition, concluding that since the agreement made no provisions for claims accruing between the time of the initial agreement and the time the agreement was finalized, there was an assumption of liability on the part of Kroger, the successor in interest.

Kroger subsequently renewed its motion for summary disposition, contending that, because the language of the purchasing agreement specifically disclaimed any liability from the date of the agreement to the finalizing of the agreement, there was no implied assumption of liability for an injury occurring during that time period. Kroger claimed that it was not a continuation of Meadowdale, and that plaintiff incorrectly relied on the "continuity of the business" exception from *Turner v Bituminous Casualty Co*, 397 Mich 406; 204 NW2d 873 (1976), because the exception was inapplicable outside of the products liability areana.

The trial court denied Kroger's renewed motion for summary disposition, concluding that there was no provision in the purchasing agreement for tort claims arising during the interim period involved. The court found that, because such a provision was missing from the detailed agreement, it was possible for a reasonable trier of fact to conclude that Kroger intended to assume liability for such claims arising during that time period.

Kroger thereafter brought a motion for rehearing and/or reconsideration, arguing again that the purchasing agreement specifically contained language that Kroger disclaimed liability for any tort claim that occurred before the closing of the agreement.

The trial court concluded that it did commit palpable error when it denied Kroger's earlier motion. The trial court explained that a growing body of case law finds that a successor corporation may become liable in a product liability action when all the assets of the seller corporation is purchased by the successor even where there is express language in the agreement to the contrary. The trial court further indicated that such a situation arises if third-party creditors have no notice of the transfer of the asssets from the seller to the buyer. The trial court concluded, however, that this exception had not been extended to simple negligence claims in Michigan. It therefore granted Kroger's motion.

We first address plaintiff's claim that the trial court erred in dismissing its claim upon its finding that *Turner v Bituminous Casualty Co*, 397 Mich 406; 204 NW2d 873 (1976), was limited to product liability cases.

An order granting summary disposition is reviewed de novo. *Plieth v St Raymond Church*, 210 Mich App 568, 571; 534 NW2d 164 (1995). A motion for summary disposition may be granted pursuant to MCR 2.116(C)(10) when, except with regard to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*. Giving the benefit of reasonable doubt to the nonmovant, the trial court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Id.* A motion brought pursuant to MCR 2.119 is reviewed for an abuse of discretion. *Williams v Williams*, 214 Mich App 391, 396; 542 NW2d 892 (1995).

Under the traditional corporate analysis, the sale or transfer of assets by one corporation to another did not bring with it assumption of liability for the liquidated or unliquidated debts, claims, or other liabilities of the selling corporation. *Foster v Cone-Blanchard Machine Co*, ___ Mich App ___; ___ NW2d ___ (Docket No. 187389, issued 1/7/97); *Fenton Area Schools v Sorenson-Gross Co*, 124 Mich App 631, 641; 335 NW2d 221 (1983); *Pelc v Bendix Machine Tool Corp*, 111 Mich App 343, 351; 314 NW2d 614 (1981). The applicable law and limited exceptions have been summarized as follows:

> If one corporation purchases the assets of another and pays a fair consideration therefor, no liability for the debts of the selling corporation exists in the absence of fraud or agreement to assume the debts.
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> * * *
>
> There are certain instances, however, in which the purchaser or transferee may become liable for the obligations of the transferor corporation. The transferee may be held liable for the debts of the transferor corporation: (1) where there is an express or implied assumption of liability; (2) where the transaction amounts to a consolidation or merger; (3) where the transaction was fraudulent; (4) where some of the elements of a purchase in good faith were lacking, or where the transfer was without consideration and the creditors of the transferor were not provided for; or (5) where the transferee corporation was a mere continuation or reincarnation of the old corporation. [*Turner, supra* at 417 n 3.]

In this case, although the trial court was correct that the *Turner* exceptions have not been applied in simple negligence cases, the court's conclusion that the exceptions have always been limited to products liability issues was not totally correct. In fact, this Court has applied the *Turner* exceptions to at least two cases which did not involve a product liability issue. See, *Shue & Voeks, Inc v Amenity Design & Mfg, Inc*, 203 Mich App 124; 511 NW2d 700 (1993); *Antiphon, Inc v LEP Transport, Inc*, 183 Mich App 377; 454 NW2d 222 (1990),

The *Antiphon* Court began its analysis by acknowledging that it had not been afforded much opportunity to contemplate the doctrine of successor liability:

> *Rarely are the appellate courts of this state provided with an opportunity to explore and consider the parameters of the doctrine of corporate successor liability*. To date, in Michigan, the doctrine has been examined only in the context of a common-law tort action, *Chase v Michigan Telephone Co*, 121 Mich 631, 80 NW 717 (1899), *Denolf v Frank L Jursik Co*, 54 Mich App. 584, 589, 221 NW2d 458 (1974), modified on other grounds 395 Mich 661, 238 NW2d 1 (1976), a products liability action, *Turner v Bituminous Casualty Co*, 397 Mich 406, 244 NW2d 873 (1976), and an employment discrimination action, *Stevens v McLouth Steel Products Corp*, 433 Mich 365, 446 NW2d 95 (1989). *Accordingly, the action before us presents an opportunity to examine the doctrine in a different context*. [*Id.* at 382.]

In *Antiphon*, the plaintiff sought recovery of monies allegedly wrongfully paid to the defendant under theories of breach of contract, interference with an advantageous economic and business relationship, and unjust enrichment. *Id.* at 379. Among the affirmative defenses pleaded by the defendant were noncompliance with the bulk sales provisions of the Uniform Commercial Code, MCL 440.6102; MSA 19.6102, and estoppel. This Court concluded that the doctrine of estoppel could be harmonized with the *Turner* exception of the implied agreement to assume liability exception. *Id*. at 384.

Also in *Shue & Voeks, Inc, supra*, a *Turner* exception was applied in a breach of the lease action. The plaintiff had argued that the defendant was a successor in interest to the transferor corporation. *Id.* at 127. The plaintiff relied on the "continuity of the business" exception. *Id.* at 128. This Court applied the exception, but ruled that the defendant was not under the successor liability theory because the number of retained employees was significantly less than the original number and the focus of the business had changed. *Id.*

We recognize that in *City Management Corp v US Chemical Co, Inc*, 43 F3d 244, 252 (CA 6, 1994), the Sixth Circuit held that the Michigan Supreme Court intended to limit *Turner* to products liability cases only:

> Although Michigan's lower courts have applied the continuing enterprise exception in a number of other cases, they have never applied the doctrine in a case where the underlying action was not grounded in products liability. Because we conclude that the Michigan Supreme Court intended that the continuing enterprise exception be limited to products liability cases, *Turner* is inapplicable to this case. [*Id*. at 252-253.]

The Sixth Circuit, however, cited no Michigan cases in which Michigan Courts declined to apply the *Turner* exceptions beyond product liability issues. Nor did the Sixth Circuit address or discuss the decisions in *Antiphon, Inc, supra* or *Shue & Voeks, Inc, supra*.

We need not decide, however, whether the *Turner* exceptions should be extended to general negligence situations, since we find that plaintiff did not present a material question of fact as to whether there was a continuity of the business.

Plaintiff argues that summary disposition was improperly granted because there was a continuity of the business from Meadowdale to Kroger. Under the "continuity of the enterprise" exception, a cause of action for successor liability arises where the totality of the acquisition demonstrates a basic continuity of the enterprise. *Pelc*, *supra* at 352. To make such a determination, the following guidelines should be applied:

> (1) There is a continuity of management, personnel, physical location, assets and general business operations of the selling corporation;
>
> (2) The selling corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible;
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> (3) The purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations to the selling corporation; and
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> (4) The purchasing corporation holds itself out to the world as the effective continuation of the seller corporation. [*Fenton Area Schools*, *supra* at 642.]

Applying the above four guidelines to the instant case, we are convinced that there is no question of fact as to whether the totality of the transaction demonstrates the basic continuity of enterprise. Kroger did retain a majority of the management and other employees and they remained in the same physical location. Furthermore, according to the purchase agreement, Kroger purchased substantially all the assets and continued the general business operations of a grocery store. Meadowdale also agreed not to compete in the grocery store business for a period of five years, and ceased doing business. Kroger also assumed a number of Meadowdale's liabilities and obligations which led to the uninterrupted continuation of normal business operations. Considering these three enumerated factors, there could be a sufficient showing of a continuing enterprise.

However, the fourth and final factor, the purchasing corporation holding itself out to the world as the effective continuation of the seller corporation, is not satisfied. There is no dispute that Kroger changed the "Great Scott" sign to a "Kroger" sign within a week of the closing of the agreement and never held itself out to the world as the effective continuation of the seller corporation. The total lack of this factor necessarily precludes a finding of "continuity of enterprise." We therefore conclude that plaintiff has not raised a genuine issue of material fact as to whether there was a continuation of the enterprise. The trial court properly granted Kroger summary disposition on this ground.

Plaintiff also argues that the trial court erred in granting Kroger summary disposition because the purchasing agreement was fraudulent since it made no financial provisions for people injured between the initiation of the agreement and the closing date. We disagree.

Under *Turner, supra*, a purchasing corporation may be liable for the obligations of the selling corporation where the transaction was fraudulent. In such a scenario, inadequate consideration had to have been paid to the seller or there was a lack of good faith on the part of the parties. *Turner, supra* at 437 (Coleman, J., dissenting). Here, the purchasing agreement in the present case reflects a good faith effort to have Meadowdale carry on the business as usual during the transaction period. The agreement states that from the date of the agreement until closing, Meadowdale, as seller, shall carry on the usual, regular and ordinary course of its business and use all reasonable efforts to preserve intact its present business and assets. The agreement also requires Meadowdale to pay all debts, claims, liabilities and obligations relating to the business in the ordinary course. These provisions, when read in conjunction with the liabilities Kroger agreed to assume and not assume, show an intent for Meadowdale to be responsible for injuries to third parties from the initiation of the agreement to the time of the closing. We therefore conclude that the trial court properly granted summary disposition to Kroger on this ground.

We note that Kroger "emphasizes" its argument that plaintiff's present position is self-imposed because she failed to provide timely notice in bringing this action. Kroger contends that, had plaintiff commenced this action in 1990, she may have been successful in recovering from the sale of proceeds received by Meadowdale. We find this argument meritless. In this case, plaintiff provided notice in a timely manner. When the slip and fall occurred, the store manager completed an accident report. A copy was kept in the store and a copy was sent to the insurance company. Pursuant to the purchasing agreement, Kroger had the opportunity to investigate all books, records, and the like until the sate of closing. Contrast, *Stevens v McLouth Steel Products Corp*, 433 Mich 365, 368; 446 NW2d 95 (1989).

Affirmed.

/s/ Myron H. Wahls
/s/ Harold Hood
/s/ Kathleen Jansen

[1] Martha Bagoly will be referred to as "plaintiff." Lewis Bagoly appears to have asserted a claim of loss of consortium only.