COURT OF APPEALS
DECISION
DATED AND FILED

December 5, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2253 **Cir. Ct. No. 2003CV7679**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

A.O. SMITH CORPORATION,

PLAINTIFF-RESPONDENT,

V.

SPX CORPORATION,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed*.

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 CURLEY, J. SPX Corporation (SPX) appeals the grant of summary judgment in favor of A.O. Smith Corporation (A.O. Smith). This case arises out of lawsuits filed against SPX for asbestos-related illnesses, in response to which SPX argued that a 1972 stock purchase agreement mandated that it be

held harmless by A.O. Smith for asbestos liability where the exposure took place prior to 1972. A.O. Smith filed this declaratory judgment action seeking a declaration that the 1972 agreement did not obligate A.O. Smith to hold SPX harmless. The trial court concluded that because the indemnification clause of the 1972 agreement did not include liability for asbestos-related illnesses arising from pre-1972 exposure to asbestos, A.O. Smith was not obligated to hold SPX harmless.

¶2 SPX contends that the plain language of the indemnification clause of the 1972 agreement shows that the agreement does include liability for pre-1972 exposure to asbestos, and that the trial court thus misinterpreted the agreement by imposing a new and different meaning. We conclude that the relevant provision of the 1972 agreement is an accounting provision whose terms mandate indemnity only when the liability could and should have been reported on the 1972 balance sheet. Because the asbestos liabilities in question could not have been foreseen in 1972, A.O. Smith is not obligated to hold SPX harmless. Therefore we affirm.

I. BACKGROUND.

¶3 In 1969, A.O. Smith acquired Layne & Bowler Pump Company (Layne & Bowler), which specializes in the production of pumps. On February 17, 1972, A.O. Smith sold Layne & Bowler to General Signal Corporation (General Signal) by entering into a stock sale agreement. In 1998, SPX acquired General Signal, and in 2001, SPX and General Signal merged into SPX.

¶4 Beginning in 2002, numerous lawsuits naming SPX as a defendant have been brought related to illnesses allegedly resulting from exposure to asbestos-containing components in or on pumps manufactured and sold by Layne

& Bowler. Many of the complaints filed against SPX alleged that the exposure had taken place prior to 1972. SPX has not disputed liability for exposure that took place after 1972. SPX has, however, taken the position that, under Article 2.6 of the 1972 agreement between A.O. Smith and General Signal, SPX it is not liable for any illnesses that resulted from exposure that predates the agreement. Article 2.6 provides in relevant part:

> As of [February 17],[1] 1972, L & B had no liabilities of any nature which, if known, would have been included in said balance sheet in accordance with generally accepted accounting principles consistently applied by L & B, and which in the aggregate are in an amount greater than $25,000 (net of receipts by L & B of items not shown as assets on the balance sheet) whether accrued, absolute, contingent or otherwise, other than liabilities reflected or adequately reserved against on the balance sheet of L & B referred to in Article 1.4, and as to any such amount in excess of $25,000, A. O. SMITH will hold GENERAL harmless.…

SPX maintained that this indemnification clause means that A.O. Smith agreed to hold SPX harmless for any liability for asbestos-related injuries where the exposure took place prior to the sale.

¶5 A.O. Smith disagreed and initiated this declaratory judgment action against SPX, seeking a declaration that the 1972 agreement does not give rise to an obligation of A.O. Smith to hold SPX harmless for any claims asserted against SPX alleging asbestos exposure resulting from products manufactured by Layne & Bowler. Following discovery, A.O. Smith filed a motion for summary judgment, arguing that it cannot be required to indemnify SPX because the phrase "if

[1] Although Article 2.6 of the agreement contains the date January 1, 1972, Article 6.1 makes clear that all representations and warranties of A.O. Smith contained in the agreement are to take effect on as of the closing date, February 17, 1972.

known" in Article 2.6 specifies that the liability must have been known by 1972. SPX responded by advocating that the words "would have been" in Article 2.6 require a transfer back in time, emphasizing that although the claims were not known, they existed, since the injuries were caused decades before symptoms appear. SPX also filed its own motion for summary judgment seeking a declaration that A.O. Smith is covered for pre-1972 asbestos exposure to Layne & Bowler products.

¶6 In ruling on the motions, the trial court first observed that "[a]t first blush, Section 2.6 of the Agreement might seem ambiguous, because the words 'if known' seem to beg the question 'how long after closing may a liability become known and still be covered?'" The court disagreed that this was the case, however, because "reviewing the entire provision yields a significant clue that resolves any ambiguity about the words 'if known,'" explaining that "[t]he clue consists of the terms which the words 'if known' are meant to qualify: 'liabilities.'" The court therefore deduced that "[t]he limited scope of this term ['liabilities'] in turn limits the meaning of the words 'if known,' and excludes SPX's interpretation of Section 2.6." The trial court reached this conclusion by reasoning as follows:

> The term "liabilities" is to be understood broadly. AO [Smith] agreed to hold General Signal harmless from "liabilities of any nature … whether accrued, absolute, contingent or otherwise." Nevertheless, the term "liabilities" is a term of art, of the art of accounting. Implicit in this term of art is a distinct pair of limitations on what kind of knowledge triggers a duty to disclose. There is no disagreement about these limitations; the parties agree that in 1972 an accountant was not required by generally accepted accounting principles to record a liability on a balance sheet unless the liability was both foreseeable and estimable. In other words, a potential loss that generally might be termed a *legal* liability would not be considered an *accounting* liability that needed disclosing on a balance

> sheet unless it could be predicted and quantified. These factors lend an item the "accounting certainty" prerequisite to being stated on a balance sheet.
>
> Thus, Section 2.6's reference to "liabilities" disambiguates "if known" and clarifies the limit on AO [Smith]'s promise to hold the buyer harmless. The kind of liability that AO [Smith] promised to cover is a liability that was sufficiently predictable and quantifiable at the time it stated its finances on January 1, 1972, but did not become known to AO [Smith] until some time after closing – in other words, "liabilities" that "would have been included … in accordance with generally accepted accounting principles" in the January 1, 1972 balance sheet. In short, AO [Smith]'s hold-harmless obligation is not triggered unless a claim arises after closing that could have been foreseen and estimated as of January 1, 1972.

(Emphasis in original.)

¶7 Based on these limitations, the trial court concluded that summary judgment in favor of A.O. Smith was "obvious," because asbestos claims were barely heard of in 1972 and, as such, an accountant clearly could not have predicted or quantified the liability associated with a 2002 asbestos claim. The trial court added that it would be "unusual [and] extraordinary" to conclude that A.O. Smith was promising to cover liabilities that were not disclosed on Layne & Bowler's 1972 balance sheet; that is, "that A.O. Smith was conferring on SPX some kind of a money-back guarantee against any kind of liability that might arise at any time in the future, however remote, regardless of whether such a liability could have been foreseen or estimated when the 1972 balance sheet was being prepared." SPX now appeals the grant of summary judgment to A.O. Smith.

II. ANALYSIS.

¶8 We review a grant of summary judgment *de novo*, using the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304,

315, 401 N.W.2d 816 (1987). Summary judgment is appropriate if "the depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2) (2003-04).[2]

¶9 The interpretation of a written contract is a question of law that we review *de novo*.[3] ***Jones v. Jenkins***, 88 Wis. 2d 712, 722, 277 N.W.2d 815 (1979). "[T]he cornerstone of contract construction is to ascertain the true intentions of the parties.…" ***State ex rel. Journal/Sentinel, Inc. v. Pleva***, 155 Wis. 2d 704, 711, 456 N.W.2d 359 (1990). We "determine what the parties contracted to do as evidenced by the language they saw fit to use." ***Id.*** "Contract language is considered ambiguous if it is susceptible to more than one reasonable interpretation." ***Danbeck v. American Family Mut. Ins. Co.***, 2001 WI 91, ¶10, 245 Wis. 2d 186, 629 N.W.2d 150. "When the terms of a contract are plain and unambiguous, we will construe the contract as it stands." ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶14, 257 Wis. 2d 421, 651 N.W.2d 345. When construing a contract, "courts cannot insert what has been omitted or rewrite a contract made by the parties." ***Levy v. Levy***, 130 Wis. 2d 523, 533, 388 N.W.2d 170 (1986) (citation omitted). A contract "should be given a reasonable meaning so that no part of the contract is surplusage." ***Journal/Sentinel***, 155 Wis. 2d

[2] All references to the Wisconsin statutes are to the 2003-04 version unless otherwise noted.

[3] The stock purchase agreement provides that it is to be construed and enforced in accordance with the laws of the State of California. The parties do not however dispute that the California law of contracts relevant for purposes of this appeal is the same as the law of contracts in Wisconsin.

at 711. In addition, a contract is to be interpreted in the manner that it would be understood by persons in the business to which the contract relates. ***McNamee v. APS Ins. Agency***, 112 Wis. 2d 329, 333, 332 N.W.2d 828 (Ct. App. 1983).

¶10 "The construction of an unambiguous contract is a question of law." ***Wausau Underwriters Ins. Co. v. Dane County***, 142 Wis. 2d 315, 322, 417 N.W.2d 914 (Ct. App. 1987). "Whether a contract is ambiguous is itself a question of law." ***Id.*** "We review questions of law de novo, while benefiting from the trial court's analysis." ***Northern States Power Co. v. National Gas Co.***, 232 Wis. 2d 541, 545, 606 N.W.2d 613 (Ct. App. 1999).

¶11 We begin by examining the nature of the 1972 agreement. The parties chose to enter into an agreement for the sale of stock. In ***Columbia Propane, L.P. v. Wisconsin Gas Co.***, 2003 WI 38, 261 Wis. 2d 70, 661 N.W.2d 776, our supreme court recently discussed the difference between stock and asset purchase agreements. ***Id.***, ¶¶22-24. The court recognizes that the general rule is that, in a stock purchase, the "acquired corporation retains all of its liabilities and obligations, known and unknown," whereas an asset purchase can limit the purchaser's "responsibility for liabilities, particularly unknown or contingent liabilities" because the purchaser "has the opportunity to determine which liabilities of the seller it will contractually assume." ***Id.***, ¶22 (citations and internal quotation marks omitted). The court provided the following clarification of the distinction:

> Courts have also recognized this distinction, observing that the "rule of non-liability for asset acquisitions is frequently the reason why parties choose that option in acquiring a business, as opposed to a merger or stock acquisition, in which the predecessor's obligations and liabilities continue in the surviving entity." In other words, the general rule of non-liability in an asset purchase is "based upon the premise that when one corporation sells

> its assets, it transfers an interest distinct from that of the corporate entity itself. The rule protect[s] a bona fide purchaser from liabilities caused by a predecessor corporation of which the bona fide purchaser was unaware at the time of acquisition."
>
> [S]tock versus asset acquisitions have been discussed in the following manner:
>
> > A buyer may either purchase the assets of a seller or the stock of the seller's corporation to effectuate an acquisition. An asset purchase provides greater security to the buyer that no undisclosed or contingent liabilities will be transferred. In a stock sale, all undisclosed or contingent liabilities remain with the corporation.

Id., ¶¶23-24 (citations and footnotes omitted). The general rule regarding successor liability in the case of stock purchases thus suggests that because this was a stock purchase, all liabilities would ordinarily remain with Layne & Bowler, and thus be exclusively the responsibility of SPX.[4] Our inquiry does not end here, however. Rather, we must decide whether the terms of the indemnification clause contained in Article 2.6 of the 1972 agreement nonetheless cover asbestos-related liability in instances where the exposure to asbestos pre-dates the agreement.

¶12 Turning to the specific terms of the agreement, Article 2.6, as noted, provides in relevant part:

> As of [February 17], 1972, L & B had no liabilities of any nature which, if known, would have been included

[4] SPX insists that ***Columbia Propane, L.P. v. Wisconsin Gas Co.***, 2003 WI 38, 261 Wis. 2d 70, 661 N.W.2d 776 in fact support its position because the case involved a "warranty [that] is uncannily similar to the one that had been given by the seller, A.O. Smith, in this case." In so arguing, SPX attempts to discount the distinction between the asset sale at issue in ***Columbia Propane*** and the stock sale at issue here. ***Columbia Propane***'s strong emphasis on the difference between stock and asset sales however demonstrates that SPX's attempt to cite ***Columbia Propane*** as support for its position based on the language of the warranty is misguided.

> in said balance sheet in accordance with generally accepted accounting principles consistently applied by L & B, and which in the aggregate are in an amount greater than $25,000 (net of receipts by L & B of items not shown as assets on the balance sheet) whether accrued, absolute, contingent or otherwise, other than liabilities reflected or adequately reserved against on the balance sheet of L & B referred to in Article 1.4,[5] and as to any such amount in excess of $25,000, A. O. SMITH will hold GENERAL harmless.… A separate covenant with respect to litigation and proceedings pending or threatened against or relating to L & B is set froth in Article 2.14 infra.

(Footnote added.) A.O. Smith thus agreed to hold General Signal harmless for any amount in excess of $25,000 (which, per Article 8.1, is extended to all successors, and thus includes SPX). The parties disagree, however, on what, if any, other prerequisites Article 2.6 contains that must be satisfied before A.O. Smith is required to indemnify SPX.

¶13 SPX contends that the plain reading of the language "which, if known, would have been included in said balance sheet in accordance with general accounting principles consistently applied by Layne & Bowler," demonstrates that the indemnity includes asbestos liabilities that existed but were not yet known. SPX argues that "if known" does not exclude long-latency asbestos-related diseases, because although there was no knowledge of the disease for several

[5] Article 1.4 provides in part:

> A. O. SMITH has delivered to GENERAL a balance sheet of L & B, as of January 1, 1972, and a related statement of income and income retained in the business for the period from January 1, 1971 through December 31, 1971, and a computation prepared by A. O. SMITH of the purchase price determined in accordance with Article 1.3. GENERAL has agreed to proceed on the basis of these documents in reliance upon the warranties made by A. O. SMITH hereafter and a procedure for valuation of inventories and receivables hereinafter set forth….

years, the liabilities resulting from pre-1972 exposure to asbestos did exist in 1972. Therefore, the argument goes, that the liabilities were not known for several years after 1972 does not militate against their inclusion in the indemnity. SPX suggests that its interpretation is supported by the wide breadth the agreement gave to the term "liability" by speaking of liabilities "of any nature," "whether accrued, absolute, contingent or otherwise," as well as by the parties' explicit agreement that the commitments were to survive indefinitely.

¶14 Accordingly, SPX contends that the trial court misinterpreted the agreement by limiting the scope of the word "liability." According to SPX, in Article 2.6, the word "liability" has two different meanings: it is a generally broad concept, but when referred to in connection with generally accepted accounting principles (GAAP), it is a narrow accounting term and "a distinct subset of the broader term 'liabilities.'"

¶15 SPX also insists that the trial court's reasoning was grammatically incorrect because the word "liabilities" should not limit the scope of the words "if known," since "the words 'if known' are part and parcel of the GAAP caveat, which, by its very nature, is a limitation to the phrase 'liabilities of any nature', not the other way around."

¶16 Finally, SPX also disagrees with the trial court's conclusion that SPX's position implies a "money-back guarantee" against any liability that might arise in the future, and submits that this concern is misplaced because SPX "sought indemnity only for those liabilities (in excess of $25,000) that existed prior to the 1972 sale but simply took time to become known to Layne & Bowler and SPX," and thus, "[i]f such liabilities, once known, are the type which would

have been included in its 1972 GAAP balance sheet, then they should be paid by A.O. Smith."[6]

¶17 A.O. Smith, by contrast, agrees with the trial court's interpretation of the agreement. A.O. Smith asserts that SPX "reads the words 'As of 1972' right out of the Agreement," and that SPX's position is an "attempt to expand the indemnification clause through emphasis on 'if known' [which] necessarily ignores the basic foundation of the indemnification obligation, the 1972 balance sheet." According to A.O. Smith, SPX also ignores the phrase "any such amount," explaining that the use of "any such amount," rather than "any amount," "means that the obligation to hold SPX harmless only applies to the liabilities previously described, i.e.[,] liabilities that existed in 1972 and were subject to disclosure on the 1972 balance sheer under GAAP." Further, emphasizing the importance of the 1972 balance sheet, A.O. Smith explains that the agreement obligates it to indemnify SPX to the extent that a liability existed in 1972 "even if the liability was unknown to A.O. Smith in 1972, provided that the liability existed in 1972 and was subject to reporting under GAAP on the 1972 balance sheet, and was in excess of $25,000 in the aggregate."

¶18 In reviewing the terms of the agreement, we first note that although our review is *de novo*, we find the trial court's analysis of the issue to be very helpful, not only because it is exceptionally thorough, but also because both sides,

[6] In addition to arguing that the trial court erred in granting summary judgment in favor of A.O. Smith, SPX also asks us to award partial summary judgment to SPX pursuant to WIS. STAT. § 802.08(6), and to find as a matter of law that A.O. Smith's indemnity covers claims for pre-1972 exposure to asbestos. Because we determine that the trial court's grant of summary judgment to A.O. Smith was proper, we do not address this argument. *See* ***Gross v. Hoffman***, 227 Wis. 2d 296, 300, 277 N.W.2d 663 (1938) (unnecessary to address non-dispositive issues).

especially SPX, addressed it in great detail. *See* ***Northern States***, 232 Wis. 2d at 545 ("We review questions of law de novo, while benefiting from the trial court's analysis."). It is true that Article 2.6 was not drafted in the clearest possible manner and likely could have been drafted using more specific language to give it what the trial court termed "surface clarity." Despite this lack of "surface clarity," we reach the conclusion that it was nevertheless drafted clearly enough to have an unambiguous meaning.

¶19 We cannot agree with SPX that the trial court's conclusion imposes a new and different meaning on the terms of the agreement; rather, we conclude that the true meaning of Article 2.6 is far narrower and simpler than SPX would have us believe.

¶20 We agree with the trial court that Article 2.6 is an accounting provision. This becomes obvious when Article 2.6 is viewed in conjunction with the preceding section, Article 2.5. Article 2.5 provides that A.O. Smith warrants that Layne & Bowler's balance sheet was prepared in accordance with GAAP:

> The balance sheet of L & B as of January 1, 1972 and the related statement of income and income retained in the business for the period from January 1, 1971 to December 31, 1971, delivered to GENERAL pursuant to Article 1.4 hereof, has been prepared in accordance with generally accepted accounting principles applied on a consistent basis and correctly sets forth the financial condition of L & B at December 31, 1971 and the results of its operations for the period then ending.

Having warranted in Article 2.5 that Layne & Bowler's balance sheet has been prepared in accordance with GAAP, Article 2.6 then sets forth an additional warranty from A.O. Smith for liabilities *not* reflected on the balance sheet. The extent of this additional warranty turns on the terms used in Article 2.6., *and* the fact that the provision centers around accounting.

¶21 Dissecting the language of Article 2.6, we first observe that Article 2.6 has two main parts. First, it states that as of the date on which the agreement was entered into, Layne & Bowler

> had no liabilities of any nature which, if known, would have been included in said balance sheet in accordance with generally accepted accounting principles consistently applied by L & B, and which in the aggregate are in an amount greater than $25,000 … whether accrued, absolute, contingent or otherwise, other than liabilities reflected or adequately reserved against on the balance sheet of L & B referred to in Article 1.4.

Second, Article 2.6 promises that "as to any such amount in excess of $25,000, A.O. SMITH will hold GENERAL harmless"; in other words, with respect to those amounts referenced in the first part, A.O. Smith will indemnify General Signal.

¶22 We next turn to the specific terms of the greatly-debated portion of Article 2.6, that reads: "L & B had no liabilities of any nature which, if known, would have been included in said balance sheet in accordance with generally accepted accounting principles." First, as the trial court correctly recognized, the meaning of "if known" turns on the meaning of "liabilities," and the meaning of "liability" and "if known" can be gathered from the context in which they appear. This inevitably directs the analysis to the fact that Article 2.6 is fundamentally an accounting provision that explained that Layne & Bowler's liabilities were reported on a "balance sheet in accordance with generally accepted accounting principles."

¶23 As to the meaning of the crucial two words "if known," we emphasize the importance of reading them in context. This leads us to conclude that the only reasonable way to read "if known," in the language "L & B had no

liabilities of any nature which, if known, would have been included in said balance sheet…," is that "if known" means that when the parties signed the agreement, Layne & Bowler was unaware of any liabilities that should have been listed on the balance sheet but had been left off. Stated slightly differently, what is meant is: When the parties entered into the agreement, A.O. Smith included all liabilities that it was aware of on the balance sheet for Layne & Bowler; however, if there were further liabilities that A.O. Smith should have included, but of which A.O. Smith was unaware, A.O. Smith assures that it would have included those liabilities on the balance sheet as well. "[I]f known" thus implies a necessary limit for when liability can become known; that is, when the liability could and should have been disclosed on the 1972 balance sheet.

¶24 Article 2.6 is thus essentially a warranty by A.O. Smith promising to General Signal that, in the event that A.O. Smith made a mistake on Layne & Bowler's balance sheet and omitted something that should have been included on that balance sheet, it will hold General Signal harmless for the consequences of any such mistake. Article 2.6 is quite simply A.O. Smith's promise that if it did not include on the balance sheet all the items it should have, that an accountant would have in accordance with GAAP, then it will take responsibility for those failures.

¶25 For these reasons, we cannot agree with SPX that the words "if known" imply that A.O. Smith agreed to indemnify General Signal for "liabilities" that allegedly existed prior to the 1972 sale, but took thirty years to become known to Layne & Bowler. As A.O. Smith notes, "if known" does not mean that lawsuits filed against SPX in 2002 are to be transformed via the contractual language into liabilities of Layne & Bowler that existed in 1972. SPX's reading of Article 2.6, that the word "liabilities," as used in Article 2.6, has a two different meanings,

ignores the essence of Article 2.6; namely, that it is a promise to report on the 1972 balance sheet the liabilities in accordance with GAAP. SPX's reading is little more than a creative attempt to read into Article 2.6 something that simply is not there in an effort to come up with an interpretation, more than thirty years later, that supports their position under the facts of this case. That the agreement specifies that Article 2.6 includes liabilities "of any nature," "whether accrued, absolute, contingent or otherwise," does not broaden the meaning of the article, but merely explains that regardless of the type of liability that may have inadvertently been overlooked by the accountant who prepared the balance sheet, General Signal will be held harmless.

¶26 We thus agree with the trial court that it follows that it would be absurd to conclude that the accountant who in 1972 prepared the balance sheet could have meant to, but inadvertently neglected to, include liability for asbestos-related illnesses arising in 2002.

¶27 Our conclusion that Article 2.6 was not intended to function as an indemnity for future asbestos litigation is further supported by the last sentence of Article 2.6, "[a] separate covenant with respect to litigation and proceedings pending or threatened against or relating to L & B is set forth in Article 2.14 infra." Article 2.14 reads:

> There is known to A. O. SMITH no litigation or proceeding pending or threatened against or relating to L & B, its properties or its business which could materially and adversely affect such properties or business; nor is any basis known to exist for any such action or for any governmental investigation relative to L & B, its properties or its business. All litigations or claims of a material nature, including administrative proceedings, against L & B are set forth in Schedule E, and as to all such legal claims, A. O. SMITH will hold GENERAL harmless, including attorneys' fees and other expenses of litigation.

Given that the agreement provided a separate provision specifically devoted to litigation and pending or threatened legal proceedings in which A.O. Smith agrees to hold General Signal harmless, this begs the question why the drafters would have bothered to include such a section if, as SPX insists, indemnity for future asbestos lawsuits were intended to be found in Article 2.6. The logical answer is that future litigation was intended to be covered by Article 2.14, not Article 2.6.

¶28 It is easy to understand SPX's motivation, when faced with numerous lawsuits resulting from asbestos exposure that predates its ownership of Layne & Bowler, for seeking to have A.O. Smith shoulder the responsibility for the portion of diseases that originated from exposure to asbestos at a time when A.O. Smith owned Layne & Bowler. That, however, is not what A.O. Smith agreed to in Article 2.6 of the 1972 agreement. We are confined to the terms of the agreement that A.O. Smith and SPX's predecessor General Signal entered into, and those terms simply do not permit a conclusion consistent with SPX's position. It is not up to us to rewrite the parties' agreement.

¶29 When General Signal purchased Layne & Bowler, it purchased the company, along with liabilities for future asbestos litigation. Had the parties intended to impose a different duty to indemnify, they would have said so in the agreement, or better yet, structured the agreement as an asset sale rather than a stock sale, in which case General Signal could have specified the liabilities it wished to assume. The parties, two large corporations both represented by counsel, were certainly sophisticated enough to understand the ramifications of using the terminology they did and structuring their transaction in the manner they

did. Therefore, we affirm the trial court's grant of summary judgment to A.O. Smith.[7]

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[7] We disagree with the Dissent's conclusion that "if known" means "contingent liability." The Dissent reaches this conclusion by first formulating the question as follows: "The question is whether, if it had been known in 1972, A.O. Smith would have been required by generally accepted accounting principles, to disclose *the risk of* asbestos-related liability in a financial statement." Dissent, ¶36 (emphasis added). The Dissent then answers its own question in the following manner: "[I]f *the risks* of asbestos had been known to A.O. Smith before the 1972 agreement was signed, it was a contingency which generally accepted accounting principles then required be disclosed, regardless of whether the extent of the liability could be precisely quantified." Dissent, ¶38 (emphasis added).

However, in our view nothing indicates that Article 2.6 discussed the disclosure of "*the risk* of asbestos-related liability." Rather, the disputed language centers around the disclosure of the "liabilities … if known," not "the risk" of such liabilities. GAAP in Article 2.6 refers merely to the manner in which the "liabilities … if known" were to be reported on the balance sheet. In our view, the fact that Article 2.6 discusses GAAP does not invite a discussion about contingencies, which can then be read as implying that "if known" really means "potential liability" some time in the future.

Moreover, the Dissent assumes that because A.O. Smith in 1972 knew "what Layne & Bowler manufactured, and at least generally how such manufacture was conducted," that it must have known that asbestos could cause "serious disease." Dissent, ¶37. Nothing in the record supports such speculation.

¶30 KESSLER, J. (*dissenting*). I do not disagree with the Majority's basic statement of the applicable law. (Majority, ¶¶9-10.) However, because I conclude that the Majority's construction of the 1972 agreement reads out of existence significant terms in Article 2.6 to which the parties specifically agreed, and fails to consider the generally accepted accounting principles as they existed when the contract was written in 1972, I respectfully dissent.

¶31 The 1972 agreement is not a contract written by two unsophisticated parties. Rather, it is a twenty-seven page contract (including schedules), prepared in 1972 for sophisticated companies by lawyers who attempted to resolve all known and unknown contingencies in the relationship between the buying company, General Signal (later acquired by SPX[1]), and the selling company, A.O. Smith. The 1972 agreement provided for A.O. Smith to deliver all stock in Layne & Bowler to General Signal,[2] in exchange for which General Signal would pay the purchase price agreed upon, after adjustments based on an appraisal by an accounting firm of Layne & Bowler's assets and certain liabilities.[3] The parties acknowledged that A.O. Smith had delivered a balance sheet of Layne & Bowler as of January 1, 1972, and an income statement for January 1, 1971 through December 31, 1971, upon which General Signal relied and upon which the

[1] All parties agree SPX acquired the rights and obligations of General Signal under the contract with A.O. Smith.

[2] 1972 Agreement, art. 1.2

[3] ***Id.***, arts. 1.3 and 1.5.

purchase price was based.[4] A.O. Smith warranted that the balance sheet and income statement had been "prepared in accordance with generally accepted accounting principles applied on a consistent basis."[5]

¶32 Although this was a sale of stock which, as the Majority notes, might ordinarily be expected to automatically transfer all assets and all liabilities to the buyer,[6] the parties specifically agreed to deviate from that usual arrangement. They agreed that the seller, A.O. Smith, would "hold harmless" General Signal from a number of unresolved liabilities. The liabilities which remained with A.O. Smith included pending or threatened litigation or proceedings specifically identified on a schedule attached to the 1972 agreement.[7] Specifically as to those known risks, A.O. Smith warranted:

> 2.14 There is *known to A.O. SMITH* no litigation or proceeding pending or threatened against or relating to [LAYNE & BOWLER], its properties or its business which could materially and adversely affect such properties or business; nor is any basis known to exist for any such action or for any governmental investigation relative to [LAYNE & BOWLER], its properties or its business. All litigations or claims of a material nature, including administrative proceedings, against [LAYNE & BOWLER] are set forth on Schedule E, and as to all such legal claims, A.O. Smith will hold GENERAL [SIGNAL] harmless, including attorneys' fees and other expenses of litigation.

(Emphasis added.)

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[4] ***Id.***, art. 1.4

[5] ***Id.***, art. 2.5

[6] Majority Opinion, ¶17.

[7] 1972 Agreement, art. 2.14.

¶33 A.O. Smith disclosed in the 1972 agreement that Layne & Bowler's income tax returns had been audited for all years up to and including 1968. As to Layne & Bowler's income tax liability for the fiscal years ending December 31, 1969, 1970 and 1971, which had not yet been audited by the Internal Revenue Service, A.O. Smith promised to "defend and hold GENERAL [SIGNAL] harmless from all tax deficiencies levied for years prior to January 1, 1972."[8] Because the audits had not yet occurred, the extent of the tax liability, if any, could not have been known in 1972. However, apparently because of the history of audits, this was a specific contingent liability both parties reasonably anticipated.

¶34 Finally, to allocate all other liabilities of which either party was unaware at the time of the 1972 agreement, the parties agreed that:

> 2.6 As of January 1, 1972, [LAYNE & BOWLER] had no liabilities of any nature which, *if known, would have been included in said balance sheet in accordance with generally accepted accounting principles consistently applied* by [LAYNE & BOWLER], and which in the aggregate are in an amount greater than $25,000 ... whether accrued, absolute, contingent or otherwise, other than liabilities reflected or adequately reserved against on the balance sheet of [LAYNE & BOWLER] referred to in Article 1.4, and as to any such amount in excess of $25,000, A.O. SMITH will hold GENERAL [SIGNAL] harmless.[9]

(Emphasis added.)

¶35 In the context of the contract as a whole, and based on the plain language of this provision, it is apparent that by this section A.O. Smith agreed to assume responsibility for any liability in excess of $25,000 which, if A.O. Smith

[8] ***Id.***, art. 2.6.

[9] ***Id.***

had known about it as of January 1, 1972, it would have disclosed on the balance sheet. As to the claims of injury related to Layne & Bowler's use of asbestos that are at the heart of this appeal, there are two possibilities. Either A.O. Smith knew about the asbestos risk in 1972 and did not disclose it, or it did not know about the liability associated with asbestos. Under either alternative, if the asbestos risk required disclosure (based on "generally accepted accounting principles" in 1972) if it had been known at that time, then A.O. Smith must hold General Signal, now SPX, harmless for all amounts arising from that risk in excess of $25,000.

¶36 The question is whether, if it had been known in 1972, A.O. Smith would have been required, by generally accepted accounting principles, to disclose the risk of asbestos-related liability in a financial statement. Accounting Research Bulletin (ARB) No. 50, issued in October 1958, was in effect in 1971 and at the time the 1972 agreement was signed. ARB No. 50 discusses, from an accounting perspective, what a contingency is and the related disclosure requirements:

> In the preparation of financial statements … it is necessary to give consideration to contingencies…. [A] contingency is an existing condition, situation, or set of circumstances, involving a considerable degree of uncertainty; which may, through a related future event, result in … the incurrence … of a liability…. A commitment that is not dependent upon some significant intervening factor … should not be described as a contingency.

¶37 Before 1972, A.O. Smith, as the sole owner of Layne & Bowler, must have known what Layne & Bowler manufactured and, at least generally, how such manufacture was conducted. Presumably, A.O. Smith knew that asbestos was used in the manufacturing process and/or product, and was aware of the general scope of Layne & Bowler's sales and product distribution. Had A.O. Smith known before the 1972 agreement was signed that asbestos caused serious disease (the "existing condition"), there would still remain the

"considerable degree of uncertainty" as to a future event which would "result in" liability—namely, who would get sick, how sick would they become, and what would be the financial value of their damages. The ARB description of a contingency was fully satisfied as to the asbestos claims, if A.O. Smith had known of that risk at the time it entered into the 1972 agreement.

¶38 ARB No. 50 also explains that precise measurement of the extent of liability is not required in order to require disclosure of a contingency:

> The contingencies with which this section is primarily concerned are those in which the outcome is not sufficiently predictable to permit recording in the accounts, but in which there is a reasonable possibility of an outcome that might materially affect financial position.

Examples of contingencies identified in ARB 50, which cannot be sufficiently predicted to be recorded "in the accounts," include pending or threatened litigation, assessments, additional taxes, guarantees of debts for others, and receivables repurchase agreements. Nothing in ARB 50 suggests these examples are exclusive. The extent of liability for damages, for example, caused by a widely distributed product, or caused to workers in the manufacture of that product, are similarly not sufficiently predictable in amount to permit accurate advance quantification. However, as we have seen under then-applicable generally accepted accounting principles, that does not mean such a contingency is not to be disclosed. Rather, if the risks of asbestos had been known to A.O. Smith before the 1972 agreement was signed, it was a contingency which generally accepted accounting principles then required be disclosed, regardless of whether the extent of the liability could be precisely quantified.

¶39 The careful allocation of liability done by the parties in 1972 should not be rendered meaningless by this court in 2006. "If known" in 1972 cannot

reasonably be understood to mean "actually known" in 1972. Such a conclusion is contrary to the plain language of the contract. It renders "if known" a meaningless phrase, and is inconsistent with other specific provisions in the 1972 agreement allocating known and identified contingent liabilities.

¶40 I conclude, therefore, that under applicable generally accepted accounting principles, disclosure of the asbestos-related potential liability would have been required in 1972 if A.O. Smith had known about it at that time. By contract, A.O. Smith has accepted the responsibility to hold SPX harmless for that then-unknown contingent liability. Consequently, I would reverse.