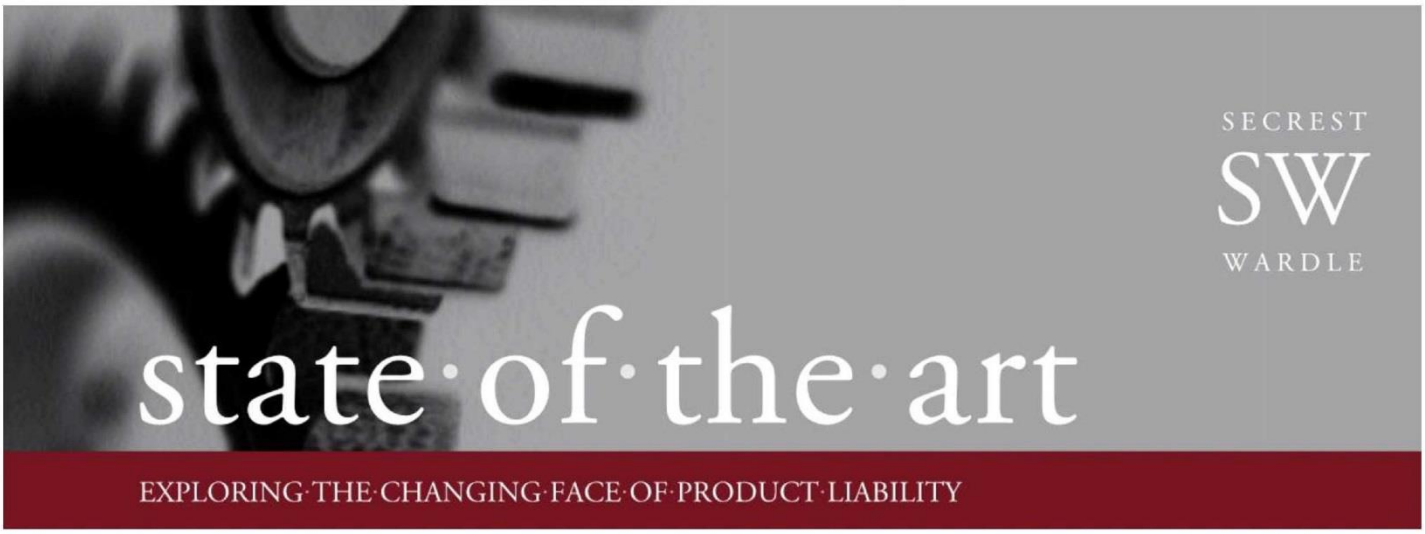

Tragic snowmobile death case may breathe some life into Michigan products liability litigation

By: Drew W. Broaddus **February 16, 2016**

SECREST WARDLE NOTES

In Michigan, it is extremely difficult to recover under a products liability theory, following legislation that took effect in 1996. See MCL 600.2946(2). Under the statute a negligent design theory, such as the one advanced in *Estate of Schwarck*, requires proof both that the product was unreasonably dangerous at the time it left the manufacturer's control and that a practical and technically feasible alternative design was available at the time of production.

Skinner v Square D Co, 445 Mich 153, 163 (1994) – a case that was discussed by both the *Estate of Schwarck* majority and dissent – established that in a products liability case (or any other tort case) "a causation theory that, while factually supported is, at best, just as possible as another theory" is not sufficient to survive summary disposition. Judge Riordan found *Skinner* to be controlling but the majority found it factually distinguishable.

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In *Estate of Schwarck v Arctic Cat, et al.*, unpublished opinion per curiam of the Court of Appeals, issued January 14, 2016 (Docket No. 322696), a divided panel of the Michigan Court of Appeals reinstated a lawsuit brought by relatives of two sisters who died on February 7, 2010, after their allegedly defective Arctic Cat snowmobile went in reverse and vaulted them off a cliff on Mackinac Island. The trial court granted Artic Cat's motion for summary disposition on the grounds that the plaintiffs' evidence with respect to causation were speculative. The trial court found:

> [T]here is little dispute as to what happened in the snowmobile accident…. [T]he two sisters … travelled an approximate distance of 25 feet in reverse and through a split rail fence over a steep

> precipice some 40 feet below and, unfortunately, met untimely deaths. Also, unfortunately, there were no witnesses to the accident. Instead, we are left with speculation regarding the cause of the accident, which arises from competing theories offered since that fateful evening. Those theories are based on first-responder witness observation of snow tracks and the fact that the gear shift was positioned in the "silent reverse" zone when the snowmobile was found after falling forty feet down a cliff. *Estate of Schwarck*, unpub op at 1 (Riordan, J., dissenting).

The Court of Appeals majority (Judges Jane Markey and Cynthia Diane Stephens) found that the plaintiffs' proofs were sufficient to present their cases to a jury. According to the majority, "[p]laintiffs offered competent evidence from which a jury could reasonably infer that decedent Schwarck drove the Arctic Cat in reverse off the West Bluff of Mackinac Island unintentionally, relying on the ineffective reverse alarm." *Estate of Schwarck*, unpub op at 4.

The plaintiff estates filed suit against Arctic Cat (and two other companies not a part of the appeal) raising claims of negligent manufacture and production, gross negligence, and breach of implied warranty. The gist of plaintiffs' theory was that the Arctic Cat 660 was negligently designed, tested, approved, manufactured, and produced without a backup alarm that operated throughout all the reverse travel positions and as a result proximately caused decedents' injuries. After discovery, Artic Cat moved for summary disposition under MCR 2.116(C)(10), arguing that even if the Arctic Cat 660 had a "silent reverse zone," it was not a cause of the accident because the alarm was intended as a warning to bystanders and not as an indicator of shift position for operators. Arctic Cat asserted that there was no malfunction of the vehicle's shift indicator and that the indicator was designed to apprise the operator of the shift position of the craft being steered. Therefore, decedent Schwarck, who knowingly engaged the Arctic Cat into reverse, should have looked to the indicator to ascertain the gear of the craft. Arctic Cat proffered testimony of four first responders to support its contention that the snowmobile tracks were only in one rearward motion south, and that the multiple explanations for how the accident occurred made the "defective shift lever" theory hypothetical.

In response to Artic Cat's (C)(10) motion, plaintiffs argued that forensic evidence showed that the shift lever was in the reverse alarm zone when retrieved, which indicated that decedent Schwarck had shifted from full reverse to forward. Plaintiffs stated that decedent Schwarck was in the process of executing a three-point or "K-turn" Plaintiffs offered the opinions of two retained experts (in accident reconstruction and human factors) as well as an affidavit from decedent Schwarck's surviving spouse and personal representative (the opinion does not explain what this affidavit said; Mr. Schwarck did not witness the accident).

As noted above, the Court of Appeals majority found that the plaintiffs' evidence was sufficient to create a jury-submissible question about causation. Plaintiffs were therefore able to proceed under a products liability theory (although the panel noted that they had failed to preserve an argument with respect to their breach of implied warranty theory and therefore, this argument remained dismissed). The majority distinguished *Skinner v Square D Co*, 445 Mich 153 (1994), as follows:

> …[I]n *Skinner*, the Court indicated that the plaintiff could not have been confused about whether the Square D switch was on or off because of the noise of the tumbler. If the switch were on, the tumbler's loud noise would have been heard. Here, the Court may compare the noise of the tumbler to the sound of the reverse alarm. Just as the sound of the tumbler indicated the switch was on, so did the sound of the reverse alarm indicate the snowmobile was in reverse. In other words, when the tumbler could not be heard, the switch was off, and here when the alarm could not be heard, the snowmobile was presumably in forward. While the Court in *Skinner* was not persuaded that the plaintiff was misled by the switch, here a jury could find that but for the alarm, decedent Schwarck would not have been confused about whether she was in forward or reverse. Defendant's argument, that the operator's manual control of the gearshift dissipates any confusion as to what gear the operator is in, is not dispositive. [Plaintiff's accident reconstructionist] reported that twice during his test runs with an exemplar model, when he shifted forward, the shaft had stopped at the shift fork transition point and prevented it from fully seating in the stowed "drive" position. This evidence indicates that

manual control of the gearshift would not have eliminated operator confusion because the gearshift has the capacity to stop before it is fully in forward gear. *Estate of Schwarck*, unpub op at 7-8.

Judge Michael Riordan dissented, finding that plaintiffs' proofs were too speculative to submit the question of causation to a jury. As of February 15, 2016, Artic Cat has filed a motion for reconsideration in the Court of Appeals which had not been decided. While such motions are rarely granted, they often signal a party's intention to file an Application for Leave to Appeal to the Michigan Supreme Court.

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