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Probable Cause Exception to Enforcement of Will and Trust *In Terrorem* Clauses: Determining the Factors in Applying the Exception and Considering Opportunities for an Early Determination of Whether the Exception Has Been Satisfied

By Thomas F. Sweeney, Thomas M. Dixon, and Thomas E.F. Fabbri

Introduction

In a case of first impression, *Schiffer v Brenton*, 247 Mich 512, 520, 226 NW 253 (1929), the Michigan Supreme Court held that *in terrorem* (also referred to as penalty or no-contest) clauses in wills were valid and enforceable, irrespective of the good or bad faith of the contest. The *Schiffer* court reasoned that "such provisions serve a wise purpose; they discourage a child from precipitating expensive litigation against the estate, and encourage and reward other children in their effort to sustain their parent's disposition of his property if such contest is precipitated; they discourage family strife, they discourage litigation, and the law abhors litigation." *Schiffer, supra.*

Michigan law under *Schiffer* as developed over time, was uniformly codified with respect to wills and trusts with the adoption of the Estate and Protected Individuals Code ("EPIC") on April 1, 2000 for wills, and the Michigan Trust Code ("MTC") on April 1, 2010 for trusts. Michigan now has a common statutory provision authorizing the use of *in terrorem* clauses in wills and trusts and an exception to their enforcement, if there is probable cause to contest a will or trust containing an *in terrorem* clause.

For wills, the provision is contained in MCL 700.2518[1] and 700.3905.[2] For trusts, the provision is contained in MCL 700.7113.[3] A penalty clause typically reduces or eliminates a devise to a devisee who challenges the validity of part or all of the instrument, whether it be a will, a codicil to a will, a trust, or an amendment to a trust. The clause may also include a similar penalty if a devisee challenges the administration of a will or trust. However, this article will only address a contest of the validity of a part or all of one of the foregoing instruments. The exception under all three cited code sections affecting such instruments, provides that a penalty clause shall not be given effect if probable cause exists for instituting a proceeding to contest an instrument.

The statutes establish a balancing test between, on the one hand, respecting a testator's or settlor's right to provide for the disposition of his or her assets after death to such persons and subject to such conditions desired by the decedent (commonly referred to as donative intent), and on the other hand, protecting against a misfeasance or malfeasance that corrupted the real intent of the testator or settlor. The Reporter's Comment to the cited code sections describes the drafting rational behind these three sections.

> A court should understand that the rule recognizes the testator's legitimate desire and expectation that the testamentary plan will be implemented without spiteful disruption and spurious claims. At the same time, the exception is to permit challenge and questioning when there is a reasonable basis for concern. Courts should police the rule and its exception carefully and thoughtfully, or the balancing that was sought will disappear.[4]

Penalty provisions should not result in a court's unwittingly assisting misfeasance or malfeasance. In order to provide courts with the ability to balance these conflicting interests, a probable cause exception exists to the rule that otherwise validates *in terrorem* clauses.[5]

There are two important legal questions raised with respect to determining whether probable cause exists in a given situation and the manner that a court deals with this question:

1. What factors should be considered in determining whether probable cause exists?

2. At what stage in a proceeding, may a court determine whether probable cause exists?

Determining the Factors

The first question about the factors to be considered in determining whether probable cause exists was intentionally not answered by the drafters of MCL 700.3905 and 700.7113 in order to permit the development of caselaw to provide guidance based on the facts in a particular case. This is indicated from the Reporter's Comment under MCL 700.3905 (and quoted in the Reporter's Comment to MCL 700.7113) that states:

> Courts must be vigilant in policing the concept of probable cause and require that there be some substantial basis in fact for a contest or other challenge. If any flimsy excuse is sufficient, the exception swallows the rule.[6]

Further, the Uniform Probate Code, a model code for the states to consider in drafting their own probate codes, does not seek to define the probable cause exception.

The term "probable cause" is not limited to disputes regarding *in terrorem* clauses in wills and trusts. In Michigan, examples in other areas of law containing the concept of probable cause include criminal law and malicious prosecution law. Looking at these areas of law may assist in determining the factors in applying that exception in will and trust contests involving an i*n terrorem* clause. In addition, the Restatement 2d of Property (Wills and Other Donative Transfers), § 9.1 and the Restatement 3d of Property (Wills and Other Donative Transfers), § 8.5, provide further guidelines. Other sources are appellate decisions in Michigan and other states that have addressed the factors to be considered in determining probable cause in will and trust disputes involving *in terrorem* clauses.

Criminal Law Probable Cause in Michigan

In the criminal law setting, probable cause signifies evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief in the defendant's guilt. *People v Green*, 255 Mich App 426, 661 NW2d 616 (2003). *See also People v Dellabonda*, 265 Mich 486, 490, 251 NW 594 (1933) (probable cause defined as "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that a person accused was guilty of the offense with which he is charged"). The factors can be summarized as sufficient information available to such person to cause a prudent person to conscientiously believe a person is guilty of a crime. This exception requires significantly less than the standard of evidence to convict the accused.

Michigan Exception for Probable Cause in a Civil Action for Malicious Prosecution

A cause of action for malicious criminal prosecution arises when one person causes another to be arrested for a crime for which the arrestee is ultimately found not guilty or against whom the criminal case is dismissed. A plaintiff must demonstrate that the civil defendant acted with an ulterior purpose otherwise improper in the normal conduct of the proceeding. The defense to a malicious prosecution claim depends on the civil defendant having probable cause to file the criminal complaint. *Pilette Indus, Inc v Alexander*, 17 Mich App 226, 169 NW2d 149 (1969); see Restatement Torts, 2d §§653–672.

M Civ JI 117.04, regarding malicious prosecution cases, provides that a "Defendant had probable cause if, based on the facts and circumstances known to [him / her] at the time [he / she] [initiated / continued] the criminal proceeding, [he / she] reasonably believed that plaintiff was guilty of a crime. Probable cause may be based on information received from others, but only if the information is of such a reliable kind and from such reliable sources that a reasonable person would believe the information is true." This jury instruction focuses on what a hypothetical person would reasonably believe based on the facts and circumstances known to the per-

son including such information from other reliable sources that appears to be reliable.

Restatement 2d of Property (Wills and Other Donative Transfers) § 9.1

Restatement 2d, § 9.1, recognizes *in terrorem* clauses, "unless there was probable cause for making the contest or attack." Comment *j,* to § 9.1 provides that:

> The term "probable cause" means the existence, at the time of the initiation of the proceeding, of evidence which would lead a reasonable person, properly informed and advised, to conclude that there is a substantial likelihood that the contest or attack will be successful. The evidence needed to establish probable cause should be less where there is a strong public policy supporting the legal ground of the contest or attack.… A factor that bears on the existence of probable cause is that the beneficiary relied upon the advice of disinterested counsel sought in good faith after a full disclosure of the facts.

It is important to note that the definition in the Restatement 2d, § 9.1 *Comment j* does not require one possess all of the evidence needed for a successful prosecution of the contest of the will or trust. It merely requires a substantial likelihood of success based on what is known at the commencement of the proceeding. This version of the Restatement includes an additional consideration involving the inquiry, whether the person commencing the proceeding was advised by disinterested and reasonably informed counsel. This version also suggests that where there is a strong public policy, the evidence to support probable cause should be less.[7]

Restatement 3d of Property (Wills and Other Donative Transfers), § 8.5

The Restatement 3d, § 8.5, continues to recognize the validity of *in terrorem* clauses "unless probable cause existed for instituting the proceeding." Comment *c* to § 8.5 provides in part as follows:

> Probable cause exists when, at the time of instituting a proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful. A factor that bears on the existence of probable cause is whether the beneficiary relied upon the advice of an independent legal counsel sought in good faith after full disclosure of the facts. The mere fact that the person mounting the challenge was represented by counsel is not controlling, however, since the institution of a legal proceeding challenging a donative transfer normally involves representation by legal counsel.

This later version of the Restatement is essentially a re-affirmation of the prior version except to indicate that the existence of disinterested and reasonably informed counsel is not necessarily satisfied solely because the petitioner has retained an attorney to make the contest.

Michigan Court of Appeals Recognition of Restatement 3d, § 8.5

In the Michigan case of *Nacovsky v Hall (In re Mary E Griffin Revocable Grantor Trust),* 281 Mich App 532, 760 NW2d 318 (2008) the Michigan Court of Appeals cited Restatement 3d, § 8.5, comment *c*, in extending the application of MCL 700.2518 and 700.3905 to trusts prior to the enactment of MCL 700.7113. The court stated at page 540:

> Probable cause exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful.

The Court of Appeal's decision was reversed by the Michigan Supreme Court on other grounds.[8]

In a recent case*, In re Estate of George Eugene Stans*, No 309958, 2013 Mich App LEXIS 1131 (June 20, 2013), the Michigan Court of Appeals addressed the application of probable cause citing *In re Griffen Trust* and its citation of Restatement, 3d, §8.5, comment c. In this case, one daughter's petition for formal administration of a pour-over will naming her as personal repre-

sentative was objected to by a second daughter. The decedent's trust contained an *in terrorem* clause providing for forfeiture if a beneficiary or heir unsuccessfully contested the admission of the will to probate or any provision of the will or trust. The second daughter alleged wrongdoing by the first daughter regarding probate property before she was appointed personal representative. The Court of Appeals applied MCL 700.2518 and MCL 700.3905 since the will expressly incorporated the trust's *in terrorem* clause apparently by referring to the will and by having a pourover devise to the trust. The second daughter's objection to the appointment of her sister was a contest of the will. The Court of Appeals concluded that the assertion of "…any ground which would justify the removal of a personal representative under MCL 700.3611(2) is equally sufficient to support an interested person's objection to the initial appointment of a personal representative under MCL 700.3203(2)." Since the first sister took possession of the probate property and may have failed to account for that property prior to her appointment, those facts were sufficient to satisfy the probable cause standard, avoid a forfeiture, and affirm the lower court's refusal to enforce the clause, albeit for different reasons. The Court of Appeals also ruled that since there was no proceeding contesting the trust, there was no contest with respect to the trust under MCL 700.7113.

Caselaw from Other States

Appellate courts in several states have considered the factors in applying the exception of probable cause in a will or trust dispute involving an *in terrorem* clause.

In *Geisinger v Geisinger,* 241 Iowa 283, 41 NW2d 86 (1950), involving a dispute over the construction of a will and codicils and the validity of an *in terrorem* clause, the Iowa Supreme Court, citing the Restatement of the Law, Torts § 675,[9] held that a person has probable cause for initiating civil proceedings against another, if he reasonably believes in the existence of facts upon which his claim is based and reasonably believes that under such facts the claim may be valid at common law or under an existing statute, or so believes in reliance upon the advice of counsel he receives and acts upon.

In *In re Estate of Wells*, 26 Kan App 2d 282, 983 P2d 279 (1999), a Kansas appellate court cited *In re Estate of Foster*, 190 Kan 498, 500, 376 P2d 784 (1962), in which the Kansas Supreme Court adopted the rule of the Restatement of Property § 429 (1944), which held that a contestant acts with probable cause when there is a substantial belief that a will is invalid. The *Wells* court then analyzed and adopted *In re Estate of Campbell*, 19 Kan App 2d 795, 801, 876 P2d 212 (1994), in which the court adopted the definition of probable cause contained in comment *j* of the Restatement 2d, § 9.1.

Under Ariz. Rev. Stat. § 14-2517, a penalty clause cannot be enforced if there exists probable cause to contest a will. In *Rodriguez v Gavette (In re Estate of Shumway)*, 198 Ariz 323, 327, 9 P3d 1062 (2000) the Arizona Supreme Court adopted the *Restatement of Property*[10] exception of "probable cause" holding that:

> We believe the RESTATEMENT's standard for probable cause properly balances the conflicting policy interests and therefore adopt it over the other potential standards, including that framed by the court of appeals and those presented by the parties, which included the colorable claim and Rule 11 standards. We include the good faith element rejected by the court of appeals. While we agree that good faith is not the sole test, we believe subjective belief in the basis of the challenge is part of the required belief in the substantial likelihood of success. We will apply the RESTATEMENT's test flexibly, especially when strong policy supports grounds for challenge—as in the case of suspected undue influence, the principal ground for contest in the present case. The RESTATEMENT's standard of a "reasonable person, properly informed and advised" who concludes there is a substantial likelihood of success in the contest is, of course, a question initially for the trial court. In addressing that question, the trial judge should, as the

RESTATEMENT requires, refer to the evidence known at the time the contest was initiated.

In *Winningham v Winningham*, 966 SW2d 48 (Tenn 1998), with regard to the issue of probable cause the Supreme Court of Tennessee held:

> that a contest will not work a forfeiture where there is, in addition to good faith, probable cause, and reasonable grounds for instituting the suit. In *Woolard v. Ferrell*, 26 Tenn. App. 197 (Tenn. App. 1942), the Court of Appeals applied reasoning from malicious prosecution law to analyze the issue of probable cause to contest a will with a forfeiture clause. That court quoted from a treatise on malicious prosecution, stating, the law as to reasonable or probable cause is defined to be such a state of facts in the mind of the prosecutor as would lead a person of ordinary caution and prudence to believe, or entertain an honest or strong suspicion, that the person is guilty. It does not depend on the actual state of the case in point of fact, but upon the honest and reasonable belief of the party commencing the prosecution…The question of probable cause applies to the nature of the suit, and the point of inquiry is whether the defendant had probable cause to maintain the particular suit upon the existing facts known to him.
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> More recently, this Court has defined the existence of probable cause in the context of a malicious prosecution suit as being independent of the subjective mental state of the prosecutor, requiring "only the existence of such facts and circumstances sufficient to excite in a reasonable mind the belief that the accused is guilty of the crime charged." *Roberts v. Federal Express Corp*., 842 S.W.2d 246, 248 (Tenn. 1992).

As noted In *Winningham*, even though this requirement for exemption from forfeiture is usually discussed in the language of "probable cause" with reliance on malicious prosecution decisions, "reasonable ground" or "reasonable justification" is the more appropriate characterization of the factor to be applied. While the advice of counsel may constitute probable cause in cases of malicious prosecution, it will not defeat a forfeiture unless the suit to contest the will was reasonably justified under all of the circumstances.

The *Winningham* court also noted that:

> While the advice of counsel may constitute probable cause in cases of malicious prosecution, it will not defeat a forfeiture unless the suit to contest the will was reasonably justified under all of the circumstances. As stated in *In Re Friend's Estate,* 209 Pa. 442 (1903), "…if the mere advice of counsel can be regarded as probable cause for instituting proceedings to contest a will, there would be none without cause, and in every instance such a [forfeiture] clause as the testatrix inserted in hers would be nugatory."

The essential point in *Winningham* is that the petitioner must show that under all the circumstances the contest was reasonably justified. This includes a showing that a reasonably prudent person would have believed or entertained an honest or strong suspicion that there was probable cause to contest the instrument and that the advice of informed counsel is not by itself sufficient but is a factor to be considered along with other factors.

Factors in Applying the Probable Cause Exception

The various sources of law discussed above provide several common factors for determining the exception of "probable cause" with respect to a will or trust contest when there is an *in terrorem* clause. While some of these sources of law emphasize one factor over another, this variation may reflect, in part, the application of the balancing of the conflicting interests at play in contests involving *in terrorem* clauses. These common factors include the following:

Time of Determination

The facts and circumstances considered by the court in determining probable cause should be those in existence at the time a proceeding to determine probable cause is commenced. The later discovery of facts and circumstances presently unknown to the petitioner and the respondent that supports the petitioner or the respondent should not be material on the question of probable cause.

Source of Information

The facts and circumstances must be known to the petitioner and may include information received from others, but only if the information is reliable in kind and from a reliable sourBelief of a Reasonable Person

Belief of a Reasonable Person

The belief of the petitioner should satisfy a reasonable person standard. In other words, a hypothetical, reasonable person, exercising ordinary prudence, after considering the available facts and circumstances, including those obtained from reliable sources, and being reasonably informed and advised, must believe there is a requisite likelihood that the contest will be successful. As in the defense of a malicious prosecution claim, showing that a reasonable person would believe there is probable cause to contest a will or trust is not the same as proving the validity of the contest itself by a preponderance of the evidence.

Opinion of Independent or Disinterested Counsel

The opinion of legal counsel, sought in good faith after a disclosure of the facts and circumstances, can be supportive of a finding of probable cause. However, an affirmative counsel's opinion will not necessarily, by itself, avoid a forfeiture if the facts and circumstances then known are insufficient to show the requisite likelihood of success. Although an opinion of counsel does not appear to be a mandatory requirement, an opinion from an independent or disinterested counsel, based on the available facts and circumstances and an informed legal analysis, will carry more weight than no opinion or an opinion lacking these components.

Requisite Likelihood of Success

Some sources of law state that the facts and circumstances should indicate there is substantial likelihood of success, while others indicate there should be a reasonable likelihood of success. This difference may be explained by focusing on the word "substantial," which depending on the context can be considered either a qualitative term or a quantitative term. Regardless of the adjective used, what is clear is that the term does not refer to a preponderance of the evidence, which has a quantitative meaning. Rather, the term appears to refer to a qualitative meaning. Is there sufficient substance to establish a reasonable likelihood that the contest may succeed? That determination is not dependent on the contest actually succeeding in an evidentiary hearing. Rather, the term is intended to exclude contests from continuing that are based on any "flimsy excuse" having no or minimal substance.[11]

Good Faith Requirement

Some sources of law state a requirement that the petitioner's belief must have been reached in good faith, while others do not make this a specific requirement. A good faith requirement would appear to be satisfied if the petitioner's belief is that of a reasonable person, properly informed and advised, rather than simply a subjective belief not shared by a hypothetical reasonable person.

Flexible Application of Exception Based on Public Policy

Some sources of law state that the exception should be flexibly applied, including using a lower standard of evidence, when a public policy (such as protecting against forgery or undue influence) would support the grounds for the contest. Courts uniformly recognize that there is a public policy against giving validity to will or trust resulting from forgery, undue influence, lack of testamentary capacity, duress, or fraud. Accordingly, the same flexibility should be available to the court in considering any petition based one of the aforementioned public policy grounds.[12] More importantly, the flexibility granted to a court should reflect the court's focus on the facts and

circumstances produced to support the substance of the allegation of probable cause and not the particular legal basis underlying the assertion of probable cause.

These are primary, but not necessarily exclusive, factors for courts to consider in applying the exception in a particular case.[13] As stated in the Reporter's Comments to MCL 700.3905 and 700.7113, "Courts must be vigilant in policing the concept of probable cause and require that there be some substantial basis in fact for a contest or other challenge. If any flimsy excuse is sufficient, the exception swallows the rule."[14]

Opportunities for Early Determination of Probable Cause

The statutory provisions regarding the time to contest a will are determined with respect to a will or codicil, pursuant to a part 4 of Article III (MCL 700.3401 *et seq*) based on when the instrument is presented to the court. The time to contest a trust or trust amendment is covered by MCL 700.7604(1) and is the earlier of two years after the settlor's death or six months after the date that the trustee has provided the information to the petitioner set forth under MCL 700.7814(2)(c). This information leads to the question of how soon after the commencement of the contest, should a court consider the issue of probable cause.

In the criminal law context, probable cause is determined at the preliminary examination and conducted at the initial stages of the criminal proceeding. In *People v Greene*, 255 Mich App 426, 443-444, 661 NW2d 616 (2003) the court stated:

> [A]t the preliminary examination, the prosecution need not prove beyond a reasonable doubt that the defendant committed the crime charged. The threshold for the evidence necessary to bind over a defendant for trial is much lower than the evidence needed to convict a defendant of the crime at trial.
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> If the evidence introduced at the preliminary examination conflicts or raises a reasonable doubt about the defendant's guilt, the magistrate must let the fact finder at trial resolve those questions of fact.
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> Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to support the bind-over of the defendant if such evidence establishes probable cause.

The above described principal under criminal law suggests that, in cases in which there is a contest involving a will or trust contest containing an *in terrorem* clause, resolution of the probable cause issue need not wait until the trial. In fact, there may be advantages to having this issue resolved sooner rather than later in many cases.

In those cases in which there are sufficient undisputed relevant facts and circumstances regarding probable cause, the determination of whether or not probable cause exists is a question of law to be decided by the court.[15] In such cases, advancement of the resolution of this issue may have merit, rather than having the resolution wait until the case is tried. A determination of the existence of probable cause does not mean that the petitioner has won the contest, only that the *in terrorem* clause will not result in a forfeiture if the petitioner loses. The petitioner still has the burden of proof regarding the contest.

If the petitioner provides no relevant facts and circumstances, the court may determine that there is no basis for advancing the probable cause exception, as a matter of law, which may result in the end of the proceeding.

If there are insufficient undisputed facts and circumstances to allow the court to determine the existence of probable cause as a matter of law, the petitioner will know that forfeiture may occur, unless the petitioner is able to prevail in an evidentiary hearing on the mixed questions of fact and law regarding the issue of probable cause. Even though this would be an evidentiary hearing, the exception to be met by the petitioner is one of probable cause and not a preponderance of the evidence.

An early decision on probable cause may be a more efficient use of the time of both the court and counsel in determining this preliminary question in cases involving *in terrorem* clauses. An early determination by the court as a matter of law or in an evidentiary hearing may also facilitate an earlier resolution of these cases, although that can never be guaranted.

Notes

1. MCL 700.2518 states: A provision in a will purporting to penalize an interested person for contesting a will or instituting other proceedings relating to an estate is unenforceable if probable cause exists for instituting proceedings.

2. MCL 700.3905 states: In accordance with section 2518, a provision in a will purporting to penalize an interested person for contesting a will or instituting another proceeding relating to the estate shall not be given effect if probable cause exists for instituting a proceeding contesting the will or another proceeding relating to the estate.

3. MCL 700.700.7113 states: A provision in a trust that purports to penalize an interested person for contesting a trust or instituting another proceeding relating to a trust shall not be given effect if probable cause exists for instituting a proceeding contesting the trust or another proceeding relating to the trust.

4. Reporter's Comment to MCL 700.2518, Estates and Protected Individuals Code with Reporters' Commentary (2013 ed.), p 82.

5. Reporter's Comment to MCL 700.7113, Estates and Protected Individuals Code with Reporters' Commentary (2013 ed), p 383.

6. Reporter's Comment to MCL 700.3905, Estates and Protected Individuals Code with Reporters' Commentary (2013 ed), p 234. This comment suggests that satisfaction of the exception requires more than a single "genuine issue as to any material fact" as required under MCR 2.116(C)(10).

7. Restatement 2d, § 8.5 identifies "forgery" as an example of when a lesser level of evidence should satisfy the exception since there is strong public policy against forgery. The same can be said about undue influence, lack of testamentary capacity, duress or fraud.

8. *Nacovsky v Hall (In re Mary E Griffin Revocable Grantor Trust),* 483 Mich 1031, 760 NW2d 318 (2009). The Michigan Supreme Court determined that the Michigan Court of Appeals improperly extended a statutory provision permitting penalty clauses in wills and allowing a challenge to the will based on probable cause to trusts without any statutory provision. At the time of the Supreme Court decision, a statutory provision extending the same treatment to trusts had already been drafted and was part of the proposed Michigan Trust Code then before the Michigan Legislature, but had not as yet been enacted into law.

9. Restatement Torts, §675 also states that: One who initiates a civil proceeding against another has probable cause for doing so if he reasonably believes in the existence of the facts upon which his claim is based, and

(a) Reasonably believes that under such facts the claim may be valid at common law or under an existing statute, or

(b) So believes in reliance upon the advice of counsel given under the conditions stated in [Restatement, Torts] § 666.

10. Restatement, 2d, § 9.1.

11. Reporter's Comment to MCL 700.3905, Estates and Protected Individuals Code with Reporters' Commentary (2013), p 234.

12. Estate of Shumway at 327.

13. For example, an early determination by the court that a presumption of undue influence exists as a matter of law, should satisfy the probable cause exception.

14. Reporter's Comment to MCL 700.3905, Estates and Protected Individuals Code with Reporters' Commentary (2013), p 234.

15. *Rankin v Crane*, 104 Mich 6, 61 NW 1007 (1895); *Merriam v Continental Motors Corp*, 339 Mich 546, 64 NW2d 691 (1954), *Renda v International Union, UAW*, 366 Mich 58, 114 NW2d 343 (1962); *Drobczyk v Great Lakes Steel Corp*, 367 Mich 318, 116 NW2d 736 (1962); See footnote 12.

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