

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM J. STIERLE and PATRICIA S.
STIERLE,

UNPUBLISHED

Plaintiffs/Counter
Defendants-Appellants,

v

No. 180169
LC No. 94-2421 CZ

LIMA TOWNSHIP BOARD and ARLENE
BAREIS,

Defendants/Counter Plaintiffs
Third-Party Plaintiffs-Appellees,

and

DONALD T. HILLIGOSS and VERONICA J.
HILLIGOSS,

Intervening Defendants/Third-
Party Defendants-Appellees.

Before: Murphy, P.J., and O'Connell and M.J. Matuzak,* JJ.

O'CONNELL, J. (dissenting).

I respectfully dissent. The majority relies on two decisions for its conclusion that alleged irregularities in the procurement of signatures for a referendary petition may invalidate the subsequent referendum itself, *Burton Twp v Genesee Co*, 369 Mich 180; 119 NW2d 548 (1963), and *Chateau Estates v Macomb Election Comm'rs*, 25 Mich App 351; 181 NW2d 320 (1970). In both of these cases, however, the party challenging the petition brought suit *before* the referendum itself. In contrast,

* Circuit judge, sitting on the Court of Appeals by assignment.

the present plaintiffs delayed until after the referendum was decided to their detriment before bringing suit. I believe this distinction is significant.

In criminal law, a defendant may not, in general, challenge the sufficiency of the evidence brought forward at his preliminary examination after he has been convicted following a trial. *People v Hall*, 435 Mich 599; 460 NW2d 520 (1990). This is because any evidentiary error occurring at the preliminary examination is shown to have been harmless by the fact that the subsequent trial demonstrated, beyond a reasonable doubt, that the defendant was guilty, as evidenced by his conviction. The proper procedure where a defendant believes that error occurred in the preliminary examination is to raise the issue immediately. *Id.*, p 615.

Similarly, in the context of constitutional amendments, this state has adopted the “election-cures-error” doctrine. To paraphrase this doctrine, “questions justiciable prior to election day are [deemed] merged in the political decision of the people, once that decision is duly certified.” *Graham v Miller*, 348 Mich 684, 699; 84 NW2d 46 (1957). In *Graham*, our Supreme Court quoted with approval from *The Constitutional Prohibitory Case*, 24 Kan 700, 711 (1881), where future United States Supreme Court Justice Brewer wrote, “[t]his is a government by the people, and whenever the clear voice of the people is heard, legislatures and courts must obey.”

I see no material distinction between *Hall*, *Graham*, and the present dispute. Any irregularity in the referendary petition presently in issue was shown to have been harmless by the fact that the referendum was submitted to the electorate and was passed by the electorate. There is no allegation that “fraudulent misrepresentations” were made in the context of the referendum itself. If a fair trial may cure error in the preliminary examination stage of a criminal prosecution where a man’s liberty is at stake, *Hall*, *supra*, and if a fair election may cure error occurring in the preliminary procedural phase of the process to amend our very constitution, *Graham*, *supra*, then, surely, a fair referendum must be deemed to cure error occurring in the petition stage of a referendum. Therefore, because an admittedly fair referendum was held, I would hold that any error occurring at the petition stage was harmless. Suit should have been brought, if at all, prior to the referendum. See *Graham*, *supra*.

Accordingly, I agree with the circuit court that plaintiffs have failed to state a claim upon which relief may be granted where they delayed bringing suit until after the referendum. While the majority goes on to address the question of fraudulent inducement, I find it unnecessary to reach this issue. However, I would note that the majority must rely on *implication* for its conclusion that certain types of fraudulent misrepresentation may vitiate a referendary petition where the purpose of the petition is concealed – no reported Michigan decision, prior to today, has ever struck down a petition for such “fraudulent inducement.” I would hesitate to become the first court to do so because of the ramifications such a decision could have on all popular elections in which the prevailing party fails to abide by campaign promises.

I would affirm.

/s/ Peter D. O’Connell