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1998 WL 178570 (Ohio App. 9 Dist.)  
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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Ninth District, Summit County.

Frank RASKOW, et al., Appellants,  
v.  
Richard FORTNER, et al., Appellees.

No. 18399.

April 15, 1998.

Appeal from Judgment Entered in the Common Pleas Court County of Summit, Ohio.

[KENNETH L. GIBSON](#), Attorney at Law, 234 Portage Trail, P.O. Box 535, Cuyahoga Falls, Ohio 44222, for Appellants.

[LAWRENCE R. BACH](#), Attorney at Law, 1500 One Cascade Plaza, Akron, Ohio 44308, for Appellees.

*DECISION AND JOURNAL ENTRY*

DICKINSON, Presiding Judge.

\*1 This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

Plaintiffs Frank and Marge Raskow have appealed from an order of the Summit County Common Pleas Court that denied them damages and injunctive relief. They have argued that the trial court incorrectly denied their request for a jury trial. This Court reverses the judgment of the trial court because plaintiffs' complaint included a legal claim, for which they were entitled to a jury trial.

I.

Plaintiffs own a home in Copley, Ohio. The land upon which their house stands abuts the property of defendants Richard and Lillian Fortner. During 1995, defendants constructed a dam along the western border of their land. According to defendants, they built the dam to divert effluent from a neighbor's septic system around their garden. During September 1995, after a heavy rainstorm, water flowed across defendants' property and onto plaintiffs' land, flooding the basement of their house and a first-floor room. Shortly thereafter, according to plaintiffs, a second flooding of their home was narrowly averted when they used pumps and ditches to channel water away from their house.

On March 11, 1996, plaintiffs filed a complaint against defendants, along with a motion for a preliminary and permanent injunction. They sought an order that would have required defendants to remove the dam. Relevant parts of that complaint were as follows:

4. On or about July of 1995, [defendants] built a dam which caused a diversion of the natural flow of water across [defendants'] property and forced the water to travel outside of its established course further south and onto [plaintiffs'] property.

5. On or about September 9, 1995, [plaintiffs'] property was flooded and the water entered into their house causing approximately \$8,500.00 in damages and costs of repair.

6. On or about February 27, 1996, [plaintiffs'] property was again flooded and [they were] forced to dig ditches across [their] back yard in effort to prevent a further incursion of water into [their] house. The cost of repairing these damages have not yet been obtained.

\* \* \*

9. Unless enjoined, [plaintiffs] will suffer irreparable harm and ongoing and continued damage and flooding[.]

10. In the alternative, unless enjoined, [plaintiffs] will suffer permanent loss of value of their property[.]

Wherefore [plaintiffs] demand judgment against the defendants in the amount of \$160,000.00 compensatory damages and \$250,000.00 in punitive damages, reasonable attorney's fees, permanent and temporary injunctive relief, costs, and such further relief as the Court may deem just

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and equitable.

The case proceeded to trial on February 6, 1997. Although plaintiffs had specifically demanded a jury trial, the trial court construed the complaint as one "primarily for permanent injunction" and heard the matter itself. The trial court denied relief because it found that plaintiffs had failed to show that the dam caused the water to be diverted into their house. Neither an injunction nor damages was awarded. Plaintiffs timely appealed to this Court.

## II.

\*2 Plaintiffs' sole assignment of error is that the trial court incorrectly failed to grant them a jury trial. They have argued that their complaint alleged a claim for money damages to compensate them for the water that defendants had allegedly diverted onto their land. That issue, they have claimed, must be settled by a jury, not the trial court.

Plaintiffs set forth at least two causes of action in their complaint. They asked for money damages to compensate them for the floods that allegedly damaged their property in the past and for an injunction to require defendants to remove the dam to prevent future flooding. Pursuant to [Article I, Section 5, of the Ohio Constitution](#) and [Section 2311.04 of the Ohio Revised Code](#), a demand for a money judgment usually entitles a plaintiff to a jury trial. A plaintiff has no right to a jury trial, however, for the resolution of equitable claims, and a trial court may itself resolve those claims. [Ohio Bd. of Dietetics v. Brown \(1993\), 83 Ohio App.3d 242, 247, 614 N.E.2d 855](#). When a case presents both a legal and equitable claim for relief, and the money demand is "incidental and ancillary" to the equitable claim and can be awarded only if the equitable relief is granted first, then the case is predominantly an equitable action, for which no jury trial is required. [Murello Constr. Co. v. Citizens Home Savings Co. \(1985\), 29 Ohio App.3d 333, 334, 505 N.E.2d 637, Pyromatics, Inc. v. Petruziello \(1983\), 7 Ohio App.3d 131, 134, 454 N.E.2d 588](#); see, also, [Runyan v. Maloney \(1981\), Clermont App. No. 906, unreported, 1981 Ohio App. LEXIS 14226, at \\*12, and Rowland v. Entrekin \(1875\), 27 Ohio St. 47, 49](#).

In this case, plaintiffs sought compensatory damages, punitive damages, and equitable relief in the form of an injunction. Their request for damages did not depend on their first obtaining the equitable relief for which they asked. Their claim was to compensate them for the damages that they had

allegedly sustained as a result of the past flooding of their property. Along with that claim, they asked for an injunction to prevent future flooding. Had plaintiffs not requested equitable relief, and demanded only a money judgment, they would have been entitled to a jury trial. The trial court's decision to try this case itself, merely because plaintiffs joined with their legal claim an equitable cause of action, infringed upon their constitutional right to a jury trial.

Defendants have argued that plaintiffs' damages were dependent upon their right to equitable relief. "If damages were to be found," defendants have argued, "the court could do so only by finding that [plaintiffs] were entitled to injunctive relief." Defendants have not, however, demonstrated how plaintiffs' damages were dependent upon the equitable claim. To the contrary, plaintiffs' claim for damages was a separate cause of action from their claim for equitable relief. See, e.g., [Coe v. Gamber \(June 16, 1978\), Erie App. No. E-77-51, unreported, 1978 Ohio App. LEXIS 8889, at \\*5 \(suit for damages from flooding and injunction to enjoin defendant from maintaining obstacle to water flow alleged two separate causes of action, requiring jury trial as to the damages issue\)](#). They properly joined those claims in one action pursuant to [Rule 18\(A\) of the Ohio Rules of Civil Procedure](#), which permits a plaintiff to join as many claims, legal or equitable, as he has against a defendant. If merely joining a legal and equitable claim allows a trial court to declare that the complaint is "primarily" for equitable relief, and deny a jury trial on that basis, a plaintiff would essentially be forced to plead only legal claims to ensure a jury trial and forgo equitable claims.

\*3 Plaintiffs' complaint alleged a cause of action for money damages. Those damages were not incidental to the equitable relief that they requested. Consequently, they were entitled to a jury trial. The trial court erred, therefore, by denying a jury trial on plaintiffs' legal cause of action.

Moreover, the trial court erred not only by deciding the legal claim itself, but also by deciding the equitable claim before presenting the legal claim to the jury. In construing the federal constitutional right to a jury trial in civil actions in federal court, the United States Supreme Court has held that, when both a legal and equitable claim, involving the same facts and issues, are presented, the jury must decide the legal claim first. See [Lytle v. Household Mfg., Inc. \(1990\), 494 U.S. 545, 550, 110 S.Ct. 1331, 108 L.Ed.2d 504, 514](#), citing [Beacon Theatres, Inc. v. Westover \(1959\), 359 U.S. 500, 510, 79 S.Ct. 948, 3](#)

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[L.Ed.2d 988, 997](#). Otherwise, "if an issue common to both legal and equitable claims was first determined by a judge, relitigation of the issue before a jury might be foreclosed by res judicata or collateral estoppel," thus infringing on the right to a jury trial. [Lytle, 494 U.S. at 550, 108 L.Ed.2d at 514](#). This Court agrees with the above reasoning and concludes that it is applicable to this case. See *State v. Cordle* (Jan. 8, 1985), Franklin App. No. 84AP-484, unreported, 1985 Ohio App. LEXIS 5446, at \*5-6. In this case, plaintiffs claimed that defendants' dam diverted water from its natural course and onto their property. They alleged \$8500 in damages from the first flood and an undetermined amount from the second flood. They further alleged that, unless defendants were made to remove the dam, they would continue to suffer damages from repeated flooding. The evidence plaintiffs will use to demonstrate damages will be the same to show their need for injunctive relief. Plaintiffs presented two causes of action from the same set of facts. A jury trial should have been conducted to decide whether and to what extent plaintiffs had suffered damages. Following such determination, the trial court should have ruled on the request for an injunction. It was error for the trial court to do otherwise. Plaintiffs' assignment of error is sustained. This case is remanded for a jury trial on the issue of damages. Further, because the jury's finding must necessarily precede the trial court's finding, the equitable claims must be decided only after the jury returns its verdict.

### III.

Plaintiffs' assignment of error is sustained. The judgment of the trial court is reversed and the cause remanded for proceedings consistent with this opinion.

*Judgment reversed and cause remanded.*

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Summit Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to [App.R. 27](#).

\*4 Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. [App.R. 22\(E\)](#).

Costs taxed to appellees.

Exceptions.

QUILLIN and REECE, JJ., concur.

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