

[Cite as *Smith v. Dartt*, 2005-Ohio-1885.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Albert Smith, M.D.

Court of Appeals No. L-05-1124

Relator

v.

Lucas County Common Pleas Court,
General Division,
Judge Denise Ann Dartt

WRIT OF MANDAMUS
DECISION AND JUDGMENT ENTRY

Decided: April 15, 2005

Respondent

* * * * *

John S. Wasung, and David T. Henderson, for relator.

* * * * *

HANDWORK, J.

{¶ 1} This matter is before the court on the petition of relator, Albert Smith, M.D., who requests that this court issue a writ of mandamus, pursuant to R.C. Chapter 2731, ordering respondent, Judge Denise Ann Dartt, of the Lucas County Court of Common Pleas, General Division, to grant a continuance of the trial date, currently scheduled for April 18, 2005, in the case of *McCarty v. Tenenbaum, M.D., et al.*, Case No. CI0200202235.

{¶ 2} Based upon the verified complaint filed by relator, it is evident that

Attorney John S. Wasung is lead trial counsel in both the *McCarty* case and *Antonini, etc. v. Flower Hospital, et al.*, Case No. CI0200303885. On May 26, 2004, the *Antonini* case was scheduled for trial on April 18, 2005, before Judge James D. Bates, of the Lucas County Court of Common Pleas, General Division. Subsequently, on November 12, 2004, the *McCarty* case was also scheduled for trial on April 18, 2005. The parties in each case attested by affidavit their desire to have Attorney Wasung continue as their attorney and to be represented at trial by Attorney Wasung. It is well-established that a party has a clear legal right to counsel of his or her choice. See *155 North High, Limited v. Cincinnati Insurance Company* (1995), 72 Ohio St.3d 423, 429.

{¶ 3} A continuance of a scheduled trial is generally within the sound discretion of the trial court for good cause shown. With respect to a request for continuance based upon a conflict of trial date assignments, however, the Rules of Superintendence for the Courts of Ohio are mandatory. Ohio Sup.R. 41(B)(1) states:

{¶ 4} "When a continuance is requested for the reasons that counsel is scheduled to appear in another case assigned for trial on the same date in the same or another trial court of this state, the case which was first set for trial *shall* have priority and *shall* be tried on the date assigned. * * *." (Emphasis added.)

{¶ 5} Insofar as the *Antonini* case was set for trial first on April 18, 2005, we find that the *Antonini* case shall have priority over the *McCarty* case and shall be tried on the date assigned. Pursuant to R.C. 2731.06, "When the right to require the performance of an act is clear and it is apparent that no valid excuse can be given for not doing it, a court,

in the first instance, may allow a peremptory mandamus." Accordingly, we hereby grant the petition for writ of mandamus and order respondent, Judge Denise Ann Dartt, of the Lucas County Court of Common Pleas, General Division, to grant a continuance of the trial date, currently scheduled for April 18, 2005, in the case of *McCarty v. Tenenbaum, M.D., et al.*, Case No. CI0200202235, and to set a new trial date which is not in conflict with any other previously scheduled trial for which any party's counsel is already obligated. The deputy clerk of the court of appeals is deputed to serve this writ on respondent, Judge Denise Ann Dartt, Lucas County Common Pleas Court, General Division. Costs assessed to respondent.

WRIT GRANTED.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Dennis M. Parish, J.
CONCUR.

JUDGE