

**IN THE SUPREME COURT OF OHIO
CASE NO. 2012-0556**

JOHN DOE : ON APPEAL FROM THE CLINTON
: COUNTY COURT OF APPEALS
: Plaintiff-Appellant :
: TWELFTH APPELLATE DISTRICT
: vs. :
: COURT OF APPEALS
BRANDON BRUNER : CASE NO. CA2011-07-013
: Defendant-Appellee :

MERIT BRIEF OF APPELLANT

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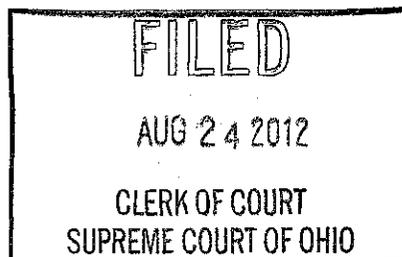


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I. STATEMENT OF THE CASE AND FACTS

Plaintiff/Appellant, John Doe ("Doe"), filed this lawsuit August 31, 2010 in Clinton County Common Pleas Court, alleging that he is a former student at Wilmington College and that Defendant/Appellee, Brandon Bruner ("Bruner"), was a fellow student when Bruner sexually assaulted and molested Plaintiff on several occasions in September and October 2009 on campus. (Complaint, ¶¶1-2). Following Plaintiff's report of the sexual assaults, Bruner was ordered to refrain from any contact with Plaintiff. (Complaint, ¶3). Bruner violated that order and was convicted in Wilmington Municipal Court of telephone harassment. (Complaint, ¶3).

Doe asserted civil claims of assault and battery, intentional infliction of emotional distress, and civil remedy for victim of crime (R.C. 2307.60). Doe stated: "The name of the Plaintiff in the caption of this Complaint is fictional and is being used to protect the identity of a sexual abuse victim, pursuant to Ohio public policy. The identity of the Plaintiff will be disclosed to Defendant and the Court confidentially." (Complaint, ¶1).

Bruner did not challenge Doe's use of a pseudonym in this case. Rather, the trial court, *sua sponte*, requested briefing from Doe as to why he should be permitted to proceed under a pseudonym. (Appendix D, Magistrate's Pretrial/Memorandum Orders, April 19, 2011). An oral hearing occurred on June 8, 2011 following the briefing, after which the Magistrate entered a single sentence ruling: "Pursuant to Civ. R. 10(A) and this Court's policy, it is ordered that Plaintiff correct the title of this action

to include Plaintiff's name." (Appendix E, Magistrate's Order, June 13, 2011). The trial court subsequently affirmed the Order with a five sentence Entry, stating in pertinent part: "After review of the full record, the Court notes Plaintiff had no issue identifying the name of the Defendant in court pleadings. To now claim Plaintiff's interest in keeping his own identity secret is superior to Defendant's interest in that regard rings hollow to this court." (Appendix F, Entry, June 22, 2011).

Doe appealed and the Twelfth District Court of Appeals affirmed, albeit with a much more sophisticated analysis. The majority opinion observed, "Although the practice of proceeding under a pseudonym is well established in Ohio, neither the Ohio Supreme Court nor any Ohio appellate court has yet addressed a challenge to this practice." (Appendix B, Opinion, ¶4). The concurring opinion observed, "[T]he Ohio Civil Rules and Ohio case law provide virtually no guidance on the proper use of pseudonyms." (Appendix B, Opinion, ¶17).

Due to the lack of guidance in Ohio jurisprudence on this issue, the majority proceeded to analyze a split in federal circuit court rulings on this issue, choosing and applying the methodology favored by the U.S. Sixth Circuit. It held that a party can proceed under a pseudonym where a "plaintiff's privacy interest substantially outweighs the presumption of open judicial proceedings." (Appendix B, Opinion, ¶6). It offered its list of primary considerations: 1) whether the plaintiffs seeking anonymity are suing to challenge governmental activity; 2) whether prosecution of the suit will compel the plaintiffs to disclose information of the utmost intimacy; 3)

whether the litigation compels plaintiffs to disclose an intention to violate the law, thereby risking criminal prosecution; and 4) whether the plaintiffs are children. (Appendix B, Opinion, ¶7)

The majority recognized that Doe would be required in this case to disclose facts of utmost intimacy, but "this factor alone is not enough to allow Doe to proceed pseudonymously." (Appendix B, Opinion, ¶10). The concurring opinion took issue with that statement and the application of the factors by the majority: "I find that the enumerated factors are not inclusive, but are without limitation. I also find that it is not the quantity of the factors presented, but the quality of the factors that should be weighed. For example, considerations of whether prosecution of a suit would compel the plaintiff to disclose information of the utmost intimacy may be in and of itself more significant than whether threats of retaliation have not been made." (Appendix B, Opinion, ¶18). The concurring judge nevertheless concurred in the judgment due to the lack of a transcript of the purported evidentiary hearing before the trial court. (Appendix B, Opinion, ¶16).

II. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: Ohio courts recognize an exception, in limited matters of a sensitive and highly personal nature, to the requirement of Civ. R. 10(A) that a plaintiff must proceed in civil litigation under his or her own name.

Proposition of Law No. 2: There is substantial public interest in ensuring that plaintiffs who would suffer

extreme distress or danger by disclosing their names are protected throughout the judicial process.

Civ. R. 10(A) provides in part: "In the complaint the title of the action shall include the names and addresses of all parties[.]" The concurring opinion from the Court of Appeals in this case observed, "The language of Civ. R. 10(A) neither grants nor denies one from using a pseudonym in Ohio pleadings and I have found no Ohio case interpreting Civ. R. 10(A) as such." (Appendix B, Opinion, ¶14). Federal Rule of Civil Procedure 10(a) also requires that "the complaint must name all the parties."

Many cases have been presented to this Court under a pseudonym. See *Doe v. Shaffer*, 90 Ohio St. 3d 388, 389, 738 N.E.2d 1243, 1244 (2000) fn.1 (observing without further comment that the name of the adult victim of AIDS "has been changed"); *Doe v. First United Methodist Church*, 68 Ohio St. 3d 531, 629 N.E.2d 402 (1994)(adult plaintiff alleging claims of sexual abuse as a minor); *In Re Application of John Doe II*, 96 Ohio St. 3d 158, 2002-Ohio-3609, 772 N.E.2d 639 (denial of bi-polar applicant to take Ohio Bar Examination); *Doe v. Archdiocese of Cincinnati*, 109 Ohio St. 3d 491, 2006-Ohio,2625, 849 N.E.2d 268 (adult plaintiff alleging claims of sexual abuse as a minor); *Doe v. Archdiocese of Cincinnati*, 116 Ohio St. 3d 538, 2008-Ohio-67, 880 N.E.2d 892 (adult plaintiff alleging claims following a sexual relationship she was forced into as a minor); *Doe v. Marlinton Local School District*, 122 Ohio St. 3d. 12, 2009-Ohio-1360, 907 N.E.2d 706, fn.1 (permitting the individual plaintiffs and alleged perpetrator

defendant to be identified by fictitious names to protect their privacy in a civil matter involving a claim of sexual assault).

The United States Supreme Court has also implicitly endorsed the use of pseudonyms to protect a plaintiff's privacy. *See e.g., Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed.2d 147 (1973)(abortion); *Doe v. Bolton*, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed.2d 201 (1973)(abortion); *Poe v. Ullman*, 367 U.S. 497, 81 S. Ct. 1752, 6 L. Ed.2d 989 (1961)(birth control). Lower federal courts have long held that plaintiffs may proceed pseudonymously. *See Doe v. Porter*, 370 F.3d 558, 560-561 (6th Cir. 2004) (upholding lower court's grant of protective order allowing the use of pseudonyms in challenge to religious instruction in schools); *City of San Diego v. Roe*, 543 U.S. 77, 125 S.Ct. 521, 160 L.Ed.2d 410 (2004) (police officer terminated from his job because of sexually explicit videotapes he had made was permitted to file pseudonymously).

"Courts have increasingly recognized an exception to this requirement [of naming the plaintiff] in limited matters of a sensitive and highly personal nature." *Rowe v. Burton*, 884 F.Supp.2d 1372, 1385-86 (D.Alaska 1994). "'Where the issues involved are matters of a sensitive and highly personal nature . . . the normal practice of disclosing the parties' identities 'yields to a policy of protecting privacy in a very private matter.'" *Southern Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffee*, 599 F.2d 707, 712-13 (5th Cir. 1979), *quoting Doe v. Deschamps*, 64 F.R.D. 652, 653 (D.Mont.1974). "Courts have long recognized... that the circumstances of a case, particularly where litigants may suffer extreme distress or danger from their

participation in the lawsuit, may require that plaintiffs proceed without revealing their true names. Courts have found that plaintiffs could proceed anonymously because they feared that revealing their true identities would lead to physical violence, deportation, arrest in their home countries and retaliation against the plaintiffs' families for bringing suit." *Lozano v. City of Hazleton*, 496 F.Supp.2d 477, 505-507 (M.D.Pa.2007). "There is substantial public interest in ensuring that cases like the plaintiff's are adjudicated and the rights of mental illness sufferers are represented fairly and without the risk of stigmatization. However, this goal cannot be achieved if litigants suffering from mental illness are chilled from ever reaching the courthouse steps for fear of repercussions that would ensue if their condition was made public. Although any litigant runs the risk of public embarrassment by bringing their case and revealing sensitive facts in a public courtroom, the situation here is vastly different... plaintiff is faced with circumstances that society may not yet understand or accept and his condition is directly tied to the issues before the court." *Doe v. Hartford Life and Acc. Ins. Co.*, 237 F.R.D. 545, 550-551 (D.N.J.2006).

"The judicial use of Doe plaintiffs to protect legitimate privacy rights has gained wide currency, particularly given the rapidity and ubiquity of disclosures over the World Wide Web." *Starbucks Corp. v. Superior Court*, 168 Cal.App.4th 1436, 86 Cal. Rptr. 3rd 482 (2008). See also, Ressler, *Privacy, Plaintiffs and Pseudonyms: The Anonymous Doe Plaintiff in the Information Age*, 53 Kan.L.Rev. 195 (2005)(suggesting that, in the age of internet search engines and electronic access to court dockets, it may be in the

public interest to permit more pseudonymous litigation); Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants be Permitted to Keep Their Identities Confidential*, 37 Hastings L.J. 1 (1985)(collecting cases); Rice, *Meet John Doe: It is Time for Federal Civil Procedure to Recognize John Doe Parties*, 57 U.Pitt.L.Rev. 883 (1996)(collecting cases).

Many plaintiffs seeking anonymity are victims of sexual abuse, often suffered as children and disclosed as adults. Given that the Ohio legislature in 2006 extended the statute of limitations for childhood sexual abuse victims to 12 years from the age of majority, R.C. 2305.111, Ohio courts will face more such suits in coming years. Permitting plaintiffs to use pseudonyms in childhood sex abuse cases serves the compelling public interest of encouraging the public identification of perpetrators.

Ohio public policy strongly supports and defends courageous sexual abuse victims who come forward to hold their perpetrators accountable. *See* Evid. R. 404(A)(2)(limiting character evidence of victim of sexual abuse); Evid. R. 807 (out-of-court statement of childhood sexual abuse victim not hearsay); R.C. 2907.02(D)(limiting impeachment of rape victim).

On the other hand, the presumption of open courts is easily overcome. "The question of whether there is a constitutional right to abortion is of immense public interest, but the public did not suffer by not knowing the plaintiff's true name in *Roe v. Wade*." *Does I through XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1072, n. 15 (9th Cir.2000). That is why the trial court's rationale in this case is bewildering. Apparently,

the gist of its rationale is that the survivor alleging that he or she has been the victim of the most humiliating and egregious offenses and his or her alleged perpetrator must be treated equally; if the survivor chooses to name his or her perpetrator, then the survivor must also be willing to publicly disclose his or her own name. Such rationale is contrary to public policy and common law, and reveals a truly unfortunate lack of understanding of the overwhelming challenges which face sexual abuse victims who finally muster the courage to come forward to prevent further atrocities. The trial court's approach would have a chilling effect on already-partially-incapacitated victims in seeking civil justice.

Proposition of Law No. 3: A plaintiff may proceed under a pseudonym where the plaintiff's privacy interest outweighs the presumption of open judicial proceedings.

Proposition of Law No. 4: In determining whether a plaintiff's privacy interest outweighs the presumption of open judicial proceedings, a court should consider the following non-exhaustive list of factors: a) the extent to which the identity of the litigant has previously been kept confidential; b) the reason upon which disclosure is feared or sought to be avoided; c) the chilling effect, if any, of disclosure and being publicly identified; d) the strength or need of the public to know the litigant's identity; e) whether the party seeking anonymity has an ulterior motive; f) whether either party is a public figure creating a strong public interest in knowing the identity of the litigant.

Proposition of Law No. 5: The court shall weigh the quality rather than the quantity of the factors.

Proposition of Law No. 6: Any one factor, standing alone, may justify use of a pseudonym if the factor is sufficiently compelling.

The majority opinion below adopted the U.S. Sixth Circuit's approach to determining when a plaintiff may proceed under a pseudonym, balancing privacy interests against open court proceedings. (Appendix B, Opinion, ¶6). "Several considerations determine whether a plaintiff's privacy interests substantially outweigh the presumption of open judicial proceedings." *Doe v. Porter*, 370 F.3d 558, 560 (6th Cir. 2004). Those considerations include:

- (1) whether the plaintiffs seeking anonymity are suing to challenge governmental activity;
- (2) whether prosecution of the suit will compel the plaintiffs to disclose information "of the utmost intimacy";
- (3) whether the litigation compels plaintiffs to disclose an intention to violate the law, thereby risking criminal prosecution; and
- (4) whether the plaintiffs are children.

Id., citing *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir.1981). While Doe does not object to those factors as far as they go, Doe suggests that the concurring opinion recommends a more thorough and less archaic list of circumstances which better apply to today's environment, such as: a) the extent to which the identity of the litigant has previously been kept confidential; b) the reason upon which disclosure is feared or sought to be avoided; c) the chilling effect, if any, of disclosure and being publicly identified; d) the strength or need of the public to know the litigant's identity; e) whether the party seeking anonymity has an ulterior motive; f) whether either party

is a public figure creating a strong public interest in knowing the identity of the litigant. (Appendix B, Opinion, ¶19). Doe encourages the Court to adopt those factors.

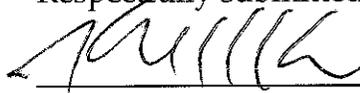
Furthermore, the concurring opinion wisely recognized that the weighing of the quality, not the quantity, of factors guides the proper determination of these issues, and that any one factor can be so strong as to unilaterally make the determination. (Appendix B, Opinion, ¶18). Doe also requests that the Court adopt those propositions of law as well.

CONCLUSION

The courts below did not apply the correct legal analysis. In particular, the courts did not recognize the impact of requiring Doe to reveal matters of utmost humiliating intimacy without the protection of a pseudonym. The effect on Doe of such a ruling would be the denial of his access to the courts.

Accordingly, Doe requests that this Court vacate the previous rulings and remand this case to the lower courts with instructions to apply the correct analysis and to hold an evidentiary hearing at which Doe may fully explain his reasons for proceeding pseudonymously.

Respectfully submitted,



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The undersigned hereby certifies that the foregoing Brief was served upon the following by regular U.S. mail this 23rd day of August, 2012:

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APPENDIX A

ORIGINAL

**IN THE SUPREME COURT OF OHIO
CASE NO. _____**

12-0556

JOHN DOE

Plaintiff-Appellant

vs.

BRANDON BRUNER

Defendant-Appellee

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CASE NO. CA2011-07-013

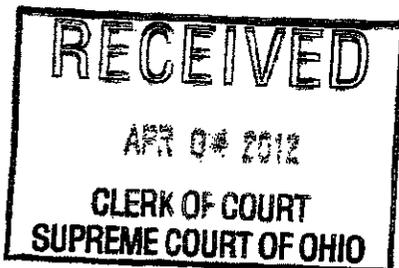
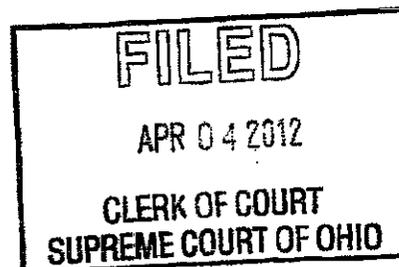
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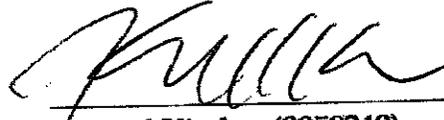


Notice of Appeal of Appellant

Appellant John Doe hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Clinton County Court of Appeals, Twelfth Appellate District, entered in Court of Appeals Case No. CA2011-07-013 on February 27, 2012.

This case raises issues of public or great general interest and a substantial constitutional question.

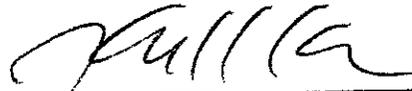
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This will certify that a true copy of the foregoing Memorandum in Support of Jurisdiction has been served upon Brandon Bruner, 6443 Hamilton Avenue, Cincinnati, OH 45224, Defendant-Appellee, by ordinary U.S. Mail, postage prepaid, this 3rd day of April, 2012.



Konrad Kircher
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APPENDIX B

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLINTON COUNTY

CLINTON COUNTY
CYNTHIA R. BAILEY, CLERK

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FILED IN COURT OF APPEALS

JOHN DOE, :
 :
 Plaintiff-Appellant, : CASE NO. CA2011-07-013
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 : OPINION
 - vs - : 2/27/2012
 :
 BRANDON BRUNER, :
 :
 Defendant-Appellee. :

CIVIL APPEAL FROM CLINTON COUNTY COURT OF COMMON PLEAS
Case No. CVH2010-0689

Konrad Kircher, 4824 Socialville-Foster Road, Mason, Ohio 45040, for plaintiff-appellant
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POWELL, P.J.

{¶ 1} Plaintiff-appellant, John Doe, appeals a decision of the Clinton County Court of Common Pleas denying his motion to proceed under a pseudonym.¹ For the reasons stated below, we affirm the trial court's decision.

{¶ 2} During the months of September and October 2009, Doe was allegedly sexually assaulted and molested by defendant-appellee, Brandon Bruner. Both parties were

1. Pursuant to Loc.R. 6(A), we sua sponte remove this appeal from the accelerated calendar.

attending Wilmington College at the time and shortly after the alleged incident Doe obtained an order prohibiting Bruner from contacting him. Later, Bruner violated the order when he sent Doe a text message. On August 31, 2010 Doe filed the present action under a pseudonym, asserting Bruner committed sexual assault and battery and intentionally inflicted emotional distress. On April 19, 2011 the magistrate ordered Doe to file a brief regarding his right to proceed pseudonymously. Subsequently, the magistrate denied Doe's request to proceed under a pseudonym. The trial court affirmed the magistrate's decision. Doe now appeals, asserting one assignment of error:

{¶ 3} THE TRIAL COURT ERRED IN REQUIRING DOE TO PROCEED PUBLICLY IN HIS TRUE NAME, WHEN PUBLIC POLICY AND COMMON LAW SUPPORT THE RIGHT OF A SEXUAL ABUSE VICTIM TO PROCEED UNDER A PSEUDONYM.

{¶ 4} In his sole assignment of error, Doe argues that the trial court erred when it ordered him to proceed under his real name. Specifically, he claims that a sexual abuse victim's right to proceed under a pseudonym is supported by Ohio common law and public policy. Although the practice of proceeding under a pseudonym is well established in Ohio, neither the Ohio Supreme Court nor any Ohio appellate court has yet addressed a challenge to this practice. *See, e.g., Doe v. Shaffer*, 90 Ohio St.3d 388, 2000-Ohio-186 (Noting the plaintiff's name has been changed); *Doe v. George*, 12th Dist. No. CA2011-03-022, 2011-Ohio-6795 (Allowing but not commenting on use of pseudonyms for plaintiffs); *Doe v. Trumbull Cty. Children Servs. Bd.*, 11th Dist. No. 2004-T-0034, 2005-Ohio-2260 (Mother's name changed during malicious prosecution action against child services agency). However, the federal courts have developed a body of law regarding this issue. As discussed below, we find persuasive and chose to follow the Sixth Circuit's approach.

{¶ 5} Both the Ohio and Federal Rules of Civil Procedure require that every complaint list the names and addresses of all parties involved in the suit. Civ.R. 10(A) and

Fed.R.Civ.P. 10(A). Federal courts have reasoned that this rule demonstrates "the principle that judicial proceedings, civil as well as criminal, are to be conducted in public." *Doe v. Blue Cross & Blue Shield United of Wisconsin*, 112 F.3d 869, 872 (7th Cir.1997). "Identifying the parties to the proceeding is an important dimension of publicness." *Id.* The public has a "legitimate interest in knowing which disputes involving which parties are before the federal courts that are supported with tax payments and exist ultimately to serve the American public." *Doe v. Indiana Black Expo, Inc.*, 923 F.Supp. 137, 139 (S.D.Ind.1996). The identification of those involved in the suit also serves the opposing parties' interest. "Defendants have the right to know who their accusers are, as they may be subject to embarrassment or fundamental unfairness if they do not." *Plaintiff B v. Francis*, 631 F.3d 1310, 1315 (11th Cir.2011).

{¶ 6} Although there is a strong policy towards open judicial proceedings, parties have been permitted to proceed under a pseudonym in exceptional circumstances. All of the federal circuits weigh the anonymous party's privacy interest against the opposing party's interest in disclosure. In balancing these interests, the second, seventh, and ninth circuits consider both the public interest in disclosure and any prejudice to the opposing party. *E.g.*, *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189 (2nd Cir.2008); *Doe v. City of Chicago*, 360 F.3d 667, 668 (7th Cir.2004); *Doe I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir.2000). Many of the remaining circuits, including the sixth circuit, only weigh the plaintiff's privacy interest against the presumption of open judicial proceedings. *E.g.*, *Doe v. Porter*, 370 F.3d 558, 560 (6th Cir.2004); *Doe v. Megless*, 654 F.3d 404, 408 (3rd Cir.2011); *Plaintiff B v. Francis*, 631 F.3d 1310, 1315-1316 (11th Cir.2011); *M.M. v. Zavaras*, 139 F.3d 798, 803 (10th Cir.1998). We chose to follow the latter approach and hold that a party can proceed under a pseudonym where a "plaintiff's privacy interest substantially outweighs the presumption of open judicial proceedings." *Porter* at 560.

{¶ 7} In balancing these concerns, the trial court "should carefully review *all* the circumstances of a given case." (Emphasis sic.) *Plaintiff B* at 1316 quoting *Doe v. Frank*, 951 F.2d 320, 323 (11th Cir.1992). Several federal circuits have enumerated sets of factors for trial courts to consider. While the sixth circuit's list of considerations are non-exhaustive, the primary concerns are: "(1) whether the plaintiffs seeking anonymity are suing to challenge governmental activity; (2) whether prosecution of the suit will compel the plaintiffs to disclose information 'of the utmost intimacy'; (3) whether the litigation compels plaintiffs to disclose an intention to violate the law, thereby risking criminal prosecution; and (4) whether the plaintiffs are children." *Porter* at 560, citing *Doe v. Stegall*, 653 F.2d 180, 185-186 (5th Cir.1981). Other factors sixth circuit trial courts have considered are whether threats of retaliation have been made against the plaintiff and the potential prejudice of the opposing party. See *Porter* at 360-36; *Doe v. Wolowitz*, E.D. Michigan No. 01-73907, 2002 WL 130614, *2 (May 28, 2002).²

{¶ 8} Having determined to follow the sixth circuit's approach, we now apply this test to the facts of this case. We begin with the principle that a trial court's ruling regarding a party's request to proceed pseudonymously will not be overturned absent an abuse of discretion. *E.g.*, *Porter* at 560; *Megless* at 406; *Frank* at 323. See *Compston v. Automanage, Inc.*, 79 Ohio App.3d 359, 367 (12th Dist.1992) (Generally, a trial court's pretrial decisions are reviewed for an abuse of discretion). An abuse of discretion is more than mere error of law or of judgment; it implies an attitude that is unreasonable, unconscionable, or arbitrary. *State v. Adkins*, 144 Ohio App.3d 633, 644 (12th Dist.2001).

2. Compare *Sealed Plaintiff* at 190 (Including additional factors for consideration such as: whether identification poses a risk of retaliatory physical or mental harm, whether identification presents other harms and likely severity of those harms, whether the defendant is prejudiced, whether the plaintiff's identity has thus far been kept confidential, whether the public interest's in litigation is furthered by requiring plaintiff to disclose his identity, whether, because of the purely legal nature of the issues presented or otherwise, there is an atypically weak public interest in knowing the litigant's identity, and whether there are any alternative mechanisms for protecting the confidentiality of the plaintiff).

An action is unreasonable where there is no sound reasoning process to support the judge's decision. *Hall v. Johnson*, 90 Ohio App.3d 451, 455 (1st Dist.1993).

{¶ 9} As mentioned above, the trial court denied Doe's request to proceed under a pseudonym. We agree with the trial court and find that Doe's privacy interests do not substantially outweigh the presumption of open judicial proceedings. Doe concedes and we agree that three of the four factors do not apply. Doe is not a child, the litigation will not compel him to disclose an intention to violate the law, and he is not challenging governmental activity. In fact, in cases where plaintiffs are challenging the actions of a private individual, courts have reasoned that this weighs towards disclosure because of the reputation and credibility concerns that a lawsuit implies for an individual defendant. See *Indiana Black Expo*, 923 F.Supp. 137, 141 ("Basic fairness requires that where a plaintiff makes such accusations publicly, he should stand behind those accusations and the defendants should be able to defend themselves"); *Doe v. Shakur*, 164 F.R.D. 359, 361 (S.D. New York 1996). Moreover, Doe has not alleged he has suffered threats of retaliation for filing this suit.

{¶ 10} Doe argues in his brief that his identity should be kept confidential because he will be forced to disclose information that will be of the "utmost intimacy." Although, it is likely that disclosing facts surrounding the sexual assault will include information that falls in this category, this factor alone is not enough to allow Doe to proceed pseudonymously. In addressing similar arguments, a federal court prohibited a plaintiff from proceeding under a pseudonym despite the fact that the case involved allegations of sexual abuse. *Wolowitz*, E.D. Michigan No. 01-73907, 2002 WL 130614. The court reasoned that even though the sexual abuse charges likely included information of the "utmost privacy," this single factor was not so persuasive that it substantially outweighed the presumption of open judicial proceedings. *Id.* at *2. Other courts have applied similar reasoning to claims regarding intimate disclosure. A New York court found that a sexual assault victim's privacy interests

were outweighed by the fact that the lawsuit was a civil suit for damages, the defendant had been publicly accused, and the public has a right of access to the courts. *Shakur* at 361. Further, a court denied the use of a pseudonym in a sexual harassment case where a plaintiff alleged she was infected with the HIV virus due to a sexual assault by her supervisor. *Doe v. Bell Atlantic Bus. Sys. Servs., Inc.*, 162 F.R.D. 418, 420 (D.Mass.1995).

{¶ 11} Thus, the trial court did not abuse its discretion in denying Doe's request to proceed under a pseudonym. Doe's assignment of error is overruled.

{¶ 12} Judgment affirmed.

YOUNG, J., concurs.

RINGLAND, J., concurs separately.

RINGLAND, J., concurring separately.

{¶ 13} I concur with the judgment of the majority. However, I write separately because I do not entirely agree with the rationale the majority propounded in affirming the trial court's decision.

{¶ 14} Initially, a review of the record indicates that following a hearing on the matter the magistrate denied appellant's request to use a pseudonym to bring his suit based on Civ.R. 10(A). This was error. The language of Civ.R. 10(A) neither grants nor denies one from using pseudonyms in Ohio pleadings and I have found no Ohio case interpreting Civ.R. 10(A) as such.

{¶ 15} Furthermore, a review of the record also indicates that the trial court modified the magistrate's order denying appellant's request without holding a hearing by finding "[appellant] had no issue identifying the name of the Defendant in Court pleadings. To now claim [appellant's] interest in keeping his own identity secret is superior to Defendant's

interest in that regard rings hollow to this court." In reviewing the nature of the complaint, I find the trial court's criticism provides an insufficient explanation of its reasoning denying appellant's request. This matter arguably involves allegations of intimate details involving unwanted homosexual activity. Appellant argues that using his real name in bringing this suit would chill his efforts to obtain redress and ultimately deny him access to the courts. This would certainly be a factor worthy of granting appellant's request to use a pseudonym if no counter arguments were presented. While defendant is clearly named as party to this action, defendant would have his own recourse by way of a suit alleging defamation should this case be resolved in his favor. This would balance out any lack of fairness that the trial court may be alluding to in its decision.

{¶ 16} Nevertheless, I concur in judgment because no transcript of the hearing before the magistrate was filed in this case. Without a transcript, this court is unable to determine what evidence was presented regarding appellant's privacy interests against those favoring disclosure. In addition, without a transcript, this court is unable to determine what evidence was presented to the magistrate explaining the reasoning process behind the trial court's vague conclusion. As this court has consistently stated, without a transcript we have no choice but to presume the regularity of the trial court's proceedings. See *Cox v. Zimmerman*, 12th Dist. No. CA2011-03-022, 2012-Ohio-226, ¶ 19, citing *Geico Indemn. Co. v. Alausud*, 12th Dist. No. CA2010-11-315, 2011-Ohio-2599, ¶ 16. I would affirm the trial court's decision on this basis.

{¶ 17} That said, as noted previously, the Ohio Civil Rules and Ohio case law provide virtually no guidance on the proper use of pseudonyms. In turn, had a transcript been provided in this case, I agree with the majority that we would then turn our attention to federal case law in order to determine this issue. Unfortunately, the federal courts are not uniform in handling the use pseudonyms in pleadings. However, after reviewing the various tests

applied by the federal courts, I agree, in general, with the majority's decision to adopt the Sixth Circuit's test requiring the court to weigh the plaintiff's privacy interest against the presumption of open judicial proceedings. This test allows the court to consider the First Amendment rights of the press and the interests of the general public. Further, nothing in the case law prevents the trial court at some later stage from finding the use of a pseudonym no longer required or warranted.

{¶ 18} In looking at the Sixth Circuit's analysis, I find that the enumerated factors are not inclusive, but are without limitation. I also find that it is not the quantity of the factors presented, but the quality of the factors that should be weighed. For example, considerations of whether prosecution of a suit would compel the plaintiff to disclose information of the utmost intimacy may be in and of itself more significant than whether threats of retaliation have not been made.

{¶ 19} Until the Ohio Supreme Court sets down a protocol or guidelines for the courts of this state to use when dealing with a request to proceed under a pseudonym, I would suggest the following: (1) the trial court hold a hearing allowing all evidence to be presented to assist it in weighing the plaintiff's privacy interests versus the presumption of open judicial proceedings; (2) that the hearing be recorded, or if necessary, transcribed for appellate review; (3) that the court memorialize its findings either orally or by written decision; (4) in reaching its decision, the court consider: (a) the extent to which the identity of the litigant has previously been kept confidential; (b) the reason upon which disclosure is feared or sought to be avoided; (c) the chilling effect, if any, of disclosure and being publically identified; (d) the strength or need of the public to know the litigant's identity; (e) whether the parties seeking pseudonym has a legitimate or illegitimate ulterior motive; (f) whether either party is a public figure creating a strong public interest in knowing the identity of the litigant; and (g) whether

opposition to the use of pseudonyms has a legitimate basis.³

{¶ 20} For the reasons outlined above, I concur in judgment only.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>

3. For a discussion of the rationale of such factors, see Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants be Permitted to Keep Their Identities Confidential?*, 37 *Hastings L.J.* 1 (1985).

APPENDIX C

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLINTON COUNTY

CLINTON COUNTY
CYNTHIA R. BAILEY, CLERK

12 FEB 27 PM 12:24

FILED-CT. OF APPEALS

JOHN DOE,

Plaintiff-Appellant,

- VS -

BRANDON BRUNER,

Defendant-Appellee.

CASE NO. CA2011-07-013

JUDGMENT ENTRY

The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Clinton County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.



Stephen W. Powell, Presiding Judge



Robert P. Ringland, Judge



William W. Young, Judge

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.

APPENDIX D

IN THE COURT OF COMMON PLEAS
CLINTON COUNTY, OHIO

CLINTON COUNTY
CYNTHIA R. BAILEY, CLERK

2011 APR 19 AM 10:21

CLERK OF COMMON PLEAS

John Doe
Plaintiff,

CASE NO. CVH 2010 0689

-vs-

MAGISTRATE'S

Brandon Bruner
Defendant.

Pretrial/Memorandum Orders

This matter came on before Magistrate McElwee on April 13, 2011 for a pretrial and a hearing on Plaintiff's motion to extend discovery.

- 1) Attorney Michael F. Arnold appeared on behalf of Plaintiff who was present with his parents.
- 2) Defendant Brandon Bruner participated on his own behalf without counsel and was accompanied by his father.

This case was filed on August 31, 2010.

1. Plaintiff's motion to continue the discovery deadline is granted. Discovery shall be completed by June 30, 2011.

2. Plaintiff shall file a brief on the issue of Plaintiff's right to be listed as John Doe by May 4, 2011. Defendant may file a response by May 18, 2011. Plaintiff may file a reply by May 25, 2011.

JK
3. Just prior to the pretrial hearing Plaintiff filed a motion requesting the court to: a) compel Defendant to provide consent to Cincinnati Public Schools (CPS) to turn over to Plaintiff the Defendant's full academic and disciplinary files or in the alternative, b) order CPS to comply with a subpoena served on CPS (via certified mail on 12/10/10). The subpoena required CPS to produce the full academic and disciplinary files of the Defendant and all documents regarding Defendant's withdrawal from Walnut Hills High School.

It is noted that CPS was not served with this motion requesting an alternative order commanding them to obey the subpoena noted above. Plaintiff is ordered to immediately serve this motion on CPS, if Plaintiff wants to pursue its alternative request regarding an order requiring CPS to comply with the subpoena.

All parties or non-parties that have been served with the motion noted in this section have until May 18, 2011 to file a response. Plaintiff has until May 25, 2011 to file a reply.

4. On April 13, 2010 Plaintiff also filed a motion to compel discovery against non-party Wilmington College (WC) based upon a subpoena Plaintiff served upon attorney Dan Buckley.

Because there is nothing in this record indicating WC is a party or that Attorney Dan Buckley has entered an appearance on behalf of non-party WC, the motion is denied at this time. Plaintiff may serve its subpoena on WC and then renew its motion concerning non-party WC.

An oral hearing shall be held on **June 9, 2011 at 1:30 p.m.** on the John Doe designation issue and any other pending motions that have been properly served.

NOTICE

A copy of this Order shall serve as notice of the oral hearing date and time established within this Entry.

ENTER this 15 day of April 2011.


Magistrate Mary H. McElwee

cc: Cincinnati Public Schools
2651 Burnet Avenue *attention Att. Daniel J. Hojny*
Cincinnati, OH 45219

Wilmington College
1870 Quaker Way
Wilmington, OH 45177

APPENDIX E

IN THE COURT OF COMMON PLEAS
CLINTON COUNTY, OHIO

CLINTON COUNTY
CYNTHIA R. BAILEY, CLERK

2011 JUN 13 AM 9:43

FILED-COMM. PLEAS

McEl.

John Doe
Plaintiff

CASE NO. CVH 2010 0689

-vs-

MAGISTRATE'S ORDER

Brandon Bruner
Defendant.

Before the Court for ruling are two pending issues: 1) Plaintiff's right to be listed as John Doe, and 2) Plaintiff's request for the Court to order the Cincinnati Public Schools to comply with a subpoena concerning Defendant's full academic and disciplinary file.

The parties and Cincinnati Public Schools were given the opportunity to address their issues in writing. Oral argument before Magistrate McElwee was afforded on June 8, 2011. Those present at the hearing included: 1) Plaintiff represented by Attorney Michael F. Arnold, 2) Defendant unrepresented and, 3) Attorney Daniel J. Hoying representing the Cincinnati Public Schools.

After careful consideration of the arguments and briefs, the Magistrate makes the following orders:

John Doe Designation

JR
Pursuant to Civ.R. 10(A) and this Court's policy, it is ordered that Plaintiff correct the title of this action to include Plaintiff's name.

Subpoena issued to Cincinnati Public Schools

Pursuant to Civ.R. 45 and Civ.R. 26, non-party Cincinnati Public Schools is ordered to produce all records in its possession regarding any disciplinary issues involving the Defendant. Those records shall be sent to Plaintiff's counsel and the Defendant.

Except for use in this proceeding, those records shall remain confidential.

Discovery

Discovery in this action shall be concluded by **July 24, 2011.** ✓

NEXT PRETRIAL

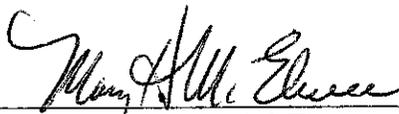
The next pretrial in this matter shall be held on **July 25, 2011 at 1:45 p.m.** ✓ The pretrial may be conducted by telephone conference¹, if arranged by the parties. Otherwise, the Court expects counsel to appear. (**Please Note:** The Court does not initiate any telephonic conferences.) The above pretrial hearing is scheduled before Magistrate Mary McElwee. **A jury trial date will be set at this**

pretrial. Arrange conf. call w/ DEF + then call at
call (937) 382-3640
@ 1:45

NOTICE

A copy of this Order shall serve as notice of the pretrial date and time established within this Entry.

ORDERED this 13 day of June 2011.


Magistrate Mary H. McElwee

Defendant is again encouraged to consult legal counsel, as the Court cannot provide private legal advice.

¹ No one may participate while driving or from an airport terminal or other location where public announcements are being made.

APPENDIX F

IN THE COURT OF COMMON PLEAS

2 AM 9:05
BAILEY, CLEMM

COMMON PLEAS

Clinton County, Ohio

211 JUN 22 AM 9:05
COURT CLERK
CHRISTIA R. BAILEY
CLEMM

LEO-COMM. PLEAS

JOHN DOE Plaintiff	Case No: CVH <u>2010-0688</u>
vs.	-ENTRY-
BRANDON BRUNER Defendant	

UP

This cause is before the Court of "Plaintiff's Motion to Set Aside Magistrate Order" accepted for filing by the Clerk of Courts on June 20, 2011.

After review of the full record, the Court notes Plaintiff had no issue identifying the name of the Defendant in Court pleadings. To now claim Plaintiff's interest in keeping his own identity secret is superior to Defendant's interest in that regard rings hollow to this Court.

The Motion is denied without hearing. Plaintiff shall comply with all orders of the Magistrate as previously directed.



June 21, 2011

John W. Rudduck, Judge