[Cite as *Doe v. Bruner*, 2012-Ohio-761.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLINTON COUNTY

JOHN DOE,	:	
Plaintiff-Appellant,	:	CASE NO. CA2011-07-013
	:	O P I N I O N
- 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

Brandon Bruner, 6443 Hamilton Avenue, Cincinnati, Ohio 45224, defendant-appellee, pro se

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.

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).