

CITY OF ALBUQUERQUE V. BUTT, 1972-NMCA-007, 83 N.M. 463, 493 P.2d 773 (Ct. App. 1972)

**CITY OF ALBUQUERQUE, Plaintiff-Appellee,
vs.
ERNEST BUTT; WILLIAM PROULX; DONALD WHITE,
Defendants-Appellants.**

No. 721

COURT OF APPEALS OF NEW MEXICO

1972-NMCA-007, 83 N.M. 463, 493 P.2d 773

January 14, 1972

Appeal from the District Court of Bernalillo County, McManus, Jr., Judge

COUNSEL

CHARLES DRISCOLL, Albuquerque, New Mexico, Attorney for Appellants.

FRANK M. MIMS, Albuquerque, New Mexico, Attorney for Appellee.

JUDGES

SUTIN, Judge, wrote the opinion.

WE CONCUR:

William R. Hendley, J., Ray C. Cowan, J.

AUTHOR: SUTIN

OPINION

{*464} SUTIN, Judge.

{1} This appeal involves the constitutionality of Ordinance No. 171-1969, § 38 D(1) of the City of Albuquerque, providing against lewd, immoral or obscene acts such as distributing obscene material in pictorial magazine form. The City of Albuquerque conceded that the ordinance is unconstitutional and the conviction appealed from must be reversed.

{2} The ordinance is unconstitutional because it does not comply with the threefold test for determining obscenity established by the Supreme Court of the United States in A Book Named "John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of Com. of Massachusetts, 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1 (1966), more widely known as the **Fanny Hill** case, and restated in Redrup v. New York, 386 U.S. 767, 87 S. Ct. 1414, 18 L. Ed. 2d 515 (1967).

{3} This court is bound by the constitutional rule of the Supreme Court of the United States, and, under the Supremacy Clause of Article VI of the Constitution of the United States, it must be obeyed. Sims v. Georgia, 385 U.S. 538, 87 S. Ct. 639, 17 L. Ed. 2d 593 (1967).

{4} Since the ordinance is unconstitutional, it is not necessary to determine whether the publications are obscene, nor to determine other points raised by the defendants.

{5} The judgment and sentence of each of the defendants is reversed, and each of the defendants discharged.

{6} IT IS SO ORDERED.

WE CONCUR:

William R. Hendley, J., Ray C. Cowan, J.