

1950

Marilyn Bingham and Jack T. Bingham v. Board of Education of Ogden City : Brief in Answer to Petition for Rehearing

Utah Supreme Court

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CASE NO. 7468

**In the Supreme Court
of the State of Utah**

MARILYN BINGHAM, an infant by JACK T. BINGHAM, her guardian ad litem, and JACK T. BINGHAM, in his own right,

Plaintiffs and Appellants,

vs.

BOARD OF EDUCATION OF OGDEN CITY,
A public corporation,

Defendant and Respondent.

**BRIEF IN ANSWER TO PETITION FOR
REHEARING**

FILED WADE M. JOHNSON,
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~~Attorney for Defendant and Respondent.~~
Clerk, Supreme Court, Utah

In the Supreme Court of the State of Utah

MARILYN BINGHAM, an infant by JACK T.
BINGHAM, her guardian ad litem, and JACK T.
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BRIEF IN ANSWER TO PETITION FOR REHEARING

It appears to respondent, the Board of Education of Ogden City, that no new matters of fact or questions of law have been presented in the petition for a rehearing herein.

It cannot be said that this Court misconceived the theory of the appellants, for, in reciting the material allegations of the complaint, Mr. Justice Latimer summarizes the theory of the plaintiffs and the allegations of the complaint in the following language:

“that the operation of the incinerator in the dangerous and hazardous manner alleged constituted a nuisance.”

The Court in the opinion further says:

“Plaintiffs, however, contend that even if we follow the general rule they still have alleged a cause of action, as immunity from tort liability cannot be claimed when the act complained of reaches the level of a nuisance.”

All of the questions presented were thoroughly discussed by the members of this Court in their various opinions.

It seems to the respondent that with the basic fact that—

“The Board of Education of Ogden City is an agency of the State of Utah, created by the legislature,” and “that school boards act in connection with public education as agents or instrumentalities of the state in the performance of a governmental function”—it follows that consequently they should “partake of the state’s sovereignty with respect to tort liability.”

Quoting further from the opinion, the Court says:

“It frequently happens that the same act or omission may constitute negligence, and, at the same time, give rise to a nuisance. At times it is most difficult to determine whether an alleged state of facts establishes a nuisance or shows merely a lack of due care. Whether or not allegations of this complaint picture a condition which, in law, is a nuisance or show merely negligent conduct, is a question not free from difficulty. Accordingly we dispose of the liability of the school board regardless of the characterization of the negligence.’

We also call the Court's attention to the last two paragraphs of the majority opinion.

What more can be said?

Respondent, therefore, submits that the petition for rehearing should be denied.

Respectfully submitted,

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Ogden, Utah

ATTORNEY FOR RESPONDENT.