

# WISCONSIN SUPREME COURT CALENDAR AND CASE SYNOPSES FEBRUARY 2012

The cases listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol.

This calendar includes cases that originated in the following counties:

Pierce  
St. Croix  
Waukesha  
Washington

## **TUESDAY, FEBRUARY 7, 2012**

9:45 a.m.	10AP342	-	Robert E. Brenner v. City of New Richmond
10:45 a.m.	10AP1398-CR	-	State v. Tally Ann Rowan
1:30 p.m.	10AP1474	-	Best Price Plumbing, Inc. v. Erie Insurance Exchange

## **WEDNESDAY, FEBRUARY 8, 2012**

9:45 a.m.	10AP1702	-	State v. Abraham C. Negrete
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The Supreme Court calendar may change between the time you receive this synopsis and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. That office will also have the names of the attorneys who will be arguing the cases.

Radio and TV, and print media wanting to take photographs, must make media requests 72 hours in advance by calling Supreme Court Media Coordinator Rick Blum at 608-271-4321. Summaries provided are not complete analyses of the issues presented.

**WISCONSIN SUPREME COURT**  
**TUESDAY, FEBRUARY 7, 2012**  
**9:45 a.m.**

*This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which reversed a St. Croix County Circuit Court decision, Judge Howard W. Cameron, Jr., presiding.*

2010AP342

[Brenner v. City of New Richmond](#)

This case examines the proper legal standard for determining whether a constitutional taking has occurred in an inverse condemnation case involving a runway extension at a municipal airport.

Some background: An inverse condemnation is an action brought by a property owner for compensation from a governmental entity that has taken the owners' property without bringing formal condemnation proceedings.

The city of New Richmond owns and operates the New Richmond Regional Airport, which is located on the outskirts of the city. In 2007, the city extended the main runway at the airport by 1,500 feet to accommodate certain types of business jets.

In connection with the runway project, the city condemned 62 acres of land owned by plaintiffs Steven and Cristy Wickenhauser and also condemned an avigation (aerial navigation) easement over 3.8 acres of the Wickenhausers' remaining 80 acres. The Wickenhausers' home is located in the area covered by the avigation easement. The easement prohibits any buildings or trees exceeding 26 to 38 feet tall, depending on their location.

The Wickenhauser's and other nearby landowners, Robert Brenner and Allan and Susan Seidling filed a petition for inverse condemnation proceedings under Wis. Stat. § 32.10.

The case was tried to the court. At trial the plaintiffs testified to various complaints about the runway expansion's effects, including odors, dust, vibrations, sound, runway strobe lights and low overhead flights. Following the trial, the circuit court issued a written decision and order dismissing the plaintiffs' suit because none of the plaintiffs had proven that the airplane overflight deprived them of all, or substantially all, economic benefits of their property. As to the Wickenhausers' claim, the trial court held that the Wickenhausers had already been paid in the context of the city's direct condemnation of an avigation easement, which included the area on which the Wickenhausers' home was situated, for any loss in value to their remaining property due to increased airplane overflights arising out of the airport improvement project.

The Court of Appeals reversed and remanded, concluding that the trial court used an improper legal standard in dismissing the case. The Court of Appeals concluded the trial court improperly used the standard for regulatory takings rather than the standard for physical occupation cases. The Court of Appeals held that the plaintiffs were entitled to compensation if they could prove that the airplane overflights resulting from the airport improvement project had a direct, immediate and substantial effect on the plaintiffs' use and enjoyment of their land.

The city argues that the Court of Appeals created a new conceptual category relating to airplane overflight inverse condemnation cases, holding that if the overflights have a direct, immediate and substantial effect on the use and enjoyment of the land a constitutional taking occurs. The city says that historically there have been only three conceptual categories that are applied when an owner of real estate seeks compensation from the government because the government's action has claimed to have resulted in a constitutional taking. Those three

categories are physical occupation, regulatory action, and consequential damages. The city also argues that when determining if a taking has occurred, the owner's property must be considered as a whole, rather than being segmented into subparts for the purpose of analyzing if a subpart of the property has been taken.

**WISCONSIN SUPREME COURT**  
**TUESDAY, FEBRUARY 7, 2012**  
**10:45 a.m.**

*This is a certification from the Wisconsin Court of Appeals, District III (headquartered in Wausau). The Court of Appeals may certify cases that it believes cannot be resolved by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Pierce County Circuit Court, Judge James J. Duvall, presiding.*

2010AP1398-CR

[State v. Rowan](#)

This certification examines whether a condition of extended supervision that allows any law enforcement officer to search the defendant, her home, or her vehicle, for a firearm at any time without probable cause or reasonable suspicion is permissible under the Fourth Amendment and Wis. Const. art. I, § 11.

Some background: At approximately 1:40 a.m. on March 13, 2008, a Prescott police officer observed Tally Ann Rowan's car skid past a stop sign and turn onto a highway without stopping. The officer activated his car's lights and began to follow Rowan, who crashed her vehicle into a stop light pole less than a mile from where she turned onto the highway.

As the officer approached Rowan's vehicle, he smelled intoxicants and observed that Rowan was belligerent and swearing. He then called for assistance from additional officers and firefighters. When Rowan was subsequently informed that the firefighters were going to cut the vehicle's battery cables to reduce the danger, Rowan said, "[G]et the fuck away from there. Where the fuck is my gun? I'm going to shoot you." After Rowan made a reaching motion downward, the police removed her from the vehicle. They subsequently found an unloaded semiautomatic handgun and a box of ammunition in the vehicle.

Rowan was taken to a hospital, where she continued to be very agitated, grabbing at people, spitting at police and hospital employees, and threatening the doctor, other medical staff, and their families.

As the officer held Rowan's arm at the hospital, Rowan grabbed the officer's thumb and very seriously injured the officer's hand, leading to the charge of battery to a police officer.

Rowan was found guilty of all charges after a jury trial. The court sentenced her to one year and two months of initial confinement and three years of extended supervision on a charge of battery to a police officer. She also was also convicted of operating a motor vehicle while under the influence of an intoxicant, resisting or obstructing an officer, and carrying a concealed weapon, but those charges are not at issue in this appeal.

Rowan challenged a condition of extended supervision on the battery sentence in a post-conviction motion. The court denied the motion, but amended the condition to make it slightly narrower than its initial order: "[T]he defendant's person or her residence or her vehicle is subject to search for a firearm at any time by any law enforcement officer without probable cause or reasonable suspicion."

The circuit court ruled that this condition was a "special needs situation" based on the particular facts of this case, including threats to law enforcement and another judge, that required a departure from the normal Fourth Amendment requirements of probable cause and a warrant.

Rowan argues that the condition the court placed on her extended supervision is not reasonable or appropriate. She further argues that there must be some legislative authority to

allow any law enforcement officer, as opposed to the community corrections officer assigned to supervise her, to conduct searches.

The state, on the other hand, argues that the circuit court properly exercised its discretion and that the condition is permissible under Samson v. California, 547 U.S. 843 (2006). The state also argues that the condition is analogous to the conditions imposed in other Wisconsin cases.

In certifying the case, the Court of Appeals concludes there is no case in Wisconsin that directly addresses the situation presented in this case.

**WISCONSIN SUPREME COURT  
TUESDAY, FEBRUARY 7, 2012  
1:30 p.m.**

*This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed a Waukesha County Circuit Court decision, Judge Michael O. Bohren, presiding.*

2010AP1474                      [Best Price Plumbing v. Erie Ins.](#)

This breach-of-contract case examines whether an insurance company may satisfy the terms of its contract with a service provider by making a check out to both the provider and the insured, and then sending the check to the insured.

Some background: The dispute began when Erie Insurance Exchange's insured, Willtrim Group LLC, suffered a loss due to frozen pipes at a vacant rental property. There is no dispute that Erie contracted with Best Price Plumbing to provide plumbing services at Willtrim's property. Erie paid Best's invoice with an \$8,897 two-party check payable to Willtrim and Best, and sent the check to Willtrim. Willtrim deposited the check into its account. Best never received payment.

Best sued Erie for breach of contract, claiming it was due the amount on its invoice. At trial, a member of the Willtrim LLC, Trevor Trimble, testified that he received a check from Erie for the amount due to Best for plumbing services, made out to Willtrim and Best, and deposited the check into Willtrim's account. He stated he was dissatisfied with the plumbing services. Trimble testified he entrusted the check to a handyman at the job site, who obtained the endorsement of a Best employee.

Best's president and a service manager testified the check was not endorsed by Best and payment terms were not discussed with Erie's adjuster. The adjuster testified that two-party checks are Erie's usual course of business and the usual course in the insurance industry. He said to pay a contractor directly, Erie must be directed to do so by its insured and that he did not receive such direction from Willtrim.

He also stated there was no question that Erie desired to make the payment to Best, and when Trimble requested the two-party check, the job was very near completion.

The verdict asked only whether Erie had entered into a contract for plumbing services with Best and whether it had breached its contract. The jury answered the first question "yes," and the second question, "no."

On motions after verdict, the circuit court acknowledged it would sustain the verdict if any credible evidence supported it. It determined, however, that the issue involved a question of contract law.

The court ruled that when the contract is silent as to terms of payment, the payment is to be made the payee's principal place of business. It was undisputed Erie did not pay Best at its principal place of business; accordingly, the court ruled no credible evidence would support a finding that Erie complied with its contractual obligation to Best.

The Court of Appeals reversed the \$14,650.31 judgment against Erie.

It said that when considering a motion to change the jury's answers to the questions on the verdict, a trial court must view the evidence in the light most favorable to the verdict and affirm the verdict if it is supported by any credible evidence.

The Court of Appeals noted the adjuster's testimony about the two-party payment convention in the insurance industry, and that Best had conceded that it did not make "a direct pay request." It concluded it was up to the jury to resolve the conflict, and because there was credible evidence to support the jury's verdict that Erie did not breach its contract with Best, the circuit court was clearly wrong when it changed the jury's answer.

Best contends the circuit court correctly analyzed the issue. It notes that its initial proposal as well as its invoice that were sent to Erie prominently displayed Best's address. It states that Erie had never raised any issue with respect to the quality of Best's work, and it contends that Trimble simply converted the funds due to Best.

Erie contends the only issue is a fact question decided by the jury. It argues the Court of Appeals correctly determined credible evidence supports the jury verdict and that Best ignores the evidence supporting the verdict and offers no valid basis for review under Wis. Stat. § 809.62(1r)(d).

**WISCONSIN SUPREME COURT  
WEDNESDAY, FEBRUARY 8, 2012  
9:45 a.m.**

*This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a Washington County Circuit Court decision, Judge Andrew T. Gonring, presiding.*

2010AP1702

State v. Negrete

This case involves an illegal immigrant now facing deportation proceedings because of a crime he was convicted of 18 years ago. The Supreme Court examines whether the fact a transcript of Abraham C. Negrete's plea hearing is no longer available means that a motion to withdraw his guilty plea, pursuant to Sec. 971.08(2), Stats., cannot be granted.

Some background: On May 28, 1992, Negrete, a citizen of Mexico, pleaded guilty to second-degree sexual assault of a child. Negrete served his sentence. On March 10, 2010, Negrete filed a motion to withdraw his guilty plea from the 1992 assault.

Negrete alleged, by affidavit, that at the time he entered the guilty plea in this case he was not advised of the immigration consequences of his guilty plea, and that he did not know of the immigration consequences of the plea. Negrete tried to obtain the transcript of the plea hearing, but the court reporter is deceased, Negrete's original attorney is deceased, and the judge who heard the case is retired. The trial court found that no transcript is available.

On May 5, 2010, without conducting a hearing, the trial court denied Negrete's motion, noting that, at the time Negrete's plea was entered, the immigration warning was "not mandatory." The trial court ruled that the plea questionnaire signed by Negrete indicated that defense counsel had explained the immigration consequences to Negrete and that Negrete understood. The court ruled that any failure to orally warn Negrete on the record was harmless error.

Negrete appealed, and the Court of Appeals affirmed.

The state argued that Negrete's claim is barred by laches, asserting that an 18-year delay in seeking to withdraw a plea is unreasonable. Negrete responds that he did not unduly delay because he did not know his claim existed until deportation proceedings began and questions whether a laches defense is reasonable where the current deportation proceeding is apparently based on this 18-year-old conviction.

The Court of Appeals opted to address the merits of Negrete's claims. The court accepted, for the purpose of discussion, that the trial court did not properly advise him on the record, that no transcript can be had, and that deportation is "likely." The Court of Appeals agreed that the alleged failure to inform Negrete would be harmless error if, when he entered his plea, Negrete was aware that deportation could result. The Court of Appeals concluded that Negrete was aware of this consequence, noting that he had initialed a box indicating such, and that Negrete's lawyer had signed the plea/waiver form indicating that the lawyer had discussed and explained the contents of each item with Negrete.

According to the Court of Appeals, therefore, "[t]here is nothing for an evidentiary hearing to resolve" because there is record evidence that Negrete was advised of the potential deportation consequences of the plea.

Negrete suggests that when the transcript is unavailable, the motion must be granted because the court is unable to determine that the warning was given. He also asserts that by the

very terms of the statute, a motion to withdraw one's plea is not ripe unless and until he faces immigration proceedings.

The state contends that no relief was warranted because Negrete indicated his understanding by initialing and signing the Request to Enter Plea and Waiver of Rights form.

A decision by the Supreme Court could affect similar cases that may arise throughout the state.