

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**2004 MTWCC 60**

**WCC No. 2002-0588**

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**IN THE MATTER OF: TIM DICK, Guardian *Ad Litem* for**

**ALICIA M. BAARSON, BRITTANY E. BAARSON,**

**and BRADLEY A. BAARSON**

**Petitioner**

**vs.**

**MONTANA STATE FUND**

**Respondent/Insurer.**

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DECISION AND JUDGMENT

**APPEAL DISMISSED 05/26/05**

**Summary:** Kimberly Baarson was murdered by her estranged husband while working for Town Pump in Butte, Montana. The guardian of her three minor children seeks death benefits.

**Held:** Kimberly Baarson's murder did not arise out of her employment.

**Topics:**

**Employment: Course and Scope: Generally.** To be compensable, an injury or death must have occurred in the course of employment and also have arisen out of the employment. The "course of employment" refers to whether the injury occurred at the workplace while the claimant was working. "Arising out" of employment requires that the injury or death be caused by the employment.

**Employment: Course and Scope: Assaults.** Assaults and murders at work are not compensable where they are motivated by personal animosity not related to the employment and the employment does not increase the risk of assault or murder.

**Employment: Course and Scope: Assaults.** Where an employee is murdered at work by her estranged husband with a history of assaultive behavior and who has a restraining order against him, the murder is not compensable unless the employer has taken actions which increase the risk of murder. An employer's affirmative actions taken to reduce the threat of

assault do not create a duty to maintain those protections and the eliminations of the protections do not increase the inherent risk.

¶11 This case involves a tragic murder. Kimberly Baarson (Kim), a mother of three minor children, was murdered by her estranged husband, Brad Baarson (Brad), who then committed suicide. The murder occurred while the claimant was working for Town Pump. Through his present petition, the guardian *ad litem*, on behalf of the children, is seeking death benefits for the children. The Montana State Fund (State Fund), which insured Town Pump at the time of the murder, denies liability, urging that the murder did not occur in the course and scope of Kim's employment.

¶12 The matter is now submitted for decision upon a motion for summary judgment of the State Fund.

### Facts

¶13 The summary judgment motion is predicated on a stipulation of facts which all three parties have endorsed. However, the parties have also submitted numerous exhibits<sup>(1)</sup> and three depositions. The stipulation, contemporaneous correspondence, and briefs do not specify how the depositions and exhibits are to be treated.<sup>(2)</sup> It is therefore not clear whether the Court is supposed to examine them to determine if they raise factual issues relevant to the resolution of the case or whether the parties are simply submitting the case for decision based on the stipulated facts, the exhibits, and the depositions. However, it does not matter. Treating the matter as one for summary judgment, I conclude that the depositions and exhibits do not raise issues of material fact.

¶14 The facts, taken from the parties' stipulations, are as follows:

¶14a On March 6, 2001[,] Kimberly Baarson was shot and killed by Brad Baarson, her estranged husband, at the Town Pump located at 901 North Excelsior, Butte, Montana.

¶14b Immediately after his attack on Kim Baarson, Brad Baarson committed suicide at the Town Pump.

¶14c Brad Baarson's attack on March 6, 2001, was directed at Kim Baarson. Prior to attacking Kim Baarson, Brad Baarson ordered a customer, Ed Tracy, to leave the store.

¶14d At the time Ms. Baarson was killed, she was employed and working at the North Excelsior Town Pump.

¶14e Kim Baarson was working alone in the evening at Town Pump at the time she was killed by Brad Baarson.

¶14f Kim Baarson began working for Town Pump in August 2000.

¶14g Kim Baarson and Brad Baarson separated prior to Christmas 2000.

¶4h On November 19, 1999, Kim Baarson contacted Butte Silver[-]Bow Law enforcement reporting domestic abuse. She met with Officer John Christie. In a report dated 11/19/99, Officer Christie reported that Kim Baarson told him that she was afraid of Brad Baarson and that Brad Baarson was verbally and physically abusive towards her and her children. And, that during an altercation approximately two months before 11/19/99, Brad Baarson held a gun to her head and choked her.

¶4i In his November 19, 1999 report, Officer Christie stated: "Kim Baarson appears to be very afraid of Brad Baarson and feels if he is not arrested, he will hurt or kill her." (Ex. 18.)

¶4j At the time of Ms. Baarson's murder, a restraining order was in effect based on a court finding that Brad Baarson posed a danger of harm to Kim Baarson.

¶4k Kim Baarson told her immediate supervisors and some fellow employees of Town Pump about Brad Baarson's history and her fear of him.

¶4l At the time of their deaths, Kim and Brad Baarson had three minor children.

¶4m On March 6, 2001[,], Kim Baarson and her children were living with Marvin Hanson.

¶4n Brad Baarson did not attempt to rob Town Pump on March 6, 2001.

¶4o Brad Baarson was not a co-employee of Kim Baarson.

(STIPULATED ISSUE AND FACTS at 2-3.)

¶5 The State Fund's motion for summary judgment sets out a number of additional facts which it asserts are undisputed. Those facts are set out in serial fashion with citations to deposition testimony and agreed exhibits. The additional facts comply with Rule 24.5.329, which provides in relevant part:

(3) Any party filing a motion under this rule shall include in its brief a statement of uncontroverted facts, which shall set forth in full the specific facts on which the party relies in support of the motion. The specific facts shall be set forth in serial fashion and not in narrative form. As to each fact, the statement shall refer to a specific pleading, affidavit, or other document where the fact may be found. Any party opposing a motion filed under this rule shall include in their opposition a brief statement of genuine issues, setting forth the specific facts which the opposing party asserts establish a genuine issue of material fact precluding summary judgment in favor of the moving party.

The guardian *ad litem* has not filed any statement controverting the enumerated facts, although he has provided, in narrative form, some additional facts that he believes should be considered by the Court. Since the State Fund's statement of facts has not been challenged, those facts are deemed uncontroverted.

¶6 The additional facts having possible bearing on the issue at hand are as follows:

¶16a On May 23, 1986, Brad Baarson, having pled guilty to aggravated assault, was sentenced. He was ordered to continue to reside at his parent[']s home, continue with psychiatric counseling, not own weapons, be placed on probation, and be subjected to random urinalysis [testing]. He was fined \$1,000.00 and given a 5 year suspended sentence. The charge arose from an incident where Brad Baarson threatened his mother and a police officer with a rifle. [Exhibit 29.]

¶16b On April 4, 1998, Brad Baarson was arrested for Partner Assault arising from an altercation with Kim Baarson. He was sentenced for domestic abuse on May 6, 1998, fined \$520.00 and sentenced to 365 days in jail with 363 suspended. [Exhibit 30.]

¶16c On November 19, 1999, Kim Baarson reported a domestic abuse incident to law enforcement in Butte/Silver Bow. She met with Officer John Christie. In a report dated November 19, 1999[,] Officer Christie recorded that Kim Baarson told him that she was afraid of Brad Baarson and that he was verbally and physically abusive towards her and her children. She further reported to Officer Christie that during an altercation approximately two months earlier Brad Baarson had held a gun to her head and choked her. [Stipulated Fact #8; Exhibit 18.]

¶16d In his November 19, 1999 report, Officer Christie stated that "Kim Baarson appears to be very afraid of Brad Baarson and feels if he is not arrested, he will hurt or kill her." [Stipulated Fact #9; Exhibit 18.]

¶16e Kim Baarson and Brad Baarson separated prior to Christmas 2000. [Stipulated Fact #7.]

¶16f On December 20, 2000, a Temporary Order of Protection was issued by the Justice Court of Silver[-]Bow County, Montana, in favor of Kim Baarson and against Brad Baarson. On December 28, 2000, this temporary order was continued as an Order of Protection with an expiration date of June 11, 2001. [Stipulated Fact #10; Exhibit 6.]

¶16g On March 6, 2001[,] the Order of Protection in favor of Kim Baarson and against Brad Baarson was in full force and effect. [Stipulated Fact #10; Exhibit 6.]

¶16h Brad Baarson threatened Kim Baarson's life prior to the date she was killed and prior to her employment with Town Pump. [Exhibit 18.]

¶16i Kim Baarson's supervisor and her fellow Town Pump employees were aware of Kim's fear of Brad Baarson's [sic] and that a restraining order had been issued against him. [Stipulated Facts #10 and #11.] Sometime around January 2001, Kim Baarson expressed to her supervisors that she felt the danger posed by Brad Baarson had diminished. [Wilhelm deposition p. 50, lines [4]-12; Medina deposition p. 75, lines 6 through p. 76, line 9.]

¶16j Because of Kim Baarson's fear of her estranged husband, the manager of the North Excelsior Town Pump store temporarily scheduled her for the day shift. [Exhibits 7, 9, 15, 37 and 38.]

¶16k During the day shift the North Excelsior Town Pump store not only had increased customer traffic, it also had another employee on duty. [Exhibits 7, 9, 15, 37 and 38; Medina deposition, p. 31, lines 3-11.]

¶16l On March 6, 2001, the manager of the North Excelsior Town Pump store scheduled another employee for the day shift because of ongoing performance concerns. As a result, the night shift was open on that day. [Exhibits 7, 9, 15, 37 and 38; Medina deposition, p. 31, lines 3-11.]

¶16m Kim Baarson was offered this night shift by her employer, but she was also informed that she did not have to take it. Kim Baarson elected to take the shift. Kim Baarson had requested additional shifts so she could earn additional money. [Exhibits 7, 9, 15, 37 and 38; Medina Deposition, p. 30, lines 13 through p. 31, line 1, p. 80, lines 1-21; Wilhelm deposition, p. 52, line 10 through p. 54, line 18.]

(Motion and Brief for Summary Judgment at 2-4.)

#### Summary Judgment Standards

¶17 Summary judgment is appropriate only where material facts are not in dispute and those facts entitle the moving party to judgment as a matter of law. ARM 24.5.329(2); Mont. R. Civ. P. 56(c); *Lewis v. Nine Miles Mines, Inc.*, 268 Mont. 336, 886 P.2d 912 (1994). A three-step analysis is required when addressing a motion for summary judgment. First, the Court must determine what facts are material to the motion. *DeVoe v. State of Montana*, 281 Mont. 356, 366, 935 P.2d 256, 262 (1997). What facts are material are identified by looking to the substantive law governing the proceedings. 281 Mont. 366, 935 P.2d 263. Second, the Court must determine whether any of the facts which are material to the motion are disputed. "[S]ummary judgment is never to be a substitute for trial if there is an issue of material fact." *McDonald v. Anderson*, 261 Mont. 268, 272, 862 P.2d 402, 404 (1993). Third, the Court must determine whether the undisputed material facts entitle the moving party to judgment as a matter of law. *Mattingly v. First Bank of Lincoln*, 285 Mont. 209, 947 P.2d 66 (1997), citing *Bruner v. Yellowstone County*, 272 Mont. 261, 264-65, 900 P.2d 901, 903 (1995).

#### Discussion

¶18 The issue in this case is whether Kim's death occurred in the course and scope of her employment. The course and scope requirement is found in section 39-71-407(1), MCA (1999), which provides:

(1) Each insurer is liable for the payment of compensation, in the manner and to the extent provided in this section, to an employee of an employer that it insures who receives an injury **arising out of and in the course of employment** or, in the case of death from the injury, to the employee's beneficiaries, if any. [Emphasis added.]

¶9 The "arising out of" and "in the course of" employment requirements are not synonymous. As set forth in *Pinyerd v. State Compensation Ins. Fund*, 271 Mont. 115, 894 P.2d 932 (1995), "in the course of employment" means only that the injury or death occurred at the place of employment while the claimant was working. "The language 'in the course of employment', generally refers to the time, place, and circumstances of an injury in relation to employment." *Id.* at 119. As applied to the present case, the claimant's death unquestionably occurred in the course of her employment.

¶10 The "arising out of" language, however, requires a causal relationship between the injury or death and the employment:

The phrase "arising out of" is related to the concept of causation. See 1 Arthur Larson, *Workmen's Compensation Law*, § 6.10 (1993); see also *Landeen*, 277 P. at 620 (stating that the words "out of" point to the cause of the accident and are descriptive of the relationship between the injury and employment).

271 Mont. at 120, 894 P.2d at 934-35. The requirement that there be a causal connection between the injury or death and the employment is a long-standing one. In *Landeen v. Toole County Refining Co.*, 85 Mont. 41, 277 P. 615, (1929), the Supreme Court said:

The Compensation Act does not contemplate that an employer who comes within its provisions shall be the insurer of his employee at all times during the period of the employment. The employer is liable only when the injury occurs to the employee while he is performing some act for the employer in the course of his employment, or is doing something that is incidental thereto.

85 Mont. at 53, 277 P. at 618.

¶11 The facts in this case show no obvious causal connection between Kim's murder and her employment. The murder was a result of the personal relationship between Kim and her estranged husband. While it occurred at her workplace, it had nothing to do with her employment. The murder did not occur during a robbery; it arose out of the personal animus of Brad.

¶12 In his treatise on workers' compensation, Larson has an entire chapter on assaults. (Ch. 8.) Murder is an assault (actually a battery) that causes death.

¶13 *Larson's* discussion of assaults reflects the same causation requirement adopted by the Montana Supreme Court, therefore, his discussion is consistent with Montana law. He summarizes the general rule, in relevant part, as follows:

Assaults arise out of the employment either if the risk of assault is increased because of the nature or setting of the work, or if the reason for the assault was a quarrel having its origin in the work. . . . **Assaults for private reasons do not arise out of the employment unless, by facilitating an assault which would not otherwise be made, the employment becomes a contributing factor. . . .**

*Larson's*, § 8.01 at 8-1 (emphasis added).

¶14 This case does not involve an assault which is due to a risk inherent in the employment, such as robbery. Moreover, it did not involve a co-employee or an assault arising out of a work-related quarrel. *Compare with Pinyerd, supra*. Rather, the murder in this case arose from "private reasons." Unless Kim's employment facilitated her murder in the sense that it "would not otherwise" have occurred, it did not arise out of her employment.

¶15 The guardian *ad litem* attempts to make a case for increased risk to Kim due to Town Pump's conduct. A review of cases in *Larson's* provides no support for the argument. The first category of exceptions to the non-compensability rule involves security guards, and only one of the four cases found liability, that being when a night watchman was making rounds with a lantern and was performing "lonely duty and was without opportunity to obtain assistance." *Larson's*, § 8.02[3][a] at 8-52. Whether or not the logic of the case is accepted, in this case the claimant was not working as a night watchman and was in a place catering to the public, so it can hardly be said that her duty was "lonely and without opportunity to obtain assistance," especially given the fact that a customer was in the store when her estranged husband came to murder her.

¶16 The second category involves a single case involving a taxi driver who was murdered for personal reasons but in which the petitioner argued that the driver's occupation increased his risk. *Larson's* § 8.02[3][b] at 8-54. While benefits were awarded at the trial level, on appeal benefits were denied because the driver was killed for personal motives not arising out of his employment. *Ramos v. Taxi Transit Co.*, 92 N.Y.S.2d 744 (1949), *aff'd* 301 N.Y. 749, 95 N.E.2d 625 (1950).

¶17 The third category involves two cases from Louisiana in which the Louisiana courts held that the workplace aggravated enmity between two employees who had a non-work dispute. *Larson's* § 8.02[3][d] at 8-55. Those cases have no application here since Brad was not an employee of Town Pump and did not work with Kim.

¶18 The fourth and final category of cases involves deliverymen murdered by jealous husbands who believed their wives were having affairs with the deliverymen. The decisions in this category appear to be split, but the category, in any event, is inapposite to this case.

¶19 In my review of the exceptions discussed in *Larson's*, I have failed to identify any acknowledged exceptions within which this case might fall. Nonetheless, I consider the

broader argument made by the guardian *ad litem* that Kim's employment increased her risk of murder by her estranged husband.

¶20 The guardian *ad litem* argues that Town Pump took responsibility for Kim's safety by making co-employees aware of her fear of her estranged husband and scheduling her work shifts during the day. (Claimant's Reply Brief at 3-4.) He further urges that "Kim was killed when Town Pump decided to end its protective measures for Kim Baarson." (*Id.* at 4.)

¶21 In support of his argument, the guardian *ad litem* cites testimony of Town Pump's assistant manager, Joyce Wilhelm, that Town Pump employees were instructed to call police if they saw Brad or his car.<sup>(3)</sup> (Wilhelm Dep. at 64.) The guardian also cites actions of Bernie Rolando, a Town Pump co-employee, but not a manager.<sup>(4)</sup> He cites Wilhelm's testimony which he characterizes as showing that Rolando "used to antagonize Brad, [and] find ways to piss him off outside of work." (*Id.* at 7.) Wilhelm testified as to an incident where Kim had been sent to Town Pump by Brad to buy him alcohol; reportedly, Rolando "licked the cans just to see if he could make him sick." (*Id.* at 7-8.) It is apparent from the testimony that the event occurred prior to Kim separating from her husband and that it did not involve her work, rather she was a customer. There is no evidence, that Brad was ever made aware of Rolando's lewd act.

¶22 Rolando also gave a recorded statement to police regarding "at least two encounters with Brad while at work."<sup>(5)</sup> The statement, however, was not to police but to a workers' compensation insurance adjuster. (Ex. 8.) Rolando identified one incident where he told Brad "he couldn't park on Town Pump property because of what he said and did to his own daughter, uh one day up there. I made him park across the street." (*Id.* at 2.) He also stated that he had "chased him [Brad] off there a couple of times," but gave no specifics. (*Id.* at 3.)

¶23 That Town Pump and its employees were aware of Kim's fear and took actions to protect her does not mean that they "took responsibility" for her safety, nor does it mean that their actions increased her risk of being murdered by her estranged husband. Their actions simply demonstrate their concern for her safety and their willingness to go an extra mile to help protect her from a personal threat that had nothing to do with the business or Kim's work. The guardian *ad litem* does not cite any law requiring Town Pump to protect Kim from her estranged husband. Its actions are better analogized to that of the Good Samaritan.

¶24 The guardian *ad litem* aptly phrases the ultimate question in this case as whether "Kim's employment created an increased risk of the assault, or [whether] the assault must have been motivated by the employment." (Claimant's Reply Brief at 2-3.) There is no evidence that the murder was "motivated" by Kim's employment. Moreover, Town Pump took measures to reduce Kim's risk of assault by an abusive, estranged husband who was ultimately intent on killing her. Its affirmative, protective measures did not create an increased risk to Kim on account of her employment; it reduced the risk. Its abandonment

of those measures did not increase her risk from her employment, it merely restored the risk to what it was without the protective measures, and even then the facts indicate that Kim's fear of her estranged husband had diminished by the time she was scheduled for the night shift and that she was not required to work that shift. In the end, nothing Town Pump could have done would have likely prevented Kim's murder.

¶25 To hold that Kim's murder arose out of her employment would impose a duty on employers to protect their employees from personally motivated assaults, deter employers from taking protective measures to protect their employees from such assaults and make employers liable for virtually every personally motivated assault committed at work.

¶26 Despite the senseless murder of Kim by her estranged husband, and the Court's empathy for the Baarson children, the State Fund's motion for summary judgment is well taken and is **granted**.

#### ORDER AND JUDGMENT

¶27 The murder of Kim did not arise out of her employment and therefore is not compensable under the Montana Workers' Compensation Act. The petition in this matter is therefore **dismissed with prejudice**.

¶28 This JUDGMENT is certified as final for purposes of appeal.

¶29 Any party to this dispute may have twenty days in which to request a rehearing from this Decision and Judgment.

DATED in Helena, Montana, this 16<sup>th</sup> day of August, 2004.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Michael J. McKeon

Mr. Greg E. Overturf

Mr. Daniel B. McGregor

Mr. Brendon J. Rohan

Submitted: April 27, 2004

1. There are thirty-six exhibits. There are objections to only two of them - Exhibits 31 and 32, to which one of the parties objects on relevancy grounds. The exhibits at issue are a crime scene video and crime scene photographs. The murder is certainly relevant, but that fact is not in dispute. The video and photographs are not helpful to resolving whether the murder occurred in the course and scope of Kim's employment.

2. In his reply brief, the guardian says, "After conducting discovery the parties agreed to submit this case to the Court on briefs and stipulated facts and exhibits." (Claimant's Reply Brief at 1.)

3. (Opening, untitled brief of guardian *ad litem* at 5.)

4. (Opening, untitled brief of guardian *ad litem* at 5.)

5. The guardian *ad litem* alludes generally to Rolando's statement and cites the page number but does not discuss or lay out the specifics. (Opening, untitled brief of guardian *ad litem* at 5-6.)