STATE OF MICHIGAN

COURT OF APPEALS

RICHARD BARKLEY, and SHARON BARKLEY as Next Friend to BRADLEY DAVID BARKLEY and SERENA ANN BARKLEY, Minors,

Plaintiffs-Appellants,

v

FRED CHRISTEN & SONS CO., d/b/a CHRISTEN/DETROIT, an Ohio corporation, ROBERT COCHRANE and MICHAEL SCHRIEBER,

Defendants-Appellees.

UNPUBLISHED
November 8, 1996

No. 185530
LC No. 94-429649-NO

Before: Markman, P.J., and Smolenski and G. S. Buth,* JJ.

PER CURIAM.

Plaintiffs appeal by right an order granting defendants' motion for summary disposition. We affirm.

Defendant Fred Christen & Sons Co. (Christen) employed plaintiff as a roofing apprentice. The individual defendants were employees of Christen with supervisory control over plaintiff. On October 6, 1991, plaintiff was injured when he fell from scaffolding while painting the ceiling of Christen's factory.

Plaintiffs filed an action against Christen under a dual capacity theory. The trial court granted Christen's motion for summary disposition in that case and this Court affirmed. *Barkley v Fred Christen & Sons*, unpublished order of the Court of Appeals, entered 12/28/95 (Docket No. 170911). Plaintiffs filed the present complaint against defendants under the intentional tort exception to the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA) on October 6, 1994. Plaintiff alleged that defendants directed him to perform the paint job under conditions that defendants knew were certain to cause an accident. Specifically, he alleged that defendants retained

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* Circuit judge, sitting on the Court of Appeals by assignment.

him to apply toxic paint in a high-ceilinged, poorly-ventilated facility with inadequate scaffolding and an inadequate mask and that he resultantly fell to the floor and suffered serious injuries.

Defendants moved for summary disposition. They contended that plaintiff's deposition testimony indicating that he volunteered to do the painting work and made no complaint about the alleged hazards belied his allegation that defendants directed the manner in which performed the painting work. They also moved for costs pursuant to MCR 2.114(E) and (F). Plaintiff failed to file a timely response to the motion. The trial court granted defendant's summary disposition motion and ordered plaintiff to pay $500 in costs. Plaintiff then filed the present appeal. Defendants moved for dismissal of the appeal, but this Court denied the motion. *Barkley v Christen & Sons Co*, unpublished order of the Court of Appeals, entered 11/27/95 (Docket No. 185530).

Plaintiffs claim that the trial court erred in granting defendants' motion for summary disposition.[1] This Court reviews decisions on motions for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).

MCL 418.131(1); MSA 17.237(131)(1) of the WDCA states:

> The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court. This subsection shall not enlarge or reduce rights under law.

The Michigan Supreme Court recently considered the parameters of the intentional tort exception in *Travis v Dreis & Krump Manufacturing Co*, 453 Mich 149; 551 NW2d 132 (1996). The Court construed "specifically intended an injury" to mean "that in acting or failing to act, the employer must have determined to injure the employee; in other words, he must have had the particular purpose of inflicting an injury upon the employee." *Travis*, *supra* at 172. It also held, at 180:

> [T]he second sentence of the intentional tort exception is one means of proving the specific intent to injure element of the first sentence. Under the second sentence, an employer may be deemed to have intended to injure if he has knowledge that an injury is certain to occur, yet disregards that knowledge.

The Court discussed the phrase "certain to occur" at 174:

> When an injury is "certain" to occur, no doubt exists with regard to whether it will occur. Thus, the laws of probability, which set forth the odds that something will occur, play no part in determining the certainty of injury.

Here, the pleadings and documentary evidence simply do not meet these standards. The pleadings and documentary evidence do not demonstrate that defendants knew that an injury was certain to occur and disregarded that knowledge. Accordingly, the trial court appropriately granted defendants' summary disposition motion.[2]

Plaintiffs next contend that trial court erroneously awarded costs of $500 to defendants. While plaintiffs argue this issue in their brief, they failed to include it in their statement of questions involved. See MCR 7.212(C)(5). It is inappropriate for this Court to review arguments not raised in the statement of questions. *Hammack v Lutheran Social Services of Michigan*, 211 Mich App 1, 7; 535 NW2d 215 (1995).

For these reasons, we affirm the trial court order granting defendants' motion for summary disposition.

Affirmed.

/s/ Stephen J. Markman
/s/ Michael R. Smolenski
/s/ George S. Buth

[1] Plaintiffs contend that the trial court erred in granting summary disposition to defendants under MCR 2.116 (C)(8) and (10). However, defendants actually moved for summary disposition under MCR 2.116(C)(7) and (10).

[2] On appeal, plaintiff focuses on the deposition testimony of defendant Cochrane. Plaintiff contends that this testimony indicates that Cochrane refused to put the guard rails on the scaffold plaintiff used and "cynically" told plaintiff to "put two planks on one platform, with a gap in between" and "one plank underneath the gap on the next platform below" so that "if [plaintiff] fell," he would only "fall to the next platform." This deposition is not part of the record before either this Court or the trial court. Even if such statement were, in fact, made, it is obviously susceptible to an interpretation far different than that Cochrane intended the accident to plaintiff to occur.