STATE OF MICHIGAN

COURT OF APPEALS

BARBARA ROSS, Plaintiff-Appellant,	UNPUBLISHED March 9, 2004
v	No. 245165 Wayne Circuit Court
ALLSTATE INSURANCE COMPANY, Defendant-Appellee.	LC No. 01-142450-NF

Before: Neff, P.J. and Wilder and Kelly, JJ.

NEFF, P.J. *(dissenting).*

I respectfully dissent because I find that MCL 500.3145(1) does not bar plaintiff's claim.

As noted in the majority opinion, the trial court correctly found that plaintiff raised a genuine issue of material fact as to whether her closed-head injury is related to the 1992 accident. What remains is to determine if defendant had proper notice under the no-fault act to implicate defendant's statutory duty to pay reasonable and necessary expenses arising as a result of that injury. Plaintiff raises three arguments, two of which are related to each other and, on the facts of this case, are persuasive.

First, plaintiff notes that defendant paid first-party no-fault benefits through March 9, 1994, as a result of the accident, which shows that defendant had notice of the accident and that plaintiff suffered injury. Second, plaintiff claims that defendant had notice of the closed head injury from the inception of the original claim for benefits. However, the majority concludes that plaintiff's notice of injury was not specific enough under MCL 500.3145(1) to cover her claim for expenses arising out of the closed head injury, a claim defendant did not raise until plaintiff's motion for reconsideration.

The majority relies on *Welton v Carriers Ins Co*, 421 Mich 571; 365 NW2d 170 (1984) and *Mousa v State Auto Ins Cos*, 185 Mich App 293; 460 NW2d 310 (1990) to support its conclusion that plaintiff's claim did not include a closed-head injury or "any head injury." It is true that the phrase "closed-head injury" was not employed in plaintiff's claim for no-fault benefits in 1992, but clearly there was a claim of a head injury, as evidenced by the Michigan Motor Vehicle No-Fault Insurance Law Attending Physician's Report submitted to defendant on a form provided by defendant and dated December 30, 1992. That report contains the following information:

1. Under History of Occurrence and Injury it is indicated that the vehicle plaintiff was driving was stopped at a light when it was slammed into and totaled.

2. Under Diagnosis and Concurrent Conditions the following is indicated:

a. Major depressive disorder with somatic features precipitated by the auto accident;

b. Symptoms have included withdrawn and minimally functioning behavior, a marked lack of energy, recurrent crying spells, irritability, severe somatic distress and very impaired sleeping.

c. The report "strongly" recommends ongoing supportive psychotherapy and use of anti-depressants to mobilize plaintiff out of her "profound depressive rut."

This language from the Attending Physician's Report was specific enough to inform defendant of the nature of a loss related to a head injury, thus satisfying the statute and both *Welton* and *Mousa*. Further, and perhaps most compelling, there is nothing in the lower court file to establish that the benefits plaintiff received immediately after the 1992 accident were not related to her head injury. Defendant's motion for summary disposition merely alleges that plaintiff's claim is for a "new injury," but there is no supporting proof that plaintiff did not receive benefits related to a head injury. Therefore, there is at least a question of fact as to whether plaintiff received benefits in 1992 as a result of her head injury in which case she was entitled to commence an action for personal protection insurance benefits at any time after the most recent allowable expense was incurred. MCL 500.3145(1); *Bohlinger v Detroit Automobile Inter-Ins Exchange*, 120 Mich App 269, 274; 327 NW2d 466 (1982). See also *Kransz v Meredith*, 123 Mich App 454, 458; 332 NW2d 571 (1983); *English v Home Ins Co*, 112 Mich App 468, 474; 316 NW2d 463 (1982); *Allstate Ins Co v Frankenmuth Mut Ins Co*, 111 Mich App 617, 621; 314 NW2d 711 (1981).

I would reverse and remand for trial.

/s/ Janet T. Neff