IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Lisa Hanes, CNM,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 414 M.D. 2010
	:	
Medical Care Availability and Reduction of Error Fund,	:	Argued: December 7, 2010
	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: March 16, 2011**

Certified nurse midwife, Lisa Hanes (Hanes), petitions for review, in our original jurisdiction, of a denial of Section 715 status by the Medical Care Availability and Reduction of Error Fund (MCARE Fund). We are asked to decide whether the MCARE Fund is obligated under Section 715 of the Medical Care Availability and Reduction of Error Act (MCARE Act),[1] to pay a claim on behalf of Hanes. The MCARE Fund denied the claim against Hanes (the Claim) on the

[1] Act of March 20, 2002, P.L. 154, as amended, 40 P.S. § 1303.715.

basis that it did not receive a timely written request for indemnification and defense, as required by Section 715 of the MCARE Act.[2]

Section 715, entitled "Extended claims," provides in relevant part, as follows:

> **(a) General rule.--**If a medical professional liability claim against a health care provider who was required to participate in the Medical Professional Liability Catastrophe Loss Fund under section 701(d) of the act of October 15, 1975 (P.L. 390, No. 111), known as the Health Care Services Malpractice Act, is made more than four years after the breach of contract or tort occurred and if the claim is filed within the applicable statute of limitations, the claim shall be defended by the department if the department received a written request for indemnity and defense within 180 days of the date on which notice of the claim is first given to the participating health care provider or its insurer. Where multiple treatments or consultations took place less than four years before the date on which the health care provider or its insurer received notice of the claim, the claim shall be deemed for purposes of this section to have occurred less than four years prior to the date of notice and shall be defended by the insurer in accordance with this chapter.
>
> **(b) Payment.--**If a health care provider is found liable for a claim defended by the department in accordance with subsection (a), the claim shall be paid by the fund. The limit of liability of the fund for a claim defended by the department under subsection (a) shall be $1,000,000 per occurrence.
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> . . . .
>
> **(d) Extended coverage required.--**Notwithstanding subsections (a), (b) and (c), all medical professional liability insurance policies issued on or after January 1, 2006, shall provide indemnity and defense for claims asserted against a health care provider for a breach of contract

[2] For a comprehensive discussion of the MCARE Act and its predecessor, see West Penn Allegheny Health System v. Medical Care Availability and Reduction of Error Fund (MCARE), 11 A.3d 598, 600-02 (Pa. Cmwlth. 2010).

> or tort which occurs four or more years after the breach of contract or tort occurred and after December 31, 2005.

40 P.S. § 1303.715.

The factual background of this case is as follows. In November 2002, a complaint for medical malpractice (the Complaint) was filed against the Hospital of the University of Pennsylvania (HUP), several doctors, and two certified nurse-midwives, one of which was Hanes[3] (collectively, Defendants), who were HUP employees. (Complaint in Brown, et al. v. Hospital of the University of Pennsylvania, et al., Court of Common Pleas, Philadelphia County, November 2002, No. 001819, R. at Exhibit 1, Hr'g Tr., January 23, 2006, R.R. at 133a-140a.) In the Complaint, the plaintiffs alleged that a medical malpractice event occurred on January 21, 1998, relating to the birth of Shamar Brown. At all relevant times, it is undisputed that Hanes was a participating health care provider[4] in the MCARE Fund who had paid the required surcharge[5] in order to be eligible for Section 715

[3] The other certified nurse-midwife was not involved in the settlement of the medical malpractice litigation and, therefore, we will not refer to her.

[4] Section 103 of the MCARE Act defines a "health care provider" as "[a] primary health care center or a person, including a corporation, university or other educational institution licensed or approved by the Commonwealth to provide health care or professional medical services as a physician, **a certified nurse midwife** . . . ." 40 P.S. § 1303.103 (emphasis added). In addition, MCARE's Senior Claims Examiner testified that Hanes was a participating health care provider and she had paid the necessary Fund surcharge for a claim such as this one. (Hr'g Tr. at 30-31, January 23, 2006, R.R. at 53a-54a.)

[5] "The MCARE Fund is funded by an assessment on each participating health care provider," Section 712(d)(1) of the MCARE Act, 40 P.S. § 1303.712(d)(1), a surcharge, the amount of which is determined by MCARE. Fletcher v. Pennsylvania Property and Casualty Guaranty Association, 603 Pa. 452, 465 n.18, 985 A.2d 678, 687 n.18 (2009).

defense and indemnification.

On February 28, 2003, the MCARE Fund received four claim forms, known as "C-416" forms, on behalf of HUP and the doctors named as Defendants in the Complaint. (Forms C-416 ##035788-A, 035788-C, 035788-D, and 035788-B, R.R. 142a-152a.)[6] Each of the C-416 forms indicated that the malpractice event resulting in the claims occurred on January 21, 1998, and that the claims were reported to HUP and the doctors on November 14, 2002. There is no dispute that these C-416 forms for HUP and the doctors were sent within the 180-day period after the Defendants received notice of the claims.

Next, the MCARE Fund notified the MCARE-assigned law firm (Law Firm), via letters dated April 8, 2003, and May 14, 2003, that HUP's primary carrier, Franklin Insurance Casualty Company (Franklin), requested the MCARE Fund to assume the handling of the claims under Section 715. (Letters from the MCARE Fund to Law Firm (April 8 & 14, 2003) R.R. at 167a, 170a, 173a, 200a.) HUP's Risk Manager and the three doctors were also notified that the MCARE Fund "has accepted this lawsuit under Section 715 of the [MCARE] Act. Therefore, your primary carrier will no longer be involved on a primary coverage basis." (Letters from the MCARE Fund to HUP's Risk Manager and the three doctors (April 8 & 14, 2003) R.R. at 176a, 179a, 182a, 194a.)

[6] The C-416 forms were signed by the Claims Administrator for HUP and submitted on behalf of HUP and its employee health care providers. Franklin Insurance Casualty Company was listed as the insurer for HUP on the C-416 forms.

Litigation of the malpractice case proceeded for approximately two and one-half years. Law Firm provided the defense for the Defendants and ultimately negotiated a settlement on behalf of the Defendants. No other attorney represented any of the Defendants during this time. In late April 2005, in the midst of settlement negotiations, and upon request for payment on behalf of Hanes, the MCARE Fund's Senior Claims Examiner stated to HUP's Office of General Counsel (OGC) that the MCARE Fund had never received a request for coverage for her. (Hr'g Tr. at 67-68, 75, January 23, 2006, R.R. at 90a-91a, 98a.) In response, HUP's OGC immediately submitted a C-416 form for Hanes. The MCARE Fund received the C-416 form for Hanes on April 28, 2005. (Form C-416 # 35788-E, R.R. 203a.) The MCARE Fund next sent a letter, dated May 3, 2005, to HUP's Claims Administrator denying "Section 715 status" to Hanes because the C-416 form was received more than 180 days after the date on which notice of the Claim was given to the health care provider or the insurer. (Letter from the MCARE Fund to HUP's Claims Administrator (May 3, 2005) at 1-2, R.R. at 209a-210a.)

On May 13, 2005, the malpractice case was settled for $1,600,000. The MCARE Fund paid $1,000,000 in Section 715 coverage on behalf of one doctor and $300,000 as excess coverage on behalf of Hanes. However, the MCARE Fund did not pay $300,000 in primary coverage for Hanes because of its denial of her Section 715 status. Therefore, Franklin tendered the $300,000 pending the

resolution of this coverage dispute.[7] (Prehearing Statement of the Commonwealth of Pennsylvania Insurance Department ¶ 25, R.R. at 121a.)

Franklin, via HUP's OGC, timely requested administrative review with the Insurance Department of MCARE's denial of Section 715 status for Hanes. The Insurance Department appointed a Presiding Officer, who held hearings on January 23, 2006, and September 23, 2009, at which testimony was presented and exhibits submitted. Before briefs were submitted or a decision was issued, the Pennsylvania Supreme Court held that this Court has original jurisdiction over claims against MCARE. Fletcher v. Pennsylvania Property and Casualty Insurance Guaranty Association, 603 Pa. 452, 481, 985 A.2d 678, 697 (2009). As a result of various orders, this case was transferred to our Court from the Insurance Department, and, noting that an evidentiary record had been created before the Insurance Department, this Court ordered briefing and oral argument. The case is now ripe for our disposition.

Hanes argues that she is entitled to Section 715 status and, therefore, should receive extended claims primary coverage from MCARE because: (1) MCARE is estopped from denying her Section 715 extended claims primary coverage since Law Firm, with the approval, knowledge and acquiescence of MCARE, took

[7] On May 11, 2005, in response to a request from HUP during settlement negotiations of the malpractice case, the Senior Claims Examiner for the MCARE Fund sent a letter to HUP's OGC that the MCARE Fund would reimburse any contribution made from the primary coverage on behalf of Hanes if any appeal from the MCARE Fund's denial of "Section 715 status" was successful. (Letter from MCARE to HUP's OGC (May 11, 2005) R. at 1, Exhibit 24, Prehearing Statement of the Insurance Department, R.R. at 281a.)

charge of her defense throughout the malpractice case; and/or (2) MCARE received timely notice of the Claim sufficient to require coverage.

We first address Hanes' argument that the MCARE Fund should be estopped from denying her extended claims primary coverage under Section 715. While the MCARE Fund argues that Hanes did not meet her burden of proving the elements of estoppel, it is well settled that when an insurance carrier defends an action on behalf of an insured for the entirety of the case, that carrier is estopped from denying liability on the grounds that the claim was not covered by the terms of the policy. Malley v. American Indemnity Corporation, 297 Pa. 216, 224, 146 A. 571, 573 (1929). This estoppel principle, in addition to being applied to insurance carriers, has also been invoked against the Medical Professional Liability Catastrophe Loss Fund (CAT Fund), the predecessor to the MCARE Fund, in a case involving former Section 605 of the Health Care Services Malpractice Act (Malpractice Act).[8] Lewinski v. Commonwealth, 852 A.2d 1270, 1278 (Pa. Cmwlth. 2004). Although the MCARE Fund, as the successor to the CAT Fund, is not itself an insurance company, its role under Section 715, as under the former

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[8] Act of October 15, 1975, P.L. 390, as amended, formerly 40 P.S. §§ 1301.101-1301.1004.

> In 2002, the General Assembly repealed the Malpractice Act, which had created the CAT Fund, and replaced it with the Mcare Act, 40 P.S. § 1303.101 – 1303.910. . . . As such, the purpose and coverage obligations of the Mcare Fund are very similar to those of the CAT Fund. . . . The Mcare Act specified that the rights, liabilities, and obligations of the CAT Fund were transferred to and assumed by the Mcare Fund. . . .

Fletcher, 603 Pa. at 472-473, 985 A.2d at 691.

Section 605, is that of a primary insurer for extended claims.

In Lewinski, this Court reviewed the CAT Fund's refusal to pay an extended claim for a doctor's professional corporation (P.C.) under the former Section 605, and held that the CAT Fund was estopped from denying coverage to the P.C. because the CAT Fund had assumed the defense of both the doctor and his P.C. Id. at 1278. The CAT Fund argued that it should not pay the extended claim because the P.C. had not paid a separate surcharge. However, the CAT Fund had assumed total control of the defense of the doctor and his P.C., despite the P.C.'s failure to pay a separate surcharge for coverage under then Section 605 of the Malpractice Act. Id. This Court's decision in Lewinski relied upon Malley, wherein the Pennsylvania Supreme Court stated:

> Where an insurance company, under an indemnity contract, takes charge of the defense of an action on which liability rests, it will be estopped from thereafter questioning the claim either because it was beyond the terms of the policy or because the latter was procured by the breach of some warranty. . . . It cannot play fast and loose, taking a chance in the hope of winning, and, if the results are adverse, take advantage of a defect in the policy. *The insured loses substantial rights when he surrenders, as he must, to the insurance carrier the conduct of the case.*

Lewinski, 852 A.2d at 1278 (quoting Malley, 297 Pa. at 224, 146 A. at 573) (emphasis added). In Lewinski, this Court applied the doctrine of estoppel to the CAT Fund, even though it is not an "insurance company" because:

> while the CAT Fund is not an "insurance company," this Court believes that the Supreme Court's rationale in Malley applies here to estop the CAT Fund from now claiming, after the suit was tried, that the CAT Fund has no duty to indemnify the professional corporation because it was not a participant in the CAT Fund.

Lewinski, 852 A.2d at 1278.[9] In Lewinski, the fact that the CAT Fund did not receive the required surcharge from the P.C. did not, "in and of itself, render the professional corporation ineligible for $1 million in excess coverage by the CAT Fund." Id. at 1277. Instead, this Court reviewed the record and found that, like the insurer in Malley, the CAT Fund's attempt to deny coverage was inconsistent with its conduct:

> The record shows that the CAT Fund was privy to the communications between [insurance company] and the Insurance Department and was aware of the Insurance Department's disapproval of the [insurance company's] "shared limits" policy language. The CAT Fund was also aware that [insurance company] did not charge a premium for its corporate "shared limits" policies. . . . the CAT Fund assumed total control of the defense of both Dr. Hurwitz *and his professional corporation* even though it had not collected a surcharge from the professional corporation. Again, the CAT Fund's present position is totally inconsistent with its conduct.

Id. at 1277-78 (emphasis in original). It is similarly inconsistent conduct that is problematic for the MCARE Fund in the instant case.

Just as the CAT Fund's late denial of the Lewinski claim was inconsistent with its conduct up to the point of that denial, the MCARE Fund's eleventh hour denial of Section 715 coverage to Hanes is similarly inconsistent with its conduct and the actions taken by Law Firm on Hanes' behalf during the two and one-half years of the proceedings in the malpractice case. During the entirety of that period, Law Firm provided status reports to the MCARE Fund about its representation of

[9] In Lewinski, the P.C., which was requesting coverage and for which the CAT Fund had already provided a defense, had not paid the surcharge for CAT Fund coverage. In contrast, Hanes did, in fact, pay the surcharge for MCARE Fund coverage in this case.

Hanes in this case. These status reports included the following specific actions taken by Law Firm on behalf of Hanes: entering an appearance, specifically listing Hanes on the docket sheet as a defendant and on whose behalf the appearance was entered, (Brown, et al. v. Hospital, et al., Case ID No. 021101819 (Brown), docket entry of Dec. 16, 2002, R.R. at 497a); filing preliminary objections, (Brown, docket entry of Dec. 16, 2002, R.R. at 497a); attempting to reach stipulations modifying the allegations of the Complaint, (Brown, docket entries of Jan. 6, 15, 22, 2003, R.R. at 497a-498a); filing an Answer with New Matter, (Brown, docket entry of June 27, 2003, R.R. at 500a); filing a motion for summary judgment (Brown, docket entry of Sept. 17, 2004, R.R. at 503a); filing a Reply Brief in Support of Summary Judgment (Brown, docket entry of Nov. 5, 2004, R.R. at 506a); filing motions in limine, (Brown, docket entries of May 2, 2005, R.R. at 507a); seeking express permission of the MCARE Fund to retain a nurse midwife expert on behalf of Hanes, which was granted, (Letter from Law Firm to the MCARE Fund (February 23, 2004), R.R. at 397a); retaining a nurse midwife expert to review Hanes' actions and to prepare a report of said review, (Letter from nurse midwife expert, Carolyn L. Gregor to Law Firm (September 3, 2004) at 1-6, R.R. at 477a-481a); preparing a pre-trial analysis report on behalf of Hanes, (Letter from Law Firm to the MCARE Fund serving as Pretrial Analysis Report (February 10, 2005) at 1-13, R.R. at 461a-473a); preparing Hanes for her deposition, conducting her deposition and reporting to the MCARE Fund that "[counsel] had spent a great deal of time preparing her," (Status Report from Law Firm to MCARE (July 19, 2004) at 1-3, R.R. at 417a-419a); reporting to the MCARE Fund that the summary judgment filed on behalf of one doctor and Hanes had been denied, (Status Report from Law Firm to the MCARE Fund (November 15, 2004)

at 1, R.R. at 452a); and preparing a "Pretrial Analysis Report" for submission to the MCARE Fund specifically discussing Hanes, noting concern about a conflict of interest between Hanes and one of the doctors, (Letter from Law Firm to the MCARE Fund serving as a Pretrial Analysis Report (February 10, 2005) at 4, R.R. at 464a). This Pretrial Analysis Report also included Law Firm's concern about how Hanes would present at trial. (Letter from Law Firm to the MCARE Fund serving as a Pretrial Analysis Report (February 10, 2005) at 5, R.R. at 465a.) These status reports sent by Law Firm to the MCARE Fund, of which there were at least twenty-five, informed the MCARE Fund of developments in the malpractice case and provided assessments of the case and each of the Defendants, including Hanes. Notably, each status report contained an introductory paragraph that stated "[t]he following will serve as a status report for the above-referenced matter in which we represent the [hospital, two doctors, another certified nurse midwife], **Linda Hanes** and [a third doctor]." (Status Reports from Law Firm to the MCARE Fund (January 27, 2004-April 15, 2005), R.R. at 387a-475a (emphasis added).)

In addition to the legal representation undertaken on behalf of Hanes by Law Firm that was inconsistent with a denial of Section 715 coverage, as documented above, the conduct of the MCARE Fund itself was also in conflict with its late denial of coverage to Hanes. The MCARE Fund received the status reports naming Hanes as one of the parties being represented by Law Firm on at least twenty-five occasions. The MCARE Fund never questioned why Hanes did not have her own counsel. There were no attorneys, other than Law Firm, representing any of the Defendants and Hanes never hired another attorney. The MCARE Fund

reassigned the malpractice case from an attorney examiner to the MCARE Fund's Senior Claims Examiner, who advised that he "looked forward to working with [Law Firm] in evaluating this case and in protecting the interests of the defendants," and that he intended "to take an active role in the analysis of this litigation." (Letter from Senior Claims Examiner to Law Firm (August 17, 2004) at 1, R.R. at 431a.) He did not separate Hanes from the other Defendants with regard to the MCARE Fund's efforts. In addition, the MCARE Fund authorized the payment of and paid the nurse-midwife expert witness' fee on behalf of Hanes. (Hr'g Tr. at 39-40, January 23, 2006, R.R. at 62a-63a.) Further, the MCARE Fund's Senior Claims Examiner testified that he: (1) knew that the MCARE Fund paid the fee for the nurse midwife expert witness; and (2) agreed that all defense costs associated with Hanes were paid by the MCARE Fund on behalf of Hanes. (Hr'g Tr. at 55, January 23, 2006, R.R. at 78a.)

The MCARE Fund argues that Hanes did not meet her burden of proving the elements of estoppel because there was: no material fact misrepresented; no explanation of how the MCARE Fund knew or had reason to know that she would rely on the misrepresentation; and no explanation of how the MCARE Fund induced her to act to her detriment. However, this case is squarely on point with, and governed by, Lewinski. As shown above, the MCARE Fund was in control of Law Firm throughout the malpractice case proceedings just as the CAT Fund controlled and directed the defense of the doctor and his P.C. in Lewinski. Law Firm was retained and paid by the MCARE Fund; entered its appearance on behalf of Hanes; hired the nurse midwife expert witness; prepared Hanes for deposition; sent more than twenty-five status reports to the MCARE Fund naming Hanes as one of the parties being represented; filed a summary judgment motion on behalf

of all the Defendants, including Hanes; and negotiated the settlement for Hanes. In short, for over two and one-half years, the MCARE Fund was ultimately in control of the direction of the defense of the malpractice case, including the actions taken on behalf of Hanes. Therefore, the control exercised by the MCARE Fund over the defense of Hanes is significant and at least as extensive as, or more extensive than, the CAT Fund's direction and control over the doctor and his P.C. in Lewinski. We, therefore, find that the doctrine of estoppel is applicable in this case.

Our determination on this point is consistent with this Court's decision in Overhead Door Co. of Lewistown, Inc. v. Workers' Compensation Appeal Board (Gill), 819 A.2d 635 (Pa. Cmwlth. 2003), in which we held that the State Workers' Insurance Fund (SWIF) was estopped from denying coverage. Similar to the case at bar, in Overhead Door, SWIF had defended the case for eighteen months; conducted discovery, including depositions; and appeared at hearings while holding itself out as the responsible insurer. Id. at 639. SWIF later discovered it did not have a contractual relationship with the claimant or his employer and then appealed the decision holding it liable for payment to the claimant. Id. This Court held that SWIF was estopped from denying its employment relationship some eighteen months into the litigation because, "SWIF's attorney represented that SWIF was the responsible insurer and for eighteen months continued to represent SWIF as the responsible insurer." Overhead Door, 819 A.2d at 639.[10]

[10] Numerous other courts have also invoked the doctrine of estoppel where a carrier has undertaken the defense of a case, see, e.g., Braun v. Annesley, 936 F.2d 1105, 1110 (10th Cir. 1991) (an insurer who undertakes the defense of a matter cannot at a later date deny coverage because permitting such a denial grants the insurer the unfettered right to induce an individual to relinquish control of his or her defense); Florida Physicians Insurance Co. v. Stern, 563 So.2d

(Continued…)

The MCARE Fund counters that: (1) the MCARE Fund was not providing a defense for Hanes as a separately covered health care provider, but for Hanes as an employee of its insured, HUP; and (2) the doctrine of estoppel cannot be invoked here because it would violate positive law.

The MCARE Fund argues that it was not providing a defense of Hanes, but was providing a defense to HUP, which had submitted a timely C-416 form, and it, therefore, "defended the actions of HUP's employees, which included Hanes." (The MCARE Fund's Br. at 12.) It argues that, because HUP had vicarious liability for the actions of Hanes, it was defending the actions of Hanes as an employee of HUP, and not Hanes as a participating health care provider. However, there is no indication of this position in any of the many letters and reports in this case. Even if Hanes, Law Firm, or HUP could reasonably have understood the defense being provided to Hanes as only a defense of HUP and its vicarious liability for Hanes, by all appearances, the representation provided to Hanes was no different than that provided to the doctors. Notably, the numerous status reports that Law Firm submitted to the MCARE Fund specifically state that it represented Hanes and the doctors, and there was never any indication that the

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156 (Fla. App. 1990) (insurer that had defended doctor in medical malpractice case for fourteen months with actual or constructive knowledge of a coverage defense was estopped from denying coverage); Hartford Insurance Group v. Mello, 81 A.D.2d 577, 437 N.Y.S.2d 433 (2d Dep't 1981) (where the insurer had defended the insured for two years, the insurer was estopped from denying coverage for an incident that occurred prior to commencement of the policy); Cigarette Racing Team, Inc. v. Parliament Insurance Co., 395 So.2d 1238 (Fla. 4th DCA 1981) (when an insurance company assumes the defense of an action, with knowledge, actual or presumed, of facts which would have permitted it to deny coverage, it may be estopped from subsequently raising the defense of non-coverage).

representation of Hanes in any way differed from that of the doctors. (Status Reports from Law Firm to the MCARE Fund (January 27, 2004-April 15, 2005), R.R. at 387a-475a.) In fact, Hanes did not have any other attorney representing her throughout the litigation of the malpractice case, even though there was a concern about a conflict of interest between Hanes and one of the doctors. (Letter from Law Firm to the MCARE Fund serving as a Pretrial Analysis Report (February 10, 2005) at 4, R.R. at 464a.) Additionally, the MCARE Fund paid the fee for the expert witness hired by Law Firm on behalf of Hanes, (Hr'g Tr. at 55, January 23, 2006, R.R. at 78a), and Law Firm represented her in all aspects and stages of the litigation, including the negotiation of the settlement *on her behalf*. As HUP's Associate General Counsel testified, "it was our understanding and it was my understanding during the handling of this case that 715 status was in place for all of the defendants." (Hr'g Tr. at 71, September 23, 2009, R.R. at 356a.) For these reasons, we must reject the MCARE Fund's argument that the defense provided to Hanes was limited to its defense of HUP.

Finally, the MCARE Fund argues that, "[e]ven where the factual requisites are met, the doctrine of equitable estoppel cannot be invoked against the Commonwealth where to do so would violate positive law." Borkey v. Township of Centre, 847 A.2d 807, 812 (Pa. Cmwlth. 2004). The MCARE Fund relies on Borkey to argue that invoking estoppel here would violate Section 715's statutory requirement that a timely request for coverage be received by the MCARE Fund because here, a C-416 form was not submitted on behalf of Hanes within the 180-day deadline.

In Borkey, a township amended its pension ordinance to establish the calculation of pension benefits for police officers that effectively increased the pension payments (New Ordinance). Id. at 809. This occurred three days prior to an officer's retirement. Id. at 810. In reliance on advice that the New Ordinance applied to him, the officer retired and his benefits were calculated according to the New Ordinance. However, under Section 1601 of the Second Class Township Code (Township Code),[11] ordinances are not effective until five days after their adoption. Because the New Ordinance was not effective when he retired, it could not be used to calculate his pension. The township, therefore, recalculated the amount of his pension based on the former ordinance and reduced the amount of his pension. The officer filed an action to reinstate his original pension benefit calculation arguing that the township should be equitably estopped from reducing it. Id. at 811. Although this Court did find that the factual requisites of estoppel had been met, it nonetheless denied the officer's claim for future benefit payments based on the positive law exception to estoppel. Id. at 813. In other words, this Court, "in the specific context of a retiree's pension benefits," held that estoppel could not be applied to require the violation of a statute. Id. at 812. Both the former and the New Ordinance in Borkey contained language that the pension benefit calculation would be "determined by the provisions of the ordinance in effect at the time the officer ceased working for the Township." Id. at 813 (emphasis omitted). The combination of this language, with Section 1601 of the Township Code, compelled the result that the former ordinance was in effect at the

[11] Section 1601(a) of the Second Class Township Code, Act of May 1, 1933, P.L. 103, as amended, 53 P.S. § 65101(a), provides that "[o]rdinances shall be recorded in the ordinance book of the township and are effective five days after adoption unless a date later than five days after adoption is stated in the ordinance."

time Borkey retired. What Borkey was really seeking in that case was to modify Section 1601 of the Township Code; however, "[t]he Board had no power to alter or modify the effective date of the 1995 Pension Ordinance . . . [which] is simply contrary to positive law. It would be tantamount to allowing the Board to amend the Second Class Township Code." Id.

We disagree that the application of estoppel in this case would violate positive law. Section 715 requires that there be a "written request for indemnification and defense." 40 P.S. § 1303.715(a). Although the MCARE Fund did not receive the written request in the precise format which it required, a "C-416 form," the MCARE Fund did receive timely written notice of the Complaint; notice that its insured, Hanes, was a named defendant; and it defended her through settlement. That the MCARE Fund had notice of Hanes' request for indemnification and defense is further supported by the fact that the MCARE Fund also paid for expenses related to the defense of Hanes, as if a C-416 form had been timely provided.[12] The statutory requirement has, thus, been met. Therefore, unlike Borkey, wherein estoppel was not permitted because it would have essentially amended the Township Code provision to modify the effective date of

[12] The Director of the Bureau of Claims Administration for the MCARE Fund acknowledged that the Joint Stipulation of the parties provides that MCARE paid all the defense costs on behalf of all Defendants, including Hanes. (Hr'g Tr. at 44, September 23, 2009, R.R. at 329a.) She further testified that MCARE prefers to receive a C-416 form once a lawsuit has been filed, (Hr'g Tr. at 26, September 23, 2009, R.R. at 311a); and that MCARE also prefers to receive a complaint when a lawsuit has been filed, and did receive a complaint in this case. (Hr'g Tr. at 26, September 23, 2009, R.R. at 311a.)

the New Ordinance, allowing estoppel in this case would not be tantamount to requiring an amendment of Section 715.

For the foregoing reasons, we find that the MCARE Fund is estopped from denying coverage under Section 715 to Hanes, and grant her the relief requested.[13]

RENÉE COHN JUBELIRER, Judge

[13] Because of our disposition, we do not need to reach Hanes' additional argument.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Lisa Hanes, CNM,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 414 M.D. 2010
	:	
Medical Care Availability and Reduction of Error Fund,	:	
	:	
Respondent	:	

O R D E R

NOW, March 16, 2011, this matter having been transferred to this Court pursuant to Fletcher v. Pennsylvania Property and Casualty Insurance Guaranty Association, 603 Pa. 452, 985 A.2d 678 (2009) and briefing ordered by Order of this Court dated May 27, 2010, Lisa Hanes is entitled to "Section 715 status" and an indemnity payment in the amount of $300,000 for her extended claim filed under Section 715 of the Medical Care Availability and Reduction of Error Act, 40 P.S. § 1303.715, arising from the settlement in the case of Brown, et al. v. Hospital of the University of Pennsylvania, et al., Court of Common Pleas, Philadelphia County, November 2002, No. 001819.

The Chief Clerk shall enter judgment in favor of Petitioner, Lisa Hanes, CNM, and against Respondent, Medical Care Availability and Reduction of Error Fund, in the above-captioned matter if no post-trial motions are filed within ten (10) days of the date of this Order in accordance with Pa. R.C.P. No. 227.1.

RENÉE COHN JUBELIRER, Judge