

[J-128-2012]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

PPM ATLANTIC RENEWABLE	:	No. 10 WAP 2012
	:	
	:	Appeal from the Order of the
v.	:	Commonwealth Court entered May 3, 2011
	:	at No. 1431 C.D. 2010 quashing the Appeal
	:	from the Order of the Court of Common
FAYETTE COUNTY ZONING HEARING	:	Pleas of Fayette County entered June 18,
BOARD, NEIL BROWN AND THOMAS J.	:	2010 at No. 2009 of 2009 G.D.
BOZEK	:	
	:	ARGUED: October 17, 2012
	:	
APPEAL OF: THOMAS J. BOZEK	:	

DISSENTING OPINION

MR. JUSTICE EAKIN

DECIDED: DECEMBER 16, 2013

Based on its interpretation of § 11003-A(d), the majority holds the order at issue here was void ab initio, and as such, was a legal nullity. In relevant part, § 11003-A(d) provides: “The right to petition the court to order the appellants to post bond may be waived by the appellee, but such waiver may be revoked by him if an appeal is taken from a final decision of the court.” 53 P.S. § 11003-A(d). The majority states, even assuming “this language affirmatively authorizes the trial court to require a bond relative to an appeal to the Commonwealth Court, it is couched in terms of an appellee’s revocation of a prior waiver, and hence, it can only pertain where the same party is the appellee before both courts.” Majority Slip Op., at 8.

Respectfully, such an interpretation convolutes the purpose of allowing a bond in the first place. The statute does not talk at all about limiting the eligibility for a bond — it talks about revoking a prior waiver of a right, which acknowledges that such a right exists.

One cannot waive a right that is nonexistent — hence, the authority to require a bond has to exist — it is a condition precedent to a waiver. This statute merely acknowledges that an eligible party may have waived the right to ask for a bond at the trial level, but provides that any such waiver may be revoked if there is an appeal beyond the trial court level — which means the bond may go forward. It does not say a bond is unavailable to an appellee unless that party was appellee below and previously did not ask for a bond. Section 11003-A(d) simply means what it says — a prior waiver, if one exists, does not preclude a subsequent request. Indeed, this recognizes one can petition for an appeal bond, even if one did not do so previously.

It is manifestly counter-intuitive to believe the statute requires a party to waive a right in one stage in order to preserve it in another. Under this interpretation, if an appellee asked for a bond at the trial level against a frivolous challenge, and prevails, the appellee is to be denied the right to ask for a bond on appeal — yet a concurrent appellee who waived a bond at trial may now obtain it on appeal. This is not the statute's purpose or meaning. Again, it is a statute about the scope of a waiver, not about eligibility.

Pennsylvania Rule of Appellate Procedure 1701(b)(1) permits a lower court to take certain limited actions after an appeal has been filed, including ancillary actions such as the issuance of a bond order as a condition to appeal. When the bond order was issued, appellant had three options: challenge it, comply with it, or ignore it. He chose the latter, at his peril. The bond was properly made a requirement of pursuing the appeal. The Commonwealth Court, therefore, properly held his failure to meet that requirement doomed the appeal — if there is an order making a bond a prerequisite to further proceedings, failure to post the bond ends the matter. If the proceeding is an appeal of the final disposition, one must obey, or appeal the bond order. This is not a new legal

concept. Thus, I would find the bond order was proper, and appellant's failure to challenge or comply with it was fatal.