

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

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Lyle W. Cayce
Clerk

No. 23-20337

ABRAHAM WATKINS NICHOLS AGOSTO AZIZ & STOGNER,

Plaintiff—Appellee,

versus

EDWARD FESTERYGA,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:22-CV-4249

Before DENNIS, WILLETT, and DUNCAN, *Circuit Judges*.

DON R. WILLETT, *Circuit Judge*:

This waiver-based remand dispute returns—our jurisdictional hands now untied. When Edward Festeryga first appealed the district court’s remand order—premised on the theory that he had waived removal by litigating in state court—binding precedent left us no choice but to dismiss for lack of jurisdiction. We complied, though not quietly. We flagged that precedent as unsound and urged en banc reconsideration. The court obliged and overruled our misguided rule—clearing the way for us to decide, definitively, whether Festeryga’s actions amounted to waiver or to nothing more than routine, procedural maneuvering.

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We hold that the district court erred in concluding that Festeryga waived his right to remove by taking part in state-court proceedings. Under our circuit’s exacting standard, waiver occurs only when a defendant “clearly and unequivocally” manifests an intent for the state court to resolve the case on its merits. Festeryga did no such thing. His lone state-court motion sought chiefly to secure a stay of discovery—a procedural step, not a request for final adjudication.

We therefore REVERSE the waiver-based remand order and REMAND so the district court may, in the first instance, determine whether Festeryga has established subject-matter jurisdiction.

I

We have twice recounted this case’s backstory;¹ here, a concise summary will do.

Abraham Watkins Nichols Agosto Aziz & Stogner, a Texas law firm, sued its former associate, Edward Festeryga, in Texas state court for various state-law torts. The firm secured a temporary restraining order and moved for expedited discovery to obtain communications and documents in Festeryga’s possession. Festeryga responded with a motion to dismiss under Texas’s anti-SLAPP statute—the Texas Citizens Participation Act (TCPA). That filing automatically stayed discovery, though the parties later stipulated to a protective order, and Festeryga agreed to produce limited materials.

On the eve of his production deadline, Festeryga removed to federal court. The district court remanded, concluding that Festeryga had waived

¹ See *Abraham Watkins Nichols Agosto Aziz & Stogner v. Festeryga*, 138 F.4th 252 (5th Cir. 2025) (en banc); *Abraham Watkins Nichols Agosto Aziz & Stogner v. Festeryga*, 109 F.4th 810 (5th Cir.), *reh’g en banc granted, opinion vacated*, 138 F.4th 252 (5th Cir. 2025).

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removal by filing his TCPA motion in state court.² It declined to decide whether federal jurisdiction existed on the basis of diversity of citizenship.³

Festeryga appealed. Bound by circuit precedent holding that waiver-based remand orders are categorically unreviewable, we dismissed for lack of jurisdiction.⁴ We did so, however, with reservations—flagging the precedent as unsound and inviting en banc correction. The full court did so, overruling our misguided precedent, vacating our dismissal, and returning the case to us to “resolve the remaining issues.”⁵

II

Two issues remain: (1) Did the district court err in concluding that Festeryga waived his removal right by participating in state-court proceedings, and (2) Has Festeryga carried his burden to establish subject-matter jurisdiction based on diversity of citizenship.

We answer (1) yes, and (2) not yet.

A

We begin with waiver: the threshold issue and the only ground the district court reached.

No one disputes that Festeryga removed within the 30-day statutory window.⁶ Yet the district court held that by filing a TCPA motion in state

² *Abraham Watkins Nichols Agosto Aziz & Stogner v. Festeryga*, No. 4:22-CV-4249, 2023 WL 4424270, at *3 (S.D. Tex. July 10, 2023).

³ *Id.* at *2.

⁴ *See Festeryga*, 109 F.4th at 817.

⁵ *Festeryga*, 138 F.4th at 263.

⁶ The removal statute permits removal within 30 days of service. 28 U.S.C. § 1446(b)(1). Festeryga removed after just 17 days.

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court and securing its automatic stay of discovery, he “reflect[ed] an intent to invoke the jurisdiction of the state court.”⁷

The parties first spar over our standard of review: *de novo*, says Festeryga; abuse of discretion, says Abraham Watkins. The latter is correct. Waiver operates as a discretionary remand ground, and we review such filings for an abuse of discretion.⁸ And we have reviewed waiver determinations in other contexts under that same standard.⁹ Still, labels matters less than substance: a district court abuses its discretion “when [its] ruling is based on an erroneous view of the law.”¹⁰ Here, the asserted error is precisely that—misunderstanding and misapplying our waiver precedent. If so—and we conclude it is—the error qualifies as an abuse of discretion.¹¹

On to the merits. Did Festeryga waive his removal rights by filing a TCPA motion in state court? We start with a broader observation: We acknowledge the argument that Congress effectively abolished the waiver doctrine in the removal context when it adopted a bright-line 30-day removal

⁷ *Festeryga*, 2023 WL 4424270, at *3.

⁸ *Adair v. Lease Partners, Inc.*, 587 F.3d 238, 240 (5th Cir. 2009). Festeryga relies on *Gilmore v. Mississippi*, 905 F.3d 781 (5th Cir. 2018), but that case involved a mandatory remand for lack of subject-matter jurisdiction, not discretionary waiver. *Id.* at 784.

⁹ See *Smith v. Travelers Cas. Ins. Co. of Am.*, 932 F.3d 302, 308 (5th Cir. 2019).

¹⁰ *United States v. Johnson*, 94 F.4th 434, 440 (5th Cir. 2024) (cleaned up).

¹¹ See *City of Albuquerque v. Soto Enters., Inc.*, 864 F.3d 1089, 1098 (10th Cir. 2017) (holding that a district court’s “legal determination that motions to dismiss alone are sufficient to constitute waiver” is reviewed *de novo*).

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deadline.¹² But we need not decide that question today.¹³ Assuming the doctrine survives, our precedent demands a high bar for finding waiver—a bar too high for Abraham Watkins to clear.

Waiver, in our circuit, is no casual affair. A defendant’s intent to remain in state court must be “be clear and unequivocal,”¹⁴ and “the right of removal is not lost by action in the state court short of proceeding to an

¹² Some have argued that Congress’s adoption of a bright-line 30-day removal rule “deliberately intended to eliminate” waiver. *Rothner v. City of Chicago*, 879 F.2d 1402, 1416 (7th Cir. 1989); see also, *Minkoff v. Scranton Frocks, Inc.*, 172 F. Supp. 870, 875 (S.D.N.Y. 1959) (“assuming that the doctrine of waiver still exists under the 1948 revision of the removal statute,” without deciding the issue); 1A James W. Moore, et al., *Moore’s Federal Practice* ¶ 0.157[9] at 151 (2d ed. 1987) (waiver is inapplicable because the amended statute’s “broad purpose” was to create “a definite, ascertainable time within which to remove”). Indeed, with respect to the common-law doctrine of laches—which operates like waiver as an equitable bar to suit—the Supreme Court has held that “in face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief.” *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 679 (2014).

Moreover, in 1976, the Supreme Court announced a categorical rule that federal courts may not remand cases on nonstatutory discretionary grounds. *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 344 (1976). The Court later carved out an exception for pendent state-law claims. See *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988). But as we have explained, that was “one, but only one, exception to the general rule” of *Thermtron*—not an open invitation to create others. *Buchner v. FDIC*, 981 F.2d 816, 820 (5th Cir. 1993). The Supreme Court has never recognized waiver as an exception to *Thermtron*.

¹³ Although we have discussed waiver in post-*Thermtron* removal cases, it is unclear whether these cases are binding under our rule of orderliness. See *Acosta v. Hensel Phelps Constr. Co.*, 909 F.3d 723, 742 (5th Cir. 2018) (“[O]ne panel of [our] court may not overturn another panel’s decision.”). For one thing, most of these post-*Thermtron* cases found waiver inapplicable anyway. See, e.g., *Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 428 (5th Cir. 2003); *Beighley v. FDIC*, 868 F.2d 776, 782 (5th Cir. 1989). More importantly, none addressed whether waiver is consistent with *Thermtron*. See *United States v. Brune*, 991 F.3d 652, 664 (5th Cir. 2021) (“[T]he rule of orderliness has little persuasive force when the prior panel decision at issue conflicts with a Supreme Court case to which the subsequent panel decision is faithful.” (citation omitted)).

¹⁴ *Tedford*, 327 F.3d at 428.

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adjudication on the merits.”¹⁵ In practical terms, waiver occurs only when a defendant has “invok[ed] the jurisdiction of the state court in resolving the issues presented by the original complaint.”¹⁶ Anything less—mere procedural skirmishing—does not suffice.

We apply this rule case by case; there is no bright line.¹⁷ We have held, for example, that moving to transfer venue, seeking a confidentiality order, and filing special exceptions—even together—does not amount to waiver.¹⁸ Nor does “engaging in extensive discovery in state court.”¹⁹ On the other side of the ledger, we have suggested waiver when defendants “tested state-court waters for four years,” filing “answers, amended answers, motions of various kinds, third-party demands, cross claims, amended cross claims, and participat[ing] in discovery.”²⁰

Here, the district court committed two legal errors in concluding that Festeryga waived removal.

First, it misread *Johnson v. Heublein, Inc.* as establishing that any motion to dismiss in state court waives removal.²¹ There, we noted—in

¹⁵ *Beighley*, 868 F.2d at 782 (quoting 1A James W. Moore, et al., Moore’s Federal Practice ¶ 0.157[9] at 153 (1987)). Other circuits likewise reserve waiver for “extreme situations.” *Rothner*, 879 F.2d at 1416; see also *Grubb v. Donegal Mut. Ins. Co.*, 935 F.2d 57, 58 (4th Cir. 1991) (adopting *Rothner*’s holding that “waiver should only be found in ‘extreme situations’”).

¹⁶ *Johnson v. Heublein, Inc.*, 227 F.3d 236, 244 (5th Cir. 2000).

¹⁷ See *Yusefzadeh v. Nelson, Mullins, Riley & Scarborough, LLP*, 365 F.3d 1244, 1246 (11th Cir. 2004).

¹⁸ *Tedford*, 327 F.3d at 428.

¹⁹ *Strong v. Green Tree Servicing, LLC*, 716 F. App’x 259, 263 (5th Cir. 2017).

²⁰ *Brown v. Demco, Inc.*, 792 F.2d 478, 481 (5th Cir. 1986). While *Brown* suggested such participation constitutes waiver, we later recognized that this discussion was dicta. See *Tedford*, 327 F.3d at 428 n.15.

²¹ *Festeryga*, 2023 WL 4424270, at *3 (citing *Johnson*, 227 F.3d at 244).

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dicta—that the defendants had waived removal by missing the statutory deadline and by filing both a motion to dismiss and a motion for summary judgment in state court.²² From that passing remark, the district court extracted a supposed bright-line rule: filing any motion to dismiss automatically invokes state-court jurisdiction. Not so.

This case illustrates why. Festeryga’s TCPA motion—while potentially dispositive—could not be decided without a hearing, and it was his responsibility to set one.²³ He never did. Filing a motion that sits idle is not the same as “submitt[ing] the cause to adjudication on the merits.”²⁴ Other circuits agree: a dispositive motion, unaccompanied by a hearing or ruling, does not trigger waiver²⁵—particularly when, as with the TCPA, the motion carries collateral procedural effects (like staying discovery, expediting proceedings, or shifting burdens) apart from any merits decision. Defendants may have sound tactical reasons to file such a motion without any intent to seek a merits ruling. The district court therefore erred in treating Festeryga’s filing, standing alone, as “clear and unequivocal” waiver.

Second, the district court treated the resulting discovery stay as evidence of waiver. Quite the opposite. Halting discovery is the quintessential act of preserving the status quo until a new forum takes over. Pushing pause belies “an intent to litigate the merits of the claim,”²⁶ and once Festeryga

²² *Johnson*, 227 F.3d at 244.

²³ See *Leach v. Schwartz*, 645 S.W.3d 906, 911 (Tex. App.—El Paso 2022, no pet.); TEX. CIV. PRAC. & REM. CODE § 27.003(d).

²⁴ *Tedford*, 327 F.3d at 428.

²⁵ See *Kenny v. Wal-Mart Stores, Inc.*, 881 F.3d 786, 791–92 (9th Cir. 2018); *Cogdell v. Wyeth*, 366 F.3d 1245, 1249 (11th Cir. 2004).

²⁶ *Festeryga*, 2023 WL 4424270, at *2 (citing *Jacko v Thorn Americas Inc.*, 121 F Supp 2d 574, 576 (E.D. Tex. 2000)). The only benefit Festeryga obtained was halting expedited discovery; without a hearing, the state court could not adjudicate the merits.

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secured the stay, he removed without setting a hearing or seeking any other ruling. If “extensive discovery” in state court does not waive removal,²⁷ stopping discovery certainly does not.

The compressed state-court timeline cements the point. Abraham Watkins sued and sought expedited discovery.²⁸ Eight days later, Festeryga filed his TCPA motion, triggering the stay. Nine days after that—having agreed to limited discovery—he removed. Seventeen days total. Such a short interval does not “clearly and unequivocally” show that he was “experiment[ing]” with his case in a state court before decamping to federal court.²⁹

In sum, Festeryga’s lone state-court act—filing a TCPA motion that was never set for hearing, never ruled on, and that yielded only a temporary discovery pause—did not waive removal under our demanding standard.³⁰

B

Abraham Watkins further contends that we lack subject-matter jurisdiction because the parties are not diverse. It points out that while Festeryga claims to be a Canadian citizen—and thus diverse from Abraham Watkins, a citizen of Texas—he previously swore on a trademark application

²⁷ *Strong*, 716 F. App’x at 263.

²⁸ Abraham Watkins requested expedited discovery in its original petition filed November 21, 2022. It also filed an emergency motion seeking the same relief the next day—November 22, 2022.

²⁹ *Rosenthal v. Coates*, 148 U.S. 142, 147 (1893) (explaining that the purpose of waiver in the removal context is to prevent a party from “experiment[ing] on his case in the state court, and, upon an adverse decision, then transfer[ring] it to the federal court”).

³⁰ Abraham Watkins also claims waiver because Festeryga agreed to a protective order signed by the state court. We agree with the district court that this falls short. Negotiating a protective order is quintessentially a procedural maneuver that doesn’t constitute waiver under our precedent. *See Tedford*. 327 F.3d at 428.

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that he is a U.S. citizen. Festeryga responds with an array of documents purporting to establish his Canadian citizenship.³¹

This issue was presented in the district court as an additional basis for remand, but the court declined to resolve it, resting its decision solely on waiver.³² We, of course, must always satisfy ourselves of our jurisdiction,³³ but deciding this question would require us to weigh the parties' competing evidence and resolve a factual dispute. And "[d]eciding disputed facts is not the office of a court of review."³⁴ We therefore think it best to allow the district court to undertake that analysis in the first instance on remand.³⁵

III

To conclude, we REVERSE the district court's holding that Festeryga waived his removal right by participating in state-court proceedings, and we REMAND for the district court to determine—in the first instance and on a full record—whether diversity jurisdiction exists.

³¹ The documents include an affidavit, Canadian passport, temporary work visa, and Form I-9.

³² See *Sangha v. Navig8 ShipManagement Priv. Ltd.*, 882 F.3d 96, 100 (5th Cir. 2018) ("Although district courts generally determine their own subject-matter jurisdiction before proceeding to a determination on the merits, such a strict sequencing of consideration is not required before a court orders dismissal on non-merits grounds.").

³³ *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 468 (5th Cir. 2020).

³⁴ *Delaughter v. Woodall*, 909 F.3d 130, 134 n.3 (5th Cir. 2018).

³⁵ See *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 235 (5th Cir. 2009) (deferring resolution of disputed factual issues to the district court in the first instance).