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United States Court of Appeals
Tenth Circuit

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ELIZABETH LUPIA,

Plaintiff - Appellee,

v.

MEDICREDIT, INC.,

Defendant - Appellant.

No. 20-1294

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:19-CV-01209-REB-KMT)

Jamie N. Cotter of Spencer Fane, LLP, Denver Colorado (Jacob F. Hollars of Spencer Fane, LLP, Denver Colorado; Scott J. Dickenson of Spencer Fane, LLP, St. Louis, Missouri, with her on the brief), for Defendant-Appellant.

Russel S. Thompson, IV of Thompson Consumer Law Group, PC of Mesa, Arizona, for Plaintiff-Appellee.

Before **TYMKOVICH**, Chief Judge, **HARTZ**, and **PHILLIPS**, Circuit Judges.

PHILLIPS, Circuit Judge.

It was just one day. Or that's how Medicredit, the debt collection agency, tells it. On a Monday, Medicredit received a letter from a consumer, Elizabeth Lupia, demanding that it cease calling her about an unpaid medical debt. The next day, on

Tuesday, before Medicredit processed the letter, it again called Ms. Lupia regarding the debt. This call formed the basis of Ms. Lupia's suit under the Fair Debt Collection Practices Act (FDCPA).

But according to Medicredit, its Tuesday call was simply a bona fide error, thereby shielding the agency from liability. After all, while some communication is instantaneous, sifting through physical mail is not. As Medicredit points out, it faces an inherent lag time between receiving and processing mail, making it impossible to immediately stop all calls to consumers who have sent cease-and-desist letters in the mail.

For Ms. Lupia, it was about more than just one day. Sure, Medicredit made its call to her one day after receiving her letter. But Medicredit's policy allowed for more time than that. In fact, it permitted up to three business days of lag time between its receipt and processing of mail (which was how long it took Medicredit to process Ms. Lupia's letter). For that, Ms. Lupia contends, Medicredit can't find refuge under the bona fide-error defense. The district court agreed and granted Ms. Lupia's motion for summary judgment.

On appeal, Medicredit challenges Ms. Lupia's standing in federal court and asserts that the district court committed several reversible errors in granting Ms. Lupia's motion. We find merit in none of these claims. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND

I. Factual Background

In April 2017, Elizabeth Lupia underwent a medical procedure at St. Francis Medical Center ("the Hospital") in Colorado Springs, Colorado. Afterward, the Hospital billed Liberty Health Share ("the Insurer"), Ms. Lupia's cost-sharing healthcare program.[1] The bill totaled $21,893. The Insurer responded by sending a payment to the Hospital of $7,154.36. Included with the payment was a document declaring that "[a]ny medical expense from the program is tendered in full and final satisfaction of charges for medical services and treatment rendered" and that "deposit by recipient shall constitute . . . satisfaction of any discrepancy between expenses hereby paid and amounts charged for such services and treatment." Appellant's App. vol. 1 at 190.

The Hospital applied the payment to Ms. Lupia's account but billed her directly for the remainder. After Ms. Lupia refused to pay the balance, the Hospital retained Medicredit, Inc., a debt-collection agency, to collect the debt. On April 25, 2018, Medicredit sent a letter to Ms. Lupia requesting payment. It followed this letter with a phone call and voicemail to her on April 30, 2018. In a letter dated May 1, 2018, Ms. Lupia responded, disputing the debt, and claiming that the Hospital's acceptance of the initial payment satisfied the full balance. Also in her letter, she

[1] Liberty Health Share is an alternative to traditional insurance and is described as a "healthcare sharing ministry wherein members make monthly contributions which are then used to pay for the medical expenses of other members in need." Appellant's App. vol. 1 at 10.

demanded that Medicredit immediately cease all telephone calls to her regarding the debt, though she welcomed written correspondence.

On May 2, Ms. Lupia mailed her non-certified letter to the address provided by Medicredit—its post-office box in Missouri. On May 7, a Monday, Medicredit received the letter, but it didn't input the letter into Medicredit's system until three days later—on May 10, a Thursday. Meanwhile, on May 8, a day after receiving the letter, a Medicredit representative called Ms. Lupia about the disputed debt. When she didn't answer the call, Medicredit left Ms. Lupia a voicemail about the debt. That was the last time that Medicredit called Ms. Lupia.

II. Procedural Background

Ms. Lupia sued Medicredit in federal district court under the FDCPA, 15 U.S.C. §§ 1692–1692p, seeking damages. Preliminarily, she alleged standing based on her intangible but "legally cognizable" harms. *Id.* at 7.

Ms. Lupia then alleged that Medicredit had violated several provisions of the FDCPA, two of which are relevant here. First, she alleged that Medicredit had violated § 1692g(b) by attempting to collect the debt despite receiving her written notice disputing the debt. Second, she claimed that Medicredit had violated § 1692c(c) by continuing to call her despite receiving her cease-and-desist letter.

In Medicredit's Answer, it denied that it had violated the FDCPA, and in the alternative, it asserted its affirmative bona fide-error defense. After discovery, both parties moved for summary judgment.

In Medicredit's motion for summary judgment, it first challenged Ms. Lupia's standing to bring her claims, arguing that she had suffered "no actual harm." *Id.* at 42. Next, it argued that making a single phone call less than twenty-four hours after receiving Ms. Lupia's letter didn't violate the FDCPA. In Medicredit's words, holding otherwise would amount to a "mere technical or 'gotcha' violation." *Id.* at 55 (citation omitted). Alternatively, Medicredit argued that the call resulted from a bona fide error because it would be "impossible to prevent every call that could be placed after a cease and desist letter arrives in Medicredit's P.O. box," and because it had implemented a policy of logging communications into its system within three days to prevent unauthorized calls. *Id.* at 58–60.

In Ms. Lupia's motion for summary judgment, she contended that Medicredit couldn't avoid liability under the bona fide-error defense because it had failed to maintain procedures reasonably adapted to prevent the specific error at issue. And in opposition to Medicredit's motion, she argued that she had standing for her FDCPA claims based on her having suffered an injury in fact from Medicredit's interference with her right to privacy.

The district court granted Ms. Lupia's motion in relevant part. It began by rejecting Medicredit's standing argument, stating that the violation presented a "material risk of harm to [Ms. Lupia's] underlying concrete interest," *id.* at 274 (citation omitted)—that is, allowing abusive debt-collection practices to "go unchecked" would likely disrupt her life, *id.* at 275. That interest, it determined, was sufficiently concrete to confer standing.

Turning to the merits, the district court determined that Medicredit violated the FDCPA because on May 7 it had received notice that Ms. Lupia disputed the debt, yet on May 8 made a "plain[] . . . attempt to collect the debt." *Id.* at 280. The district court also concluded that the bona fide-error defense didn't excuse Medicredit's violation. Though finding the error unintentional and made in good faith, the court concluded that Medicredit had "offer[ed] nothing to explain the rather substantial lapse of time between when the letter was marked received and when it was logged." *Id.* at 281. According to the court, "no reasonable jury could find a procedure which inexplicably allows a three-day lag between receipt of a debtor's dispute and logging that dispute into the system . . . to be reasonably adapted to prevent unauthorized contact with the debtor." *Id.* at 283.

After the court issued its order, Medicredit moved for the court to reconsider its denial of Medicredit's bona fide-error defense. It argued that the relevant time interval was the one day that passed between its receiving Ms. Lupia's cease-and-desist letter and its telephone call to her—not the three days it took to process Ms. Lupia's letter. Further, Medicredit asserted that it needn't prove that it maintained reasonable procedures, because Ms. Lupia had conceded the point below by not disputing the reasonableness of Medicredit's policies. To that end, Medicredit maintained that if Ms. Lupia had "[met] her initial burden," Medicredit would have produced evidence demonstrating that the processing time was reasonable. *Id.* vol. 2 at 298.

The district court denied Medicredit's motion, noting that the bona fide-error defense is an affirmative one, requiring that Medicredit prove the prongs of the defense, not that Ms. Lupia disprove them. The court concluded that Medicredit's argument rested on "a profound misunderstanding of the burden of proof," and Medicredit appealed. *Id.* at 325.

DISCUSSION

Medicredit asserts that the district court committed three reversible errors: (1) entering summary judgment sua sponte against Medicredit on grounds that Ms. Lupia had allegedly failed to raise; (2) denying summary judgment for Medicredit on its bona fide-error defense; and (3) denying Medicredit's Motion for Reconsideration. Additionally, it argues that Ms. Lupia failed to establish standing. We disagree on all points.

I. Standing

Before reaching the merits, we must consider whether Ms. Lupia has standing to pursue her claims in federal court. *United States v. Colo. & E. R.R.*, 882 F.3d 1264, 1269 (10th Cir. 2018) ("Article III standing is a fundamental requirement for any party seeking relief in federal court." (citation omitted)). Standing "ensures that a plaintiff has a sufficient personal stake in a dispute to ensure the existence of a live case or controversy which renders judicial resolution appropriate." *Tandy v. City of Wichita*, 380 F.3d 1277, 1283 (10th Cir. 2004) (citation omitted). As the Supreme Court aptly put it, standing reduces to one question: "What's it to you?" *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (quoting Antonin Scalia, *The Doctrine*

of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U. L. Rev. 881, 882 (1983)).

"We address standing on a claim-by-claim basis." *Santa Fe All. for Pub. Health & Safety v. City of Santa Fe*, 993 F.3d 802, 813 (10th Cir. 2021) (citation omitted). And we review de novo a district court's standing ruling. *Id.* at 811 (citation omitted).

To have standing, a plaintiff must show that she "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citations omitted). Injury in fact, the first of the three elements, requires that a plaintiff has suffered "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). We focus our analysis on the "concrete" requirement, which requires that an injury be "real" rather than "abstract." *Id.* (citation omitted). Simply put, "[n]o concrete harm, no standing." *TransUnion LLC*, 141 S. Ct. at 2200.

In Ms. Lupia's Complaint, she raised two FDCPA claims. First, she alleged that Medicredit violated 15 U.S.C. § 1692g(b) by continuing to attempt to collect on a debt without verifying the debt and despite her written communication disputing that she owed the debt. Second, she alleged that Medicredit violated § 1692c(c) by continuing to call her after it received her cease-and-desist letter. Relevant to standing, she alleged that Medicredit's call caused her "to suffer intangible harms,

which Congress has made legally cognizable in passing the FDCPA." Appellant's App. vol. 1 at 7 (citations omitted). We conclude that Ms. Lupia sufficiently alleged concrete harm.[2]

As a general principle, "'[c]oncrete' is not . . . necessarily synonymous with 'tangible.'" *Spokeo, Inc.*, 136 S. Ct. at 1549. Though concreteness may be more easily satisfied for tangible injuries like physical or monetary harms, intangible injuries, like the ones Ms. Lupia alleges, may nevertheless be concrete for standing purposes. *Id.*

In determining whether an intangible harm is sufficiently concrete to constitute an injury in fact, we look to both history and to the judgment of Congress. *Id.* The Court has explained: "history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider." *TransUnion LLC*, 141 S. Ct. at 2204 (citations omitted). And "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is . . . instructive and important." *Spokeo, Inc.*, 136 S. Ct. at 1549. Accordingly, we "afford due respect to Congress's decision to impose a statutory prohibition or obligation on a defendant, and to grant a plaintiff a cause of action to sue over the defendant's violation of that statutory prohibition or obligation." *TransUnion LLC*, 141 S. Ct. at 2204 (citation omitted).

[2] In doing so, we note that Ms. Lupia easily satisfies the other two standing requirements. *See Spokeo*, 136 S. Ct. at 1547. Medicredit was necessarily responsible for Ms. Lupia's injury in fact, and a favorable verdict will give her redress.

We begin with history. We consider "whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo, Inc.*, 136 S. Ct. at 1549 (citation omitted). Stated another way, this inquiry "asks whether plaintiffs have identified a close historical or common-law analogue for their asserted injury." *TransUnion LLC*, 141 S. Ct. at 2204. At common law, courts readily recognized a concrete injury arising from the tort of intrusion upon seclusion—a tort protecting against defendants who intrude into the private solitude of another. *See* Restatement (Second) of Torts § 652A(2)(a) (1977); *see also id.* § 652B. And the Supreme Court recently cited "intrusion upon seclusion" as a harm "traditionally recognized as providing a basis for [a] lawsuit[] in American courts." *TransUnion LLC*, 141 S. Ct. at 2204 (citing *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 462 (7th Cir. 2020) (Barrett, J.), *cert denied*, No. 20-209, 2021 WL 1521010 (U.S. Apr. 19, 2021)).

This tort imposes liability for intrusions on a plaintiff's privacy, such as when a defendant demands payment of a debt by making repeated telephone calls "with such persistence and frequency as to amount to a course of hounding the plaintiff." Restatement, *supra*, § 652B cmt. d. Ms. Lupia suffered a similar harm when Medicredit made an unwanted call and left her a voicemail about a debt, despite her having sent written notice disputing the debt and requesting that it cease telephone communications. Thus, Ms. Lupia suffered an injury bearing a "close relationship" to the tort of intrusion upon seclusion. *See Gadelhak*, 950 F.3d at 462–63 (determining that a consumer's receipt of a few unwanted text messages under the Telephone

Consumer Protection Act is "a modern relative" of the tort of intrusion upon seclusion—a tort with "long common law roots"); *see also DiNaples v. MRS BPO, LLC*, 934 F.3d 275, 279–80 (3d Cir. 2019) (determining that a debtor had standing after a debt collector disclosed her account number in violation of the FDCPA because it "implicate[d] core privacy concerns," which were "closely related to harm that has traditionally been regarded as providing a basis for a lawsuit" (citation omitted)).

This is true despite Medicredit's contentions that it made only one call to Ms. Lupia, that Ms. Lupia didn't answer that call, and that Ms. Lupia suffered no actual damages. On this point, we find *Gadelhak* instructive. That court rejected the argument that because a few text messages failed to rise to the level of an actionable intrusion-upon-seclusion tort, the resulting harm amounted to an abstract injury only:

> [W]hen *Spokeo* instructs us to analogize to harms recognized by the common law, we are meant to look for a "close relationship" in kind, not degree. In other words, while the common law offers guidance, it does not stake out the limits of Congress's power to identify harms deserving a remedy. Congress's power is greater than that: it may elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law. A few unwanted automated text messages may be too minor an annoyance to be actionable at common law. But such texts nevertheless pose the same *kind* of harm that common law courts recognize—a concrete harm that Congress has chosen to make legally cognizable.

Id. at 462–63 (brackets, internal quotation marks, citations, and footnote omitted).

So too here. Though a single phone call may not intrude to the degree required at common law, that phone call poses the same *kind* of harm recognized at common law—an unwanted intrusion into a plaintiff's peace and quiet. *See TransUnion LLC*,

141 S. Ct. at 2204 ("*Spokeo* does not require an exact duplicate in American history and tradition.").

Unlike here, the Court in *TransUnion* held that certain plaintiffs failed to allege a concrete harm. 141 S. Ct. at 2209–10. But that case differs markedly from ours. In considering the Fair Credit Reporting Act, the *TransUnion* Court noted that a company's maintaining incorrect information in its database, absent dissemination to a third party, failed to create a harm bearing a close relationship to the common-law tort of defamation. *See id.* Without the "necessary" defamation component that the tortious words were published, this harm differed in kind. *See id.* at 2209 (citation omitted). That analysis doesn't control our case because, as just explained, Ms. Lupia has alleged the necessary components for a common-law intrusion-upon-seclusion tort.

Next, we consider the "judgment of Congress." *Spokeo, Inc.*, 136 S. Ct. at 1549. In enacting the FDCPA, Congress recognized that abusive debt-collection practices may intrude on another's privacy interests. *See* 15 U.S.C. § 1692(a) ("Abusive debt collection practices contribute to . . . invasions of individual privacy."); *see also Cohen v. Rosicki, Rosicki & Assocs., P.C.*, 897 F.3d 75, 81 (2d Cir. 2018) ("Congress enacted the FDCPA to protect against the abusive debt collection practices likely to disrupt a debtor's life." (internal quotation marks and citation omitted)). Ms. Lupia complains that her receipt of an unwanted call and voicemail did just that.

That isn't to say that Congress may "simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is." *TransUnion LLC*, 141 S. Ct. at 2205 (citations omitted); *see also Spokeo, Inc.*, 136 S. Ct. at 1550 ("[Plaintiff] cannot satisfy the demands of Article III by alleging a bare procedural violation."). We cannot "treat an injury as 'concrete' for Article III purposes based only on Congress's say-so." *TransUnion LLC*, 141 S. Ct. at 2205 (citations omitted).

But we needn't rely on Congress's "say-so" alone. As noted, Ms. Lupia's claims have roots in long-standing common-law tradition. We thus conclude that Ms. Lupia has sufficiently alleged that she suffered a concrete injury.[3]

We find no merit in Medicredit's argument that Ms. Lupia failed to allege a sufficient injury in her Complaint. *See* Appellant's Supp. Br. at 4 ("[Ms. Lupia's] Complaint does not allege that the phone call injured her or invaded her privacy."). As noted, Ms. Lupia alleged in her Complaint that Medicredit caused her to suffer "intangible harms" that Congress "made legally cognizable in passing the FDCPA." Appellant's App. vol. 1 at 7 (citations omitted); *see also S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1152–53 (10th Cir. 2013) ("[W]e examine the . . . complaint

[3] Ms. Lupia argues alternatively that Medicredit's failure to heed her cease-and-desist letter created a risk of future consumer abuse. But because we hold that Medicredit's call itself formed the basis for Ms. Lupia's concrete injury, we needn't consider this basis. Even still, we recognize the difficulties in bringing a claim for damages based on a theory of future risk of harm. *See TransUnion LLC*, 141 S. Ct. at 2210–11 ("[I]n a suit for damages, the mere risk of future harm, standing alone, cannot qualify as a concrete harm—at least unless the exposure to the risk of future harm itself causes a *separate* concrete harm." (citations and footnote omitted)).

in assessing a plaintiff's claims, including the allegations in support of standing." (internal quotation marks and citation omitted)). Coupled with Ms. Lupia's factual allegations about the receipt of an unwanted phone call and voicemail, her allegations suffice. Indeed, Ms. Lupia asserted the same privacy interests when Medicredit contested her standing in its motion for summary judgment.

Finally, we are unpersuaded by Medicredit's argument that the Seventh Circuit's recent standing cases apply. *See, e.g.*, Appellant's Supp. Br. at 2–5 (citing *Pennell v. Glob. Tr. Mgmt., LLC*, 990 F.3d 1041 (7th Cir. 2021); *Larkin v. Fin. Sys. of Green Bay, Inc.*, 982 F.3d 1060 (7th Cir. 2020); *Brunett v. Convergent Outsourcing, Inc.*, 982 F.3d 1067 (7th Cir. 2020)). For one, those cases predate the Supreme Court's decision in *TransUnion* in which the Court clarified the *Spokeo* standing requirements, including that the tort of intrusion upon seclusion is recognized as an intangible harm providing a basis for a lawsuit in American courts. *See TransUnion LLC*, 141 S. Ct. at 2204–14. Further, none of the Seventh Circuit cases address § 1692g(b). And though *Pennell* analyzes § 1692c(c), it dealt with a plaintiff's complaints of "stress and confusion"—not an invasion of privacy. 990 F.3d at 1045. Likewise, we determine that Ms. Lupia has satisfied the injury-in-fact requirement. We therefore conclude that we are empowered to consider the merits of Ms. Lupia's claims. *See TransUnion LLC*, 141 S. Ct. at 2203 (citation omitted).

II. FDCPA Violations

Ms. Lupia alleges that Medicredit violated the FDCPA by calling her about a debt after receiving written notice from her disputing the debt and requesting that it cease calling her. She bases her first claim on § 1692g(b), which provides as follows:

> If the consumer notifies the debt collector in writing . . . that the debt, or any portion thereof, is disputed, . . . the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment . . . .

She bases her second claim on § 1692c(c), which provides as follows:

> If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt . . . .

On appeal, Medicredit doesn't challenge that its call to Ms. Lupia violated these FDCPA provisions. Instead, it relies on the bona fide-error defense—a defense that insulates debt collectors from FDCPA liability. *Johnson v. Riddle*, 443 F.3d 723, 727 (10th Cir. 2006). To prevail on this defense, a debt collector must show by a preponderance of the evidence that (1) "the violation was not intentional"; (2) that the violation "resulted from a bona fide error"; and (3) that the violation occurred despite "the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c).

The district court acknowledged that "Medicredit did not subjectively intend to violate the FDCPA in placing the May 8 call and that its mistake in doing so was genuine." Appellant's App. vol. 1 at 282. So its decision turned on the last prong.

The court determined that "no reasonable jury" could find that Medicredit's policy allowing for a three-day window between receiving mail and logging it into its system could be "reasonably adapted to prevent unauthorized contact with the debtor." *Id.* at 283. On this basis, the court granted summary judgment to Ms. Lupia.

Medicredit raises two issues with this ruling. First, it argues that the district court erred procedurally by entering summary judgment sua sponte based on a ground that Ms. Lupia had allegedly failed to raise, namely, the reasonableness of Medicredit's mail-processing policy. Second, it argues that the district court erred by determining that Medicredit hadn't established a genuine dispute of material fact as to its bona fide-error defense. We consider each argument in turn, reviewing the district court's grant of summary judgment de novo. *Gross v. Hale-Halsell Co.*, 554 F.3d 870, 875 (10th Cir. 2009) (citation omitted).

A. Procedure

Medicredit asserts that the district court erred by granting summary judgment sua sponte on a ground that Ms. Lupia didn't raise, giving Medicredit no notice or opportunity to respond. On that point, Medicredit contends that Ms. Lupia's request for summary judgment on Medicredit's bona fide-error defense wasn't "based on any facts or argument that Medicredit's three-day mail processing time was in any way not reasonably adapted to avoid the May 8 Call." Appellant's Opening Br. at 10. As we understand it, Medicredit asserts that Ms. Lupia had a burden to *disprove* that Medicredit's policies were so reasonably adapted—and that by not doing so, she conceded the point. So according to Medicredit, when the district court denied its

defense on these grounds—that its mail-processing policies weren't reasonably adapted—it did so sua sponte.

But the court didn't decide this issue sua sponte. In arguing that it did so, Medicredit confuses burden-of-proof standards. Rule 56 requires a movant for summary judgment (Ms. Lupia, here)[4] to carry the burden of production in making a prima facie case. Fed. R. Civ. P. 56(a). Though a "movant bears the initial burden of making a prima facie demonstration," when the nonmovant bears the burden of persuasion at trial, the movant may satisfy its burden "simply by pointing out to the court a lack of evidence for the nonmovant on an essential element of the nonmovant's claim." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670–71 (10th Cir. 1998) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). "If the movant carries this initial burden, . . . the burden shifts to the nonmovant to go beyond the pleadings and 'set forth specific facts' . . . from which a rational trier of fact could find for the nonmovant." *Id.* at 671 (citations omitted).

Ms. Lupia satisfied her prima facie burden by demonstrating that Medicredit lacked evidence supporting its bona fide-error defense. This defense is an affirmative one, meaning that Medicredit must prove all the elements of the defense. *See Johnson*, 443 F.3d at 727–28 (citations omitted). And in Ms. Lupia's motion for

[4] We acknowledge that the parties raised cross-motions for summary judgment. Yet we focus our analysis here on Ms. Lupia's motion because Medicredit's sua sponte argument rests solely on the district court's purported error "in granting [Ms. Lupia] summary judgment . . . on grounds not raised by [her]." Appellant's Opening Br. at 8.

summary judgment, she contended that Medicredit had "failed to show that it maintained any procedures and failed to explain how those procedures were reasonably adapted to avoid such an error." Appellant's App. vol. 1 at 125. Specifically, she pointed to her discovery request asking Medicredit for its policies used to avoid making erroneous phone calls, to which Medicredit responded that such policies "do not exist." *Id.* at 125, 162–63.

But once Ms. Lupia met her burden, and the burden shifted, Medicredit failed to set forth "specific facts" demonstrating a genuine issue for trial. As discussed below, we agree with the district court that Medicredit failed to meet its burden to create a fact dispute about its bona fide-error defense. And despite Medicredit's contention otherwise, Ms. Lupia wasn't required to contest the elements of its defense. Accordingly, we are unpersuaded by Medicredit's assertion that the district court granted summary judgment sua sponte on this ground.

Added to that, Medicredit can't claim that it lacked notice regarding any required proof because the defense itself requires a showing that Medicredit maintained procedures that were reasonably adapted to avoid the error. *See* 15 U.S.C. § 1692k(c). Even had the court granted summary judgment sua sponte, Medicredit had sufficient "notice that [it] had to come forward with all of [its] evidence," thereby making summary judgment proper. *Kannady v. City of Kiowa*, 590 F.3d 1161, 1170 (10th Cir. 2010) (citations omitted).

B. Merits

Having determined that the district court didn't procedurally err, we now consider whether the court substantively erred in granting Ms. Lupia summary judgment on Medicredit's bona fide-error defense. As mentioned, this affirmative defense has three requirements: that a violation of the FDCPA was (1) unintentional, (2) a bona fide error, and (3) made despite procedures reasonably adapted to avoid the violation. *Johnson*, 443 F.3d at 727–28 (citations omitted). We determine that there is no genuine issue of material fact as to this defense and that Ms. Lupia is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

We needn't consider the first two prongs, because Medicredit undoubtedly fails the third. "[T]he procedures component of the bona fide error defense involves a two-step inquiry: first, whether the debt collector 'maintained'—*i.e.*, actually employed or implemented—procedures to avoid errors; and, second, whether the procedures were 'reasonably adapted' to avoid the specific error at issue." *Johnson*, 443 F.3d at 729 (citations omitted).

Ms. Lupia argues that Medicredit is barred from asserting that it maintained procedures to avoid errors. She argues that during discovery, despite her multiple requests, Medicredit declined to identify any of its mail-handling procedures and denied that it had policies reasonably adapted to avoid unauthorized contact with debtors. For example, in an interrogatory, Ms. Lupia asked Medicredit to "describe all policies and procedures utilized and/or employed by Defendant" to avoid the

unauthorized collection of Ms. Lupia's debt. Appellant's App. vol. 1 at 162–63. Medicredit responded by denying that it had committed any error and further answered that "[n]o written policies or procedures . . . exist." *Id.* at 163. We take this response to mean that Medicredit denied having any mail-handling policies.

Later, in Medicredit's motion for summary judgment, it asserted differently—that "[a]t all relevant times, Medicredit maintained a procedure to avoid contacting a debtor after receiving a letter from that debtor." *Id.* at 47. But it described its procedures in general terms: that when it receives letters from consumers, it reviews those letters, and places "holds on the relevant account(s) to prevent further collection activities." *Id.* (citation omitted).

Medicredit finds itself in the unenviable position of having denied in discovery that a mail-processing policy exists, only later, at summary judgment, to assert that one exists—with nothing offered to explain its earlier denial. And it wasn't until after the district court granted summary judgment for Ms. Lupia that Medicredit submitted evidence of the specifics of its mail policies. In a sworn declaration, Don Wright, its Senior Vice President of Operations declaration, claimed that Medicredit receives nearly 400 mailings a day at its Missouri post-office box, and about 2,000 pieces of mail across all its post-office boxes. Because of this, Wright contended that it generally takes "three business days to process the mail and input any cease and desist letters into Medicredit's system that prevents further communications." *Id.* vol. 2 at 303.

Wright's declaration is too little, too late. Because Medicredit could have presented evidence in a prior briefing about the number of mailings it typically receives, we decline to consider this evidence on appeal. *See Adler*, 144 F.3d at 671 ("[A]lthough our review is de novo, we conduct that review from the perspective of the district court at the time it made its ruling, ordinarily limiting our review to the materials adequately brought to the attention of the district court by the parties.").

Even assuming that Medicredit has properly preserved the argument that it maintains procedures to avoid errors, it nonetheless fails under the second part of the inquiry, that its procedures were reasonably adapted to avoid errors.

On appeal, Medicredit describes its policies as follows. First, it receives non-certified mail (including Ms. Lupia's) at a P.O. box near its office in Missouri. After picking up the mail, it then forwards the mail to its compliance division, which reviews the letters and places any applicable holds on the corresponding accounts to prevent further collection. Due to the volume of Medicredit's incoming mail, this process "typically" takes three business days. Appellant's App. vol. 2 at 297.

The crux of Medicredit's argument is that "mail processing of three days . . . is reasonable and that expecting a one-day turnaround on processing mail is inherently unreasonable." Appellant's Reply Br. at 11. On that point, Medicredit says that the phone call "occurred less than 24 hours after Medicredit received the letter," Appellant's Opening Br. at 3, and that at least two district courts have held that three days for processing mail is reasonable, *id.* at 16–22.

But we needn't determine whether Medicredit's policies were reasonable because Medicredit hasn't shown how its policies were reasonably adapted to avoid its making unauthorized calls.[5] *See Johnson*, 443 F.3d at 729 (citations omitted). Here, Medicredit compares poorly to the debt collectors involved in cases that Medicredit relies on in its briefing. *See* Appellant's Opening Br. at 16–20 (citing *Gebhardt v. LJ Ross Assocs., Inc.*, No. 15-2154, 2017 WL 2562106 (D.N.J. June 12, 2017) (unpublished); *Rush v. Portfolio Recovery Assocs. LLC*, 977 F. Supp. 2d. 414 (D.N.J. 2013)).

In *Gebhardt*, the debt collector succeeded in showing that its policies were reasonably adapted to prevent errors by directing the court to its "detailed policies explaining how correspondence is received, reviewed, and processed by its employees." 2017 WL 2562106, at *5. The debt collector also showed that it "maintains a computer system that prevents communications from being made when coded to denote the consumer . . . demanded all communications to cease," and that it trains, tests, and audits its employees on its policies. *Id.* (citations omitted).

[5] We also question whether Medicredit's statement of what is "typically" done with its mail processing, Appellant's App. vol. 2 at 297, is sufficient to constitute a "procedure." The Court in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, explained that in the context of the bona fide error defense, procedures are "processes that have mechanical or other such 'regular orderly' steps to avoid mistakes." 559 U.S. 573, 587 (2010) (citation omitted). And as the Seventh Circuit has noted, "thinly specified" policies don't suffice. *Abdollahzadeh v. Mandarich L. Grp., LLP*, 922 F.3d 810, 817 (7th Cir. 2019) (citation omitted). Here, Medicredit's "policies" don't bar any action or outline what action must be taken, but rather state what is "typically" done. Appellant's App. vol. 2 at 297. Though we don't reach this issue, this is probably insufficient to constitute a "procedure" under *Jerman*.

And in *Rush*, the debt collector demonstrated that it had reasonably adapted procedures because it "submitted evidence that its employees [were] trained, and regularly retrained, on the FDCPA, including the prohibition on communicating with consumers after receiving . . . [a] cease and desist letter." 977 F. Supp. 2d at 428. Further, the debt collector informed the court about its process of "receiving, reviewing, and logging these letters into a consumer's account, and how its own system . . . prevents calls from being made after such a letter." *Id.*

Here, Medicredit's general evidence about its policies—which amount to little more than retrieving and reviewing the mail—isn't enough. And Medicredit's blanket assertion that its policies were reasonably adapted cannot suffice. We agree with the district court: "no reasonable jury could find a procedure which inexplicably allows a three-day lag between receipt of a debtor's dispute and logging that dispute into the system . . . to be reasonably adapted to prevent unauthorized contact with the debtor." Appellant's App. vol. 1 at 283. So Medicredit can't find refuge under the bona fide-error defense because we can find nothing in the record to show that its policies were *designed* to avoid making unauthorized calls to Ms. Lupia, or others like her.

III. Motion for Reconsideration

Finally, Medicredit asserts that the district court erred in denying its Motion for Reconsideration. It argues that the court "misapprehended the facts and law" by (1) granting summary judgment sua sponte; (2) failing to address that the call to Ms. Lupia occurred less than twenty-four hours after receiving her letter; and (3) failing to address Ms. Lupia's alleged concession that Medicredit's processing time was

reasonable. Appellant's Opening Br. at 23–24. We review a motion for reconsideration for an abuse of discretion. *Fye v. Okla. Corp. Comm'n*, 516 F.3d 1217, 1224 (10th Cir. 2008) (citation omitted).

Though "a motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law," *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (citation omitted), the district court did none of these things. Rather, the court acted within its discretion.

CONCLUSION

For the foregoing reasons, we affirm.