FOR PUBLICATION

In the

United States Court of Appeals

For the Eleventh Circuit

No. 25-10606

ZURICH AMERICAN INSURANCE COMPANY,

Defendant-Appellant-Cross Appellee,

versus

FIRST SOLAR ELECTRIC LLC,

Plaintiff-Appellee-Cross Appellant.

Appeals from the United States District Court
for the Middle District of Georgia
D.C. Docket No. 5:21-cv-00408-MTT

Before NEWSOM, ABUDU, and KIDD, Circuit Judges.

KIDD, Circuit Judge:

Golfers get mulligans. But in this case, the insurance company does not. First Solar Electric LLC was building a solar power plant in Georgia when five rain events damaged the project. First

Solar filed a claim with its insurer, Zurich American Insurance Company, which initially determined that the events were covered as water damage under First Solar's insurance policy. Based on that determination, Zurich gave First Solar three $200,000 checks as advance payments for the first three events. Before making the payments, Zurich did not attempt to reserve any right to change its coverage determination.

Zurich later reversed course and determined that the damage was *flood* damage instead of water damage. This matters because the water damage deductible was $100,000 per event, whereas the flood deductible was $2.5 million per event. Zurich then determined that First Solar's damages for each event did not exceed the flood deductible, so Zurich owed First Solar nothing and closed the claim. First Solar sued.

The district court granted partial summary judgment to both parties. It ruled that the flood deductible applied but that Zurich had waived its right to apply it to any of the events. It also ruled that the policy's suit-against-the-company provision was not a suit-limitation provision that barred First Solar's suit as untimely. The case proceeded to a damages-only trial. During the trial, Zurich moved to strike one of First Solar's witnesses as a sanction, but the district court denied the motion. The jury ultimately returned a verdict for First Solar.

Zurich appeals the district court's partial grant of summary judgment to First Solar and the denial of its motion for sanctions. First Solar asks us to affirm the final judgment based on the jury's

verdict but, alternatively, cross-appeals the district court's partial grant of summary judgment to Zurich.

The central question in this appeal is whether Georgia law permits an insurer in Zurich's situation to take a mulligan—to receive a do-over after messing up the first time. Or, under Georgia law, did Zurich's conduct waive its right to apply the flood deductible after previously applying the water damage deductible?

We conclude that, under Georgia law, because Zurich (1) made a coverage determination that led it to apply a lower, but improper, deductible, and (2) made unconditional payments under that determination without reserving its right to apply the proper deductible later, Zurich waived its right to apply the proper deductible later. As such, Zurich waived the flood deductible for the first three events, but a genuine dispute remains as to whether Zurich waived the flood deductible for the two remaining events.

As to the remaining issues, we conclude that the suit-against-the-company provision is not a suit-limitation provision; the district court did not abuse its discretion in denying Zurich's motion for sanctions; and, absent waiver, the flood deductible applies.

I. BACKGROUND

In 2018, First Solar was building a 1,038-acre solar power plant in Georgia. Prior to construction, First Solar purchased a master builders risk insurance policy from Zurich. The policy provided coverage from August 24, 2017, to August 24, 2020. The policy insured First Solar "against all risks of direct physical loss of or damage to [c]overed [p]roperty while at the location of the [insured

project] and occurring during the [p]olicy or [c]ertificate [t]erm."

A. *Rain Events and Claims Investigation*

The construction project experienced five separate, heavy rain events on or around December 13, 2019; February 5, 2020; February 13, 2020; March 3, 2020; and April 18, 2020. Each rain event resulted in rainwater accumulating on and diffusing over the ground, which damaged solar arrays, access roads, security fences, grading, and other civil, structural, and electrical works.

The policy covers both water and flood damage. "Water damage" and "flood" are both defined in the policy. "Flood" has five separate definitions. One of those definitions is relevant here: "A general and temporary condition of partial or complete inundation of normally dry land areas, including dewatered areas, from . . . [t]he unusual and rapid accumulation or runoff of surface waters from any source." "Water damage" is defined as "[a]ll damage caused by water, whatever the source, whether or not driven by wind, other than that otherwise defined as flood or that resulting from a named storm." If Zurich determines an event was caused by water damage, a $100,000 deductible applies for each event, but if the event is deemed a flood, then a $2.5 million deductible would apply for each event.

Zurich adjuster Scott Klaben was assigned to handle all of First Solar's claims. In February 2020, Klaben visited the project to inspect the damage. Klaben recorded the losses in the claim file as water damage. Klaben was prompted in the claim file system to answer whether the February 5 event was "caused by a flood?"

Klaben marked "No." Additionally, Klaben informed his boss a Zurich claims manager that the first three events each "carrie[d] a $100K deductible." First Solar's insurance broker, John Shaw, testified that he had "several" conversations with Klaben during which Klaben stated that First Solar's claims "were going to be viewed as water damage claims." In June 2020, Klaben approved three $200,000 advance payments to First Solar for the first three events. In advancing these payments, Klaben noted that a $100,000 deductible applied. Zurich did not reserve any right to change its coverage determination before issuing the payments.

On August 4, 2020, Klaben sent First Solar a status report that, for the first time, noted that the events may have been caused by floods and that the flood deductible may apply. The report also contained language that attempted to reserve Zurich's rights. In October 2020, Shaw responded to Klaben's letter outlining multiple reasons why he disputed that the events were caused by floods. From October 2020 to February 2021, Zurich continued to adjust First Solar's claims. Specifically, Zurich's third-party building consultant, MKA, continued to verify First Solar's damages.

By March 10, 2021, Shaw followed up with Klaben about the status of First Solar's claims, and Klaben responded that he was still working on it. On March 22, 2021, Anthony Morris, Zurich's outside counsel, sent a letter to Shaw confirming that Zurich's position was that the flood deductible applied to each rain event individually and, based on MKA's damage assessment, Zurich owed nothing

under the policy because First Solar did not incur damages that exceeded the flood deductible for any of the five events.

B. *Procedural History*

First Solar filed an action against Zurich and, as relevant here, brought state law claims for breach of contract, waiver and estoppel, and reformation. Zurich argued that the action was barred because the policy's suit-against-the-company provision limited the time for filing suit and made First Solar's suit untimely. First Solar moved for partial summary judgment, and Zurich moved for summary judgment. The district court partially granted each party's motion, concluding that, absent waiver, Zurich did not breach the parties' contract because the flood deductible applied, and there was no evidence of mutual mistake to support reformation of the flood deductible. However, the court determined that Zurich waived application of the deductible. The court then permitted First Solar leave to file a successive motion for summary judgment on the suit-against-the-company-provision. The district court granted that motion, ruling that the provision was not a contractual suit-limitation provision that barred First Solar's lawsuit as untimely.

The district court held a five-day jury trial on the sole issue of First Solar's damages. During the trial, Zurich moved to sanction First Solar by striking the testimony of its damages witness, Ted Garrett. The district court denied the motion. The jury returned a verdict in First Solar's favor. The court entered final judgment and

denied Zurich's post-trial motions, prompting the instant cross-appeal.

II. STANDARD OF REVIEW

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "When the parties have filed cross-motions for summary judgment, we review de novo the district court's grant of summary judgment and view the facts in the light most favorable to the non-moving party on each motion." *Cambridge Christian Sch., Inc., v. Fla. High Sch. Athletic Ass'n*, 115 F.4th 1266, 1287 (11th Cir. 2024) (citation modified). "The moving party bears 'the initial responsibility of informing the . . . court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.'" *Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256, 1260 (11th Cir. 2004) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

If the movant shows that no evidence supports the non-moving party's case, "[t]he burden then shifts to the non-moving party, who must go beyond the pleadings, and present affirmative evidence to show that a genuine issue of material fact exists." *Porter v. Ray*, 461 F.3d 1315, 1320 (11th Cir. 2006) (citing *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115–17 (11th Cir. 1993)).

A factual dispute is considered "genuine" only if "a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "If the record presents

disputed issues of fact, we may not decide them; rather, we must deny the motion" and let the case proceed to trial. *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1292 (11th Cir. 2012) (citation modified).

Federal jurisdiction in this matter is based on diversity of citizenship under 28 U.S.C. § 1332(a). The parties do not dispute that Georgia substantive law applies. *See Am. Cas. Co. of Reading v. Etowah Bank*, 288 F.3d 1282, 1285 (11th Cir. 2002). We review a district court's interpretation of an insurance contract de novo. *Id.*

We review "a district court's refusal to grant sanctions under Federal Rule of Civil Procedure 37 for abuse of discretion." *MONY Life Ins. Co. v. Perez*, 146 F.4th 1018, 1026 (11th Cir. 2025).

III. DISCUSSION

Zurich raises three issues on appeal. First, Zurich challenges the district court's interpretation of the policy's suit-against-the-company provision. Second, Zurich argues it did not waive its ability to apply the flood deductible to all the rain events. Finally, Zurich asserts that the district court abused its discretion by denying the motion for sanctions that sought to strike Garrett's testimony.

In its cross-appeal, First Solar maintains that, even without Zurich's waiver, the flood deductible is $100,000 per event. We discuss these issues in turn.

A. *The Suit Against the Company Provision*

The suit against the company provision is contained within a policy endorsement titled "Construction Property General

Conditions." The provision states, in pertinent part, that "[a]ny action or proceeding against the Company for recovery of any loss under this Policy will not be barred if commenced within (**12**) **twelve** months after the **OCCURRENCE*** becomes known to the Named Insured unless a longer period of time is required by applicable statute."

The district court determined, and First Solar maintains on appeal, that this provision is an unambiguous time-expansion provision, akin to a delayed discovery rule. Zurich maintains that the provision acts as an enforceable time bar, like the suit limitation provision that the Supreme Court of Georgia considered in *Encompass Insurance Co. of America v. Friedman*, 682 S.E.2d 694 (Ga. 2009).

The provision at issue in *Encompass* stated that "no action against Encompass can be brought unless the policy provisions have been complied with and the action is started . . . within one year after the date of loss." *Id.* at 696 (citation modified). By contrast, the provision at issue here does not include the "no action . . . can be brought" language, which, had it been included, would have made the provision an enforceable bar to untimely suits under Georgia law. *Id.*

Instead, the provision at issue here is phrased as a guarantee of non-bar within a period, leaving Zurich to argue an implied negative. Grammatically, "will not be barred if" is a negative conditional or negative guarantee. In other words, if the condition is met—that a suit is commenced within twelve months of the occurrence—the provision guarantees that the suit will not be barred.

The provision, read as a whole, does *not* expressly state the converse: that a suit *will be* barred if it is not commenced within twelve months of the occurrence. "It is the function of the [c]ourt to construe a contract of insurance as it is written, and the [c]ourt by construction cannot create a liability not assumed by the insurer, nor make a new contract for the parties, or one different from that plainly intended, nor add words to the contract of insurance to either create or avoid liability." *Pilot Life Ins. Co. v. Morgan*, 94 S.E.2d 765, 768 (Ga. Ct. App. 1956) (citation omitted).

Additionally, Zurich's argument that we should apply the converse interpretation of the provision would introduce ambiguity—it would allow the provision to be interpreted two ways. "[C]ontractual provisions are ambiguous when they are susceptible to more than one meaning, even if each meaning is logical and reasonable." *Wilkinson v. Ga. Farm Bureau Mut. Ins. Co.*, 833 S.E.2d 579, 582 (Ga. Ct. App. 2019). In cases of ambiguity, three rules of contract construction apply: "(1) ambiguities are strictly construed against the insurer as the drafter, (2) exclusions from coverage the insurer seeks to invoke are strictly construed, and (3) the contract is to be read in accordance with the reasonable expectations of the insured when possible." *Id.* Thus, if we were to accept Zurich's position, any ambiguity should be resolved in First Solar's favor.

We agree with First Solar that the provision acts as a delayed discovery rule for the benefit of the insured by permitting a suit within twelve months of becoming aware of an occurrence, even if the occurrence was unknown until after the statute of limitations.

The provision contains only language permitting an action and no language suggesting an intent to limit the time to file an action. *Pilot*, 94 S.E.2d at 768. Accordingly, we conclude that the suit against the company provision is not a suit-limitation provision.

B. *The Flood Deductible*

Zurich argues that Georgia law does not permit waiver of the flood deductible. Their argument goes something like this: Because the deductible provision limits the scope of coverage to losses exceeding the deductible, waiver cannot apply because it would afford coverage to a loss that the policy otherwise would not cover. Alternatively, even if it could waive the flood deductible, a factual dispute remains as to whether it actually did so for the rain events.

First Solar maintains that the deductible provision does not affect whether a loss is covered. Instead, it serves as a contractual payment limitation for Zurich's benefit because Zurich's obligation to pay for a covered loss does not arise until the deductible is met. First Solar cites *Sargent v. Allstate Insurance Co.*, 303 S.E.2d 43 (Ga. Ct. App. 1983), in support of its argument that the flood deductible can be waived. We agree with First Solar.

1. Georgia Law Permits Waiver

Resolving this issue requires us to consider two interrelated questions of first impression under Georgia law concerning the deductible provision: (1) whether the provision operates as a

limitation on Zurich's obligation to pay for a covered loss or, instead, a limitation on the policy's scope of coverage; and (2) if it operates as a limitation on Zurich's obligation to pay, whether the flood deductible may be waived.

When the Supreme Court of Georgia has not spoken on a topic, "we must predict how [it] would decide th[e] case." *Turner v. Wells*, 879 F.3d 1254, 1262 (11th Cir. 2018). "Decisions of the intermediate appellate courts . . . provide guidance for this prediction," and generally, "we must follow the decisions of these intermediate courts" unless "persuasive evidence demonstrates that the highest court" would reach a different conclusion than the intermediate appellate court. *Id.*

To resolve the first question, we begin by looking to the policy language and applying Georgia's established rules governing the interpretation of insurance contracts. In Georgia, insurance is a matter of contract, so "when the provisions of an insurance policy are clear and unambiguous," we apply their plain meaning. *Taylor Morrison Servs., Inc. v. HDI-Gerling Am. Ins. Co.*, 746 S.E.2d 587, 590 (Ga. 2013).

The first section of the policy is titled "**SECTION I - COVERAGE AND EXCLUSIONS**." [**R200-1:14**] The "Coverage" provision is under the "INSURING AGREEMENT" subsection, and it states that the policy covers "all risks of direct physical loss of or damage to [c]overed [p]roperty" located at the project and occurring during the policy term, subject to the exclusions, limitations, and conditions contained in the policy. Section I also contains

an "EXCLUSIONS" section that states Zurich would not "pay for loss, damage or expense caused by, resulting from, contributed to or made worse by" several specified risks. For example, loss or damage arising from any fungus is specifically excluded from coverage in that section. But there is no language in the Coverage and Exclusions section that conditions coverage on the loss exceeding the applicable deductible.

The second section of the policy is titled "**SECTION II - RATES AND DEDUCTIBLES / RATING CONDITIONS**." [**R200-1:24**] Therein is a subsection titled "RATING CONDITIONS," and within that subsection is a sub-subsection titled "APPLICATION OF DEDUCTIBLES" that contains several deductible provisions. The provision Zurich relies on provides that the applicable deductible "shall be deducted from the amount of each claim and the liability of the Company shall be only for the amount of such *insured loss* or damage in excess thereof," subject to the policy's limits. (emphasis added). Zurich maintains this language means a loss is not covered until the insured's amount of loss exceeds the deductible. We disagree with this reading.

The phrase "shall be deducted from the amount of each claim" requires subtraction of the deductible from the "amount of each claim." It therefore identifies the deductible as an amount to be subtracted from a claim, not as a condition that determines whether the underlying loss is covered. The phrase then provides that "the liability of the Company shall be only for the amount" of the "insured loss or damage" remaining "in excess thereof." Here,

"the liability of the Company" is the subject of the sentence, and "shall be only for the amount" limits that liability to a specified amount. The phrase "such insured loss or damage" identifies the loss for which Zurich is liable. The adjective "insured" describes the loss or damage, not the deductible. Finally, "in excess thereof" limits Zurich's liability to the portion of the insured loss or damage that remains after the deductible is applied.

We therefore conclude that the provision establishes a method for calculating Zurich's liability to pay for an insured loss: The deductible is subtracted from the amount of the claim, and Zurich is liable only for the resulting amount. *Pilot*, 94 S.E.2d at 768. Nothing in the provision states that a loss must exceed the deductible to qualify as an "insured loss," that a loss below the deductible is excluded from coverage, or that the deductible operates as a threshold to coverage. *Id.*

The policy's structure supports our interpretation. The deductible provision appears under "Application of Deductibles," within the "Rating Conditions" subsection of the "Rates and Deductibles/Rating Conditions" section. Those provisions primarily address the amount Zurich must pay for a covered loss. The policy addresses coverage elsewhere, in the "Coverage and Exclusions" section. Read as a whole, the policy treats the deductible as a limitation on the amount Zurich pays for a covered loss, not as a limitation on coverage.

Moreover, Zurich does not dispute that "a deductible defines when an insurer's payment obligation begins." "Most

property insurance policies contain one or more deductibles that can affect the amounts payable under that policy. A deductible is a portion of a covered loss that is not paid by the insurer." Richard J. Cohen et al., *The Insured's Share of the* Loss, 5 New Appleman on Insurance Law Library Edition § 47.03. Although the Supreme Court of Georgia has previously cited an earlier edition of Appleman, it has recognized Appleman as a "leading treatise on insurance." *Love v. Money Tree, Inc.*, 614 S.E.2d 47, 49 n.8 (Ga. 2005). Accordingly, we conclude that the policy's deductible provision limits the amount Zurich must pay for a covered loss, but it does not limit the policy's coverage. *Turner*, 879 F.3d at 1262.

To resolve the second question, whether the flood deductible may be waived, we turn to Georgia's established principles governing the waiver of contractual provisions. Under Georgia law, "[a]n insurer may waive any provision in an insurance policy inserted for its benefit, and may waive any condition or limitation in the policy upon which it could otherwise rely." *Sargent*, 303 S.E.2d at 46. However, "[t]he doctrines of implied waiver and estoppel, based upon the conduct or action of the insurer, or its agent, are not available to bring within the coverage of a policy risks not covered by its terms, or risks expressly excluded therefrom." *Id.* at 45–46 (citation modified).

The parties do not dispute that a loss caused by a "flood" is covered by the policy. Thus, "waiver of [the flood deductible] in no way results in an expansion of the coverage so as to include a risk not assumed by the insurer." *Id.* at 46. Nor is this a case in which

waiver would bring an expressly excluded risk, such as loss caused by fungus, within the policy's coverage. *Id.* at 45–46. The flood deductible "is a condition imposed for the benefit of [Zurich], and is, therefore, subject to waiver." *Id.* at 46; *see also* New Appleman on Insurance § 47.03 ("Deductibles are a risk financing technique that requires the insured to retain a portion of the loss that is otherwise being transferred to an insurer."). The deductible can also be waived because it is a payment "limitation in the policy upon which [Zurich] could otherwise rely." *Sargent*, 303 S.E.2d at 46.

Accordingly, we conclude that Zurich could waive the flood deductible. *Turner*, 879 F.3d at 1262. We will now explain why we find that Zurich waived the deductible for the first three rain events, but a genuine dispute remains as to whether Zurich waived the deductible for the two remaining events.

2. The Rain Events

"Waiver is the voluntary relinquishment of a known right and may be established by express statements or implied by conduct." *Kennestone Hosp. v. Hopson*, 538 S.E.2d 742, 745 (Ga. 2000). Implied waiver can be "shown by a party's decisive, unequivocal conduct reasonably inferring the intent to waive." *Id.* (citation modified). "[N]ormally the question of waiver is a matter for the jury, [but] where the facts and circumstances essential to the waiver issue are clearly established, waiver becomes a question of law." *C&M Enters. of Ga., LLC v. Williams*, 816 S.E.2d 44, 51 (Ga. Ct.

App. 2018) (citation modified).

The following facts are not disputed. Zurich, as the insurer that drafted and administered the policy, knew the policy's definition of "flood" and "water damage" and the different deductibles applicable to each. Klaben inspected the property in February 2020. The day after his inspection, Klaben recorded the losses in the claim file as water damage. Shaw, First Solar's insurance broker, testified that he had "several" conversations with Klaben during which Klaben stated that First Solar's claims would be viewed as water damage claims. Klaben specifically answered "no" when prompted in the claim file system to answer whether the February 5 event was caused by a flood. Klaben noted in an email to a Zurich claims manager that the first three events each carried a $100,000 deductible. In June 2020, Klaben issued First Solar three $200,000 checks as advance payments for the first three rain events, treating the losses as covered water damage. Zurich made the payments unconditionally and did not reserve its rights to change its coverage determination or apply a different deductible. *See Sargent*, 303 S.E.2d at 866–67.

Viewing the undisputed facts in Zurich's favor, First Solar met its initial burden to show that there is no genuine dispute that Zurich knew of and impliedly waived its right to apply the flood deductible to the first three events through Klaben's conduct and the unconditional payments. *Id.*; *Hickson*, 357 F.3d at 1260.

We must now consider whether Zurich has presented affirmative evidence that, viewed in its favor, creates a genuine

dispute as to whether its conduct reasonably indicated an intent to waive the deductible. *Porter*, 461 F.3d at 1320. We conclude that Zurich has not met its burden. Klaben was never deposed, and Zurich did not present evidence identifying the basis for the change in coverage determination. In response to First Solar's motion, Zurich identifies no record evidence that would allow a reasonable jury to find that its conduct did not reasonably indicate an intent to waive the flood deductible. Instead, Zurich relied solely on its legal argument that Georgia law does not permit waiver of a deductible.

For the first time on appeal, Zurich maintains that the August 4, 2020, status report, and the testimony of First Solar's corporate representative about his understanding of the report, create a genuine factual dispute as to whether it waived the flood deductible. We will assume that Zurich preserved this argument. Even so, the letter "is wholly ineffective to prevent a waiver that has already occurred." *Sargent*, 303 S.E.2d at 47. Viewing the undisputed evidence in Zurich's favor, at the latest, Zurich waived the deductible for the first three rain events on June 11, 2020, when it issued the checks under its water-damage coverage determination without reserving its right to challenge that determination. "Once [Zurich] waived the policy conditions as to [applying the flood deductible], the condition could not be reclaimed." *Id.*

In a last-ditch effort, Zurich argues for the first time on appeal in its reply brief that Klaben lacked the authority to waive the deductible. This argument was not presented to the district court or raised in Zurich's opening brief. Accordingly, we do not

consider this argument. *See United States v. Oakley*, 744 F.2d 1553, 1156 (11th Cir. 1984) ("Arguments raised for the first time in a reply brief are not properly before the reviewing court.").

Thus, we find no genuine dispute that Zurich waived application of the flood deductible for the first three rain events. Because "the facts and circumstances essential to the waiver issue are clearly established," we affirm the district court's summary judgment ruling that Zurich waived the flood deductible for the December 13, 2019, February 5, 2020, and February 13, 2020, rain events. *Williams*, 816 S.E.2d at 51.

But as to the last two rain events, we conclude that First Solar failed to show that no genuine dispute exists as to whether Zurich waived the flood deductible. In its summary judgment motion, First Solar argues that Klaben's issuance of the payments for the first three events establishes waiver for all five events. First Solar further maintains that waiver, as a matter of law, for each event is established because the August 4, 2020, status update did not expressly state that Zurich changed its position or that the flood deductible applied—and even if it did, the status update could not save Zurich from waiving its prior position.

First Solar's corporate representative testified that the status update "was the first time that [it was] formally notified that [Zurich was] going to apply the deductible related to flood instead of what was being previously applied in relation to water damage." The parties do not dispute that Zurich did not make any advance payments for the last two events before it sent the status update.

And Klaben's actions supporting waiver as a matter of law all pertained to claims adjustment decisions he made regarding the first three events.

Viewing the evidence in Zurich's favor, we cannot say "the facts and circumstances essential to the waiver issue [for the last two rain events] are clearly established." *Id.* Thus, we conclude that a factual question remains for a jury to decide: whether Zurich impliedly waived its ability to apply the flood deductible to the March 3, 2020, and April 18, 2020, rain events based on Zurich's conduct before it sent the August 4, 2020, status update. *Id.* Accordingly, we reverse the district court's summary judgment ruling as to the last two rain events. As a result, we need not decide whether Zurich preserved its factual waiver arguments for appeal. *See Fitzpatrick*, 2 F.3d at 1116 ("If the party moving for summary judgment fails to discharge the initial burden, then the motion must be denied and the court need not consider what, if any, showing the non-movant has made.").

At the conclusion of the trial, the district court entered a comprehensive order and judgment that separates the damages and prejudgment interest awarded per event. We affirm the portions of the judgment awarding damages and prejudgment interest for the first three events and vacate the portions of the judgment awarding damages and prejudgment interest for the last two events.

C. *Zurich's Motion for Sanctions*

Zurich maintains that the district court abused its discretion

by denying Zurich's motion to strike First Solar's first witness at trial, Ted Garrett. Garrett testified regarding First Solar's damages. Specifically, he testified that he was the senior project manager for the project and approved contractor invoices and change orders after the events. Additionally, Garrett testified that the documentation reflecting approved invoices and change orders was stored in First Solar's project information system, referred to as PIMS. On the fourth day of trial and two days after Garrett testified, Zurich filed a motion to exclude and strike Garrett's testimony.

Zurich argues that First Solar's purported failure to disclose Garrett's role as project manager and the documents contained in PIMS amounted to a failure to disclose information related to its damages, in violation of Federal Rules of Civil Procedure 26(a), (e), and 37(c). First Solar responds that it properly disclosed the documents it relied on to determine its damages. And Zurich waived any objection to Garrett's testimony by filing its sanction motion two days after he testified and by stipulating it did not dispute the damages amount before trial.

Rule 37(c) prohibits a party from presenting a witness or using information at trial that should have been disclosed under Rule 26(a) or (e). Fed. R. Civ. P. 37(c). Zurich does not dispute that First Solar disclosed Garrett in its initial disclosures and that he was listed as a will-call witness in the court's pretrial order.

Additionally, during discovery and almost two years before trial began, a former First Solar employee stated that Garrett was the project manager when Zurich's counsel questioned him during

a deposition. Zurich's contention that it was unaware of the documents contained in PIMS is contradicted by the exhibits it introduced at trial and produced during discovery. For example, Zurich introduced a weekly report regarding the status of construction at the project that contained a section titled "PIMS Documentation." And during discovery, Zurich produced a copy of a subcontract between First Solar and another entity that stated the subcontractor should use PIMS "for transmitting and receiving [p]roject related documents and correspondence." Zurich has not identified any information that was not disclosed. Therefore, we conclude that the district court did not abuse its discretion by denying Zurich's motion for sanctions.

D. *First Solar's Cross-Appeal*

In its cross-appeal, First Solar maintains that the applicable deductible, even without Zurich's waiver, was $100,000. It provides three reasons in support of the argument: (1) The plain language of the policy makes clear that the applicable deductible is $100,000; (2) even if the policy's language does not make clear that the $100,000 deductible applies, it presented sufficient evidence for a jury to reform the policy certificate based on the parties' mutual misunderstanding of the flood zone applicable to the insured project; and (3) a reasonable jury could conclude that Zurich did not meet its burden to prove that rainwater accumulating over several days was "rapid" and that similar rainstorms occurring almost monthly were "unusual" as defined in the policy. We discuss why

we reject each argument in turn.

1. Plain Language

The policy designates different flood levels on a scale of 1 to 3, with 1 as the highest-risk area. First Solar argues that the policy's plain language makes clear that the $100,000 deductible applies because it built the solar field in a flood level 3 area, which requires a $100,000 deductible, rather than in a flood level 1 area, which requires a $2.5 million deductible. But this misreads the policy.

The policy states that the applicable deductibles are provided in the schedule of rates and deductibles. The schedule of rates and deductibles contains the deductible amounts for flood levels 1 and 3, but it does not state what flood level and corresponding deductible apply to the project. That information is provided in the project certificate.

The master builders risk policy covers more than the project at issue in this appeal. When an insured obtains insurance coverage under such a policy, each project is underwritten on a per-project certificate basis and is subject to the terms and conditions of the master builders risk policy. *See Cherokee Credit Life Ins. Co. v. Baker*, 168 S.E.2d 171, 174 (Ga. Ct. App. 1969) ("The policy and the certificate are interlocked . . . [c]ontemporaneous instruments, each affecting and controlling the same subject-matter the two writings may be considered as essential, indivisible parts of one contract." (citation modified)). A review of the project certificate shows that the $2.5 million flood deductible applied to the project.

First Solar seeks to rely on extrinsic evidence to support the contention that the solar field was built in a flood level 3 area where a $100,000 deductible applies. But extrinsic evidence may be considered only to determine the parties' intent when a contract is ambiguous. *See Peaches Land Tr. v. Lumpkin Cnty. Sch. Bd.*, 648 S.E.2d 464, 467 (Ga. Ct. App. 2007) (explaining that "extrinsic evidence may be considered to determine the parties' intent with respect to an ambiguous contract"). First Solar fails to show the contract is ambiguous in this regard.

When drafting the project certificate, John Hernandez, Zurich's underwriter, determined that flood level 1 applied to the entire project because a portion of the site was in that level. Hernandez informed Zurich's insurance broker of this determination, and the insurance broker informed First Solar's risk manager that the policy would be written in such a manner. Moreover, when Hernandez was determining what the flood deductible should be, he did not know the specific location of the project on the larger site. Accordingly, we find that the plain language of the policy and the evidence in the record do not establish that the flood level 3 deductible should apply.

2. Reformation

First Solar argues it presented sufficient evidence for a jury to reform the policy based on mutual mistake—Zurich's allegedly erroneous flood level 1 deductible determination. "Reformation of a contract is an equitable remedy for correcting an instrument to make it express the true intention of the parties, where from some

cause, such as fraud, accident, or mistake, it does not express such intention." *Occidental Fire & Cas. of N.C. v. Goodman*, 793 S.E.2d 606, 608 (Ga. Ct. App. 2016). "Where reformation is sought on the ground of mutual mistake, it must, of course, be proved to be the mistake of both parties." *CS-Lakeview at Gwinnett, Inc. v. Simon Prop. Grp., Inc.*, 659 S.E.2d 359, 361 (Ga. Ct. App. 2008) (citation modified). "The power to relieve mistakes shall be exercised with caution; to justify it, the evidence shall be clear, unequivocal, and decisive as to the mistake." *Id.* (quoting Ga. Code Ann. § 23-2-21). "Thus, the burden on the party attempting to prove mutual mistake is a 'heavy' one." *First Chatham Bank v. Liberty Cap., LLC*, 755 S.E.2d 219, 224 (Ga. Ct. App. 2014) (quoting *Hall v. Hall*, 693 S.E.2d 624, 626 (Ga. Ct. App. 2010)).

First Solar contends that reformation of the policy is appropriate because the parties were mutually mistaken in determining the flood deductible, which should have been based on the portion of the site where the solar field was going to be built. But, as mentioned, Hernandez testified he made the final flood zone determination based on the entire site. First Solar's insurance broker and risk manager confirmed these understandings. Therefore, we find no clear, unequivocal, and decisive evidence of mutual mistake regarding the flood level determination. *CS-Lakeview*, 659 S.E.2d at 361.

3. The Words "Unusual" and "Rapid"

First Solar contends that a genuine dispute exists as to whether Zurich proved the rain events were caused by flood. As a

reminder, the policy defines "flood" as "a general and temporary condition of partial or complete inundation of normally dry land areas, including dewatered areas, from the unusual and rapid accumulation or runoff of surface waters from any source." The words "unusual" and "rapid" are undefined in the policy. Specifically, First Solar argues that, because the rainwater accumulated over several days and Zurich did not calculate the water's velocity or rate of flow, a reasonable jury could conclude that the rainwater did not accumulate rapidly. But such calculations are not necessary and do not create a genuine factual dispute.

When interpreting an insurance policy, we apply the widely accepted definition of the term and rely on dictionaries to supply that meaning. *See Alea London Ltd. v. Lee*, 649 S.E.2d 542, 544 (Ga. Ct. App. 2007) ("In determining the meaning of words used in the insurance policy, dictionaries supply the plain, ordinary, and popular sense."(citation modified)). The Oxford English Dictionary defines "rapid" as "quick, swift, fast."[1] Viewing the evidence in the light most favorable to First Solar, Zurich presented sufficient evidence to show that each separate rain event caused the rapid accumulation of surface water. *See Selective Way Ins. Co. v. Lit. Tech, Inc.*, 606 S.E.2d 68, 70 (Ga. Ct. App. 2004) (explaining that the widely accepted definition of surface water includes water derived from falling rain).

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[1] *Rapid*, Oxford English Online Dictionary, https://www.oed.com/dictionary/rapid_adj?tab=meaning_and_use&tl=true#26665542, [https://perma.cc/CTG7-WUAJ].

First Solar also contends that the jury should decide whether the rain events themselves were unusual or uncommon, given that such events occurred monthly. We reach the same conclusion as the district court: In the flood definition, the phrase "unusual and rapid accumulation" modifies "surface waters from any source." The parties did not dispute that the project sat on normally dry land. Therefore, any rapid accumulation would be unusual. Accordingly, we find that but for Zurich's waiver, the flood deductible applied.

IV. CONCLUSION

The district court's judgment is **AFFIRMED IN PART AND VACATED IN PART**. The judgment is **VACATED** as to the March 3, 2020, and April 18, 2020, rain events. The judgment is **AFFIRMED** as to all remaining issues. The case is **REMANDED** to the district court for further proceedings consistent with this opinion.