an evidentiary hearing." That order effectively disposed of all matters then pending before the court.

CONCLUSION

For the reasons discussed, we affirm the judgment of the district court dismissing McGhee's motion for postconviction relief without an evidentiary hearing.

AFFIRMED.

D & S REALTY, INC., APPELLANT, V. MARKEL INSURANCE COMPANY, A CORPORATION, APPELLEE.

789 N.W.2d 1

Filed September 10, 2010. No. S-09-642.

1. **Insurance: Contracts.** The interpretation of an insurance policy is a question of law.
2. **Statutes.** The interpretation of a statute is a question of law.
3. **Judgments: Appeal and Error.** An appellate court reviews questions of law independently of the lower court's conclusion.
4. **Equity: Estoppel.** Although a party can seek equitable estoppel in both legal and equitable actions, as its name implies, it is a judicial doctrine that is equitable in nature.
5. **Insurance: Contracts.** Insurance contracts, like other contracts, are to be construed according to the meaning of the terms which the parties have used.
6. ____: ____. When the terms of an insurance contract are clear, a court should not resort to rules of construction. Instead, the court will give the terms their plain and ordinary meaning as a reasonable person in the insured's position would understand them.
7. ____: ____. In an insurance policy, conditions precedent are those which relate to the attachment of the risk, meaning whether the agreement is effective.
8. ____: ____. Conditions subsequent in an insurance policy are those which pertain to the contract of insurance after the risk has attached and during the existence thereof; that is, those conditions which must be maintained or met after the risk has commenced, in order that the contract may remain in full force and effect. Clauses which provide that a policy shall become void or its operation defeated or suspended, or the insurer relieved wholly or partially from liability upon the happening of some event, or the doing or omission to do some act, are not conditions precedent, but conditions subsequent.
9. **Insurance: Contracts: Liability: Words and Phrases.** An exclusion in an insurance policy is a limitation of liability, or a carving out of certain types of loss, to which the insurance coverage never applied.

10. **Insurance: Contracts.** Vacancy clauses in insurance policies are "increased hazard" provisions and function as conditions subsequent.
11. **Insurance: Contracts: Breach of Contract: Statutes.** Statutory provisions like Neb. Rev. Stat. § 44-358 (Reissue 2004) that limit an insurer's ability to avoid liability for breach of increased-hazard conditions exist because the conditions are often so broad that an insured's violation of them is not causally relevant to the loss.
12. **Insurance: Contracts: Case Overruled.** Regardless of an insurer's labeling, a clause that requires an insured to avoid an increased hazard is a condition subsequent for coverage, overruling *Omaha Sky Divers Parachute Club, Inc. v. Ranger Ins. Co.*, 189 Neb. 610, 204 N.W.2d 162 (1973), and *Krause v. Pacific Mutual Life Ins. Co.*, 141 Neb. 844, 5 N.W.2d 229 (1942).
13. **Insurance: Contracts: Warranty.** To the extent that Nebraska law permits an insured's statements in the negotiation for a contract to be treated as warranties, the first sentence of Neb. Rev. Stat. § 44-358 (Reissue 2004) applies only to warranties that function as conditions precedent to the policy's being effective.
14. ____: ____: ____. Warranties that are relevant to an insurance policy's being effective are classified as "affirmative" warranties.
15. **Insurance: Contracts: Warranty: Breach of Contract.** The first and second sentences of Neb. Rev. Stat. § 44-358 (Reissue 2004) are mutually exclusive in their application, and the contribute-to-the-loss standard of the second sentence applies to breaches of conditions after the risk attaches and the insurance policy is effective. That is, the contribute-to-the-loss standard applies to breaches of conditions subsequent and continuing warranties that function as conditions subsequent.
16. **Insurance: Contracts: Warranty: Words and Phrases.** A promissory warranty is one by which the insured stipulates that something shall be done or omitted after the policy takes effect and during its continuance, and has the effect of a condition subsequent.
17. **Insurance: Contracts.** For insurance policies, the term condition subsequent comprises both preloss conditions, to which the contribute-to-the-loss standard applies, and postlost conditions, to which the standard does not apply.
18. **Insurance: Contracts: Warranty: Case Overruled.** The contribute-to-the-loss standard in the second sentence of Neb. Rev. Stat. § 44-358 (Reissue 2004) applies to preloss conditions subsequent and promissory warranties, overruling *Coppi v. West Am. Ins. Co*., 247 Neb. 1, 524 N.W.2d 804 (1994).
19. **Insurance: Contracts.** A vacancy clause in an insurance contract is not an exclusion; it is a condition subsequent to which the contribute-to-the-loss standard applies.
20. **Insurance: Contracts: Waiver: Equity: Estoppel.** Waiver and estoppel are distinct legal concepts, but Nebraska courts do not strictly apply the elements of equitable estoppel when an insured claims that an insurer has waived a policy provision.
21. **Insurance: Contracts: Waiver: Estoppel.** If the evidence shows that the insurer has waived a policy provision, it may be estopped from denying liability where, by its course of dealing and the acts of its agent, it has induced the insured to pursue a course of action to his or her detriment.

22. **Waiver: Words and Phrases.** A waiver is a voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct.
23. **Insurance: Contracts: Waiver.** An insurer may waive any provision of a policy that is for the insurer's benefit, including vacancy provisions.
24. **Waiver: Estoppel.** Ordinarily, to establish a waiver of a legal right, there must be a clear, unequivocal, and decisive act of a party showing such a purpose, or acts amounting to an estoppel on his or her part.
25. **Contracts: Waiver.** A party may waive a written contract in whole or in part, either directly or inferentially.
26. **Contracts: Waiver: Proof.** A party may prove the waiver of a contract by (1) a party's express declarations manifesting the intent not to claim an advantage or (2) a party's neglecting and failing to act so as to induce the belief that it intended to waive.
27. **Insurance: Contracts: Waiver.** Whether an insurer may waive an increased hazard condition does not depend upon whether the insured's breach of the condition occurred before or after the risk attached.
28. **Insurance: Contracts: Warranty: Breach of Contract: Liability.** When an insurer knows of a breach of condition or warranty that permits it to treat the policy as void, and the insurer continues to accept premiums, its conduct shows its intent to treat the policy as valid despite the breach. But waiver does not apply when the insured's breach of an increased hazard provision did not result in an absolute forfeiture of the policy and the insurer continues to be liable for loss from other covered causes.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Charles F. Gotch, James D. Garriott, and David A. Blagg, of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Richard J. Gilloon and Heather Veik, of Erickson & Sederstrom, P.C., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

I. SUMMARY

Appellant, D & S Realty, Inc. (D&S), owned a building known as the North Tower, located in Omaha, Nebraska. Markel Insurance Company (Markel) insured the building. After the building incurred water damage, Markel denied liability. Markel claimed that D&S violated a policy clause which

provided that Markel would not be liable for water damage if the insured property had been vacant for more than 60 consecutive days before the loss or damage occurred.

At the heart of D&S' breach of contract action is the interpretation and application of Neb. Rev. Stat. § 44-358 (Reissue 2004). Section 44-358, in part, precludes an insurer from denying liability for an insured's breach of a warranty or condition unless the breach existed at the time of the loss and contributed to the loss. Before trial, D&S argued that the contribute-to-the-loss standard applied to its alleged breach of the vacancy provision. It alleged the breach did not contribute to the loss. Markel countered that the statute did not apply. The court agreed with Markel.

At trial, the court found as a matter of law that the policy was in effect and that the building was vacant for more than 60 days. The court also refused to instruct the jury on, or to allow D&S to argue, the following: (1) § 44-358 prevented Markel from denying liability based upon the vacancy clause; or (2) Markel waived the provision or was estopped from denying liability because it had accepted premiums after learning that the building was vacant.

The only issues before the jury were whether Markel had wrongfully denied coverage or whether the policy terms excluded D&S' loss. The jury returned a verdict for Markel.

We conclude that the court erred in ruling that § 44-358 did not apply to the vacancy clause. Because it applied, the court should have allowed the jury to decide whether D&S' breach of the vacancy clause contributed to the loss. But we conclude that the court did not err in refusing to instruct the jury on D&S' claim of waiver and estoppel.

II. BACKGROUND

In January 2003, in preparation for renovations, a D&S employee turned off the heating system. But he did not drain the pipes or put in antifreeze to prevent damage. Three days later, the pipes burst and the building sustained water damage.

D&S claimed the loss under its insurance policy. The policy provided coverage for damage to the North Tower and personal

property resulting from covered causes of loss, subject to various conditions and exclusions. The "Loss Conditions" section contained a "Vacancy" clause. It provided that "[i]f the building where loss or damage occurs has been vacant for more than 60 consecutive days before loss or damage occurs," Markel would not pay for any loss caused by listed items, including water damage, "even if they are Covered Causes of Loss." The vacancy clause separately defined "vacant" for owners of buildings: "(b) . . . Such building is vacant when 70% or more of its square footage: (i) Is not rented; or (ii) Is not used to conduct customary operations. (2) Buildings under construction or renovation are not considered vacant."

And a Nebraska endorsement to the policy provided, in relevant part, that "[a] breach of warranty or condition will void the policy if such breach exists at the time of loss and contributes to the loss."

When D&S sought recovery under the policy, it represented that the North Tower was 60-percent vacant. But Markel determined that when the loss occurred, the North Tower had only a 5-percent occupancy and had less than a 30-percent occupancy for more than 60 days before the loss. Markel denied D&S' claim.

D&S sued for breach of the insurance contract. It alleged that Markel breached its obligations in denying coverage for the water damage. Markel denied that it breached any obligations. It affirmatively alleged that the policy did not cover D&S' loss because D&S failed to comply with the vacancy clause. It also claimed that D&S' loss was not covered under a limitation provision.

After Markel filed its answer, D&S moved for leave to file a reply.[1] In its proposed reply, D&S alleged that waiver and estoppel barred Markel's vacancy clause defense. D&S also claimed that § 44-358 barred Markel's vacancy clause defense because D&S' alleged breach of the condition had not contributed to the loss.

In ruling on the reply, the court permitted D&S to file it, but limited the reply to D&S' waiver and estoppel claims.

[1] See Neb. Ct. R. Pldg. § 6-1107.

It sustained Markel's objection to D&S' § 44-358 claim. Later, D&S moved for leave to file an amended reply. But the court reaffirmed its earlier order striking D&S' § 44-358 claim. It determined that the statute did not apply. The court did not state whether the vacancy clause was a condition or exclusion.

At trial, the evidence showed that in October 2002, 3 months before the loss, Markel's inspection revealed that the following parts of the building were occupied: the 10th floor of the building, the penthouse, two apartments on the 9th floor, one apartment on the 8th floor, one commercial office on the 3rd floor, and one commercial office on the 1st floor. The inspector concluded that the building was 80-percent unoccupied. The inspector also reported that 85 percent of the interior of the North Tower was "unfinished," or under construction. D&S, however, claimed that Markel knew of the building's percentage of occupancy before the loss, but had not informed D&S of the possible insurance consequences. D&S argued that because of this, Markel had waived the vacancy provision or should be estopped from asserting it to deny liability.

Markel moved for a directed verdict on several issues. The court determined, as a matter of law, that the insurance policy was in effect when the loss occurred and that the North Tower was more than 70-percent vacant for more than 60 days preceding the loss. In addition, the vacancy clause contained an exception for buildings under construction or renovation. The court ruled that whether the North Tower was under construction or renovation when the loss occurred was a fact question for the jury. And it took under advisement whether waiver and estoppel applied. But after Markel rested, the court ruled that they did not apply and that D&S could not argue waiver or estoppel to the jury. The court also ruled that § 44-358 did not apply to D&S' breach of the vacancy clause. It refused to instruct the jury on whether § 44-358 precluded Markel from avoiding liability and on waiver and estoppel. The jury returned a verdict for Markel.

D&S moved for judgment notwithstanding the verdict and for a new trial. The court denied both motions.

III. ASSIGNMENTS OF ERROR

D&S argues that the district court erred in refusing to submit to the jury whether (1) under § 44-358, the breach of the vacancy clause existed at the time of the loss and contributed to the loss; (2) Markel waived the provisions of the policy regarding occupancy; and (3) Markel was estopped from raising the policy provisions regarding occupancy as a defense. D&S also alleges that the court erred in denying its motion for judgment notwithstanding the verdict and its motion for a new trial.

IV. STANDARD OF REVIEW

[1-3] The interpretation of an insurance policy is a question of law[2]; the interpretation of a statute is also a question of law.[3] And we review questions of law independently of the lower court's conclusion.[4]

[4] Although a party can seek equitable estoppel in both legal and equitable actions, as its name implies, it is a judicial doctrine that is equitable in nature.[5] It is true that a jury in an equitable action serves only in an advisory role.[6] And we have stated that when the jury's role is advisory only, the trial court cannot commit reversible error in the giving or refusing of instructions.[7] But here the trial court ruled as a matter of law that waiver or estoppel did not apply to these facts. So we also review that ruling as a question of law.

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[2] *Copple Constr. v. Columbia Nat. Ins. Co.*, 279 Neb. 60, 776 N.W.2d 503 (2009).

[3] See *State ex rel. Amanda M. v. Justin T.*, 279 Neb. 273, 777 N.W.2d 565 (2010).

[4] See *Dutton-Lainson Co. v. Continental Ins. Co.*, 279 Neb. 365, 778 N.W.2d 433 (2010).

[5] *Burns v. Nielsen*, 273 Neb. 724, 732 N.W.2d 640 (2007); 1 Dan B. Dobbs, Dobbs Law of Remedies § 2.3(5) (2d ed. 1993); 28 Am Jur. 2d *Estoppel and Waiver* § 1 (2000).

[6] See *Wolf v. Walt*, 247 Neb. 858, 530 N.W.2d 890 (1995). But see *Billingsley v. BFM Liquor Mgmt.*, 259 Neb. 992, 613 N.W. 2d 478 (2000).

[7] See *In re Estate of Layton*, 212 Neb. 518, 323 N.W.2d 817 (1982), citing *Peterson v. Estate of Bauer*, 76 Neb. 652, 107 N.W. 993 (1906).

V. ANALYSIS

D&S does not contest the district court's conclusion that the building was more than 70-percent vacant for more than 60 days preceding the loss. Nor does D&S contest the jury's implicit finding that the building was not under construction or renovation. D&S only argues that the court erred in failing to instruct the jury on whether under § 44-358, the breach of the vacancy clause contributed to the loss, and on whether the doctrines of waiver or estoppel prevented Markel from denying liability based upon the vacancy clause.

1. Applicability of § 44-358

D&S argues that the vacancy clause is a condition under the policy and, therefore, § 44-358 applies. It argues that because § 44-358 applies, whether its breach of the condition contributed to the loss was an issue for the jury. The second sentence of § 44-358 imposes a contribute-to-the-loss standard for breaches of insurance warranties and conditions:

> The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability, unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding.

Markel views the matter differently. It argues that § 44-358 does not apply. Although Markel included the vacancy clause in the "Loss Conditions" section of the policy, it argues that this label is not determinative. It contends that we should look to the language of the clause to determine the parties' intent. Markel contends that the vacancy clause functions as an exclusion; thus, § 44-358 does not apply.

[5,6] We agree that we must determine the vacancy clause's purpose and function from the plain language of the policy. Insurance contracts, like other contracts, are to be construed according to the meaning of the terms which the parties have used. Yet, when the terms of an insurance contract are clear, we should not resort to rules of construction. Instead, we will give the terms their plain and ordinary meaning as a reasonable person in the insured's position would

understand them.[8] Neither party contends that the policy was ambiguous.

Whether the contribute-to-the-loss standard under § 44-358 applies depends on the vacancy clause's purpose and function. And the purpose and function of an insurance provision can only be determined with an understanding of the relevant terms.

(a) A Vacancy Clause Is a Condition Subsequent, Not an Exclusion

[7,8] A notable insurance treatise divides insurance policy conditions into "conditions precedent" and "conditions subsequent."[9] In an insurance policy, "[c]onditions precedent are those which relate to the attachment of the risk," meaning whether the agreement is effective.[10] Examples include conditions that the applicant satisfy the requirements of the insurability, be in good health for life and health policies, and pay the required premium. In addition, an applicant must "answer all questions in the application to the best of the applicant's knowledge and belief."[11] In contrast, conditions subsequent in an insurance policy

> are those which pertain to the contract of insurance after the risk has attached and during the existence thereof; that is, those conditions which must be maintained or met after the risk has commenced, in order that the contract may remain in full force and effect. Clauses which provide that a policy shall become void or its operation defeated or suspended, or the insurer relieved wholly or partially from liability upon the happening of some event, or the doing or omission to do some act, are not conditions precedent, but conditions subsequent and are matters of defense to be pleaded and proved by insurer.[12]

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[8] See, *Rickerl v. Farmers Ins. Exch.*, 277 Neb. 446, 763 N.W.2d 86 (2009); *Olson v. Le Mars Mut. Ins. Co.*, 269 Neb. 800, 696 N.W.2d 453 (2005).

[9] See 6 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 81:19 at 81-34 (2006).

[10] See *id.*

[11] *Id.*, § 81:20 at 81-35.

[12] *Id.*, § 81:19 at 81-34.

Markel concedes that the vacancy clause is not a condition precedent. But relying on our definition of an exclusion, Markel argues that the clause is an exclusion and not subject to § 44-358. We have defined an exclusion as "a provision which eliminates coverage where, were it not for the exclusion, coverage would have existed."[13] Markel argues that the vacancy clause is an exclusion because it does not set forth a condition that D&S must fulfill to trigger Markel's duty to pay the loss. We disagree.

Here, the vacancy clause does not provide that there is no coverage for water damage. Instead, the clause was clearly intended to permit Markel to suspend or avoid coverage for water damage while D&S failed to maintain a specified occupancy level. That level of occupancy was the condition that D&S was required to comply with to maintain coverage. The clause itself does not eliminate coverage unless the insured breaches the condition. These types of provisions are distinct from exclusions:

> A condition subsequent is to be distinguished from an exclusion from the coverage: the breach of the former is to terminate or suspend the insurance, while the effect of the latter is to declare that there never was insurance with respect to the excluded risk. Accordingly, the suicide clause in a life insurance policy is not a condition subsequent, but rather suicide is simply not a risk insured against.[14]

[9] So, it is more precise to define an exclusion in an insurance policy as a limitation of liability, or a carving out of certain types of loss, to which the insurance coverage *never* applied.[15]

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[13] *Coppi v. West Am. Ins. Co.*, 247 Neb. 1, 11, 524 N.W.2d 804, 813 (1994); *Kansas-Nebraska Nat. Gas Co., Inc. v. Hawkeye-Security Ins. Co.*, 195 Neb. 658, 240 N.W.2d 28 (1976).

[14] See 6 Couch on Insurance 3d, *supra* note 9, § 81:19 at 81-34 to 81-35.

[15] See, also, 17 Samuel Williston, A Treatise on the Law of Contracts § 49:111 (Richard A. Lord ed., 4th ed. 2000).

[10] In contrast, vacancy clauses in insurance policies are "increased hazard" provisions.[16] These provisions allow insurers to suspend or avoid coverage upon the occurrence of an "increased hazard."[17] And, as explained above, "Clauses which provide that a policy shall become void or its operation defeated or suspended, or the insurer relieved wholly or partially from liability upon the happening of some event, or the doing or omission to do some act, [are] conditions subsequent . . . ."[18] We conclude that vacancy clauses function as conditions subsequent; they are not exclusions.

(b) Our Earlier Cases Failed to Properly Distinguish Conditions Subsequent From Exclusions

We concede that some of our earlier cases could be read to support Markel's position that the vacancy clause is an exclusion. Markel relies on *Omaha Sky Divers Parachute Club, Inc. v. Ranger Ins. Co.*,[19] and *Krause v. Pacific Mutual Life Ins. Co.*[20] But we conclude that we misunderstood the function of the contract provisions in those cases.

In *Omaha Sky Divers Parachute Club, Inc.*, an aircraft insurer denied coverage for loss or damage to the aircraft while in motion. The declarations page provided that only pilots holding valid pilot and medical certificates with required ratings would operate the plane. And a clause in the exclusions section provided that the policy did not apply to "'any loss or damage occurring while the aircraft is operated in flight by other than the pilot or pilots'" set forth in the

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[16] See 6A Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 94:102 (2006).

[17] See, *id.*, § 94:1; 10A Lee R. Russ et al., Couch on Insurance 3d § 148:73 (2006).

[18] 6 Couch on Insurance 3d, *supra* note 9, § 81:19 at 81-34.

[19] *Omaha Sky Divers Parachute Club, Inc. v. Ranger Ins. Co.*, 189 Neb. 610, 204 N.W.2d 162 (1973).

[20] *Krause v. Pacific Mutual Life Ins. Co.*, 141 Neb. 844, 5 N.W.2d 229 (1942).

declarations page.[21] The plane was damaged because a brake failed. The pilot's medical certificate had expired but was renewed 2 days after the accident. We stated that the pilot's lack of a valid medical certificate had not contributed to the accident. But we rejected the plaintiff's argument that these provisions constituted a warranty or condition, the breach of which was subject to the contribute-to-loss standard under § 44-358. We concluded that the exclusion of coverage was clear and unambiguous.

Similarly, in *Krause v. Pacific Mutual Life Ins. Co.*, the plaintiff's decedent was killed in an airplane crash while he was covered under an accident policy. But a clause in the policy provided that it did not provide coverage for bodily injury sustained while riding in an airplane unless the following conditions were met:

> "[T]he insured (1) is actually riding as a fare-paying passenger (2) in a licensed commercial aircraft (3) provided by an incorporated common carrier for passenger service, (4) and while such aircraft is operated by a licensed transport pilot (5) and is flying in a regular civil airway between definitely established airports."[22]

The insurer denied liability on the sole ground that the decedent was not a fare-paying passenger.

Although the decedent had paid a nominal fee for a "trip pass," we concluded that air travel was "a strictly excluded risk, save and except when it is carried out in compliance with the words framing the exception."[23] We further concluded that fare-paying passengers included only those who had paid the full legal fare. On this reasoning, we concluded that the precursor to § 44-358[24] did not apply: "What we have here is not a

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[21] *Omaha Sky Divers Parachute Club, Inc., supra* note 19, 189 Neb. at 612, 204 N.W.2d at 163.

[22] *Krause, supra* note 20, 141 Neb. at 848, 5 N.W.2d at 231.

[23] *Id.* at 846-47, 5 N.W.2d at 230-31.

[24] See Comp. Stat. § 44-322 (1929).

forfeiture of a policy upon conditions broken, but an excepted risk never assumed by the insurer."[25]

We believe that these cases provide little guidance for determining whether a policy clause operates to define the insured risk or to condition coverage on the doing or omission of some act after the risk has attached. And we have struggled with the chameleon-like terms "conditions" and "exclusions." But in *Krause*, there was no meaningful difference between that policy, which excluded coverage for air travel unless specified conditions were met, and one that would provide coverage for air travel if specified conditions were met. Either policy would allow the insurer to avoid liability—after the risk of loss had attached—because the insured failed to satisfy preloss conditions for coverage of bodily injury sustained while riding in an airplane.

Such "exclusions," as in *Krause* and *Omaha Sky Divers Parachute Club, Inc.*, do not define the insured risk in the same sense as a suicide clause in a life insurance policy that unconditionally excludes coverage for that risk. The insurer in *Krause* clearly would have been liable if the decedent had paid the full legal fare for his transportation. *Krause* provides an example of a policy that conditions coverage for a loss rather than unconditionally excluding that loss from the insured risk.

The insured risk in *Krause* was bodily injury sustained while riding in an airplane. The conditions permitted the insurer to avoid liability if the insured failed to act in a manner that would avoid an increased hazard during air travel. Similarly, property insurance policies commonly terminate or avoid the policy if the insured acts or fails to act in a way that increases the hazard to which the insured property is exposed or changes the nature of the risk.[26] But a fire policy condition regarding an increase in hazard "is not an exclusion, but is a condition

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[25] *Krause, supra* note 20, 141 Neb. at 850, 5 N.W.2d at 232.

[26] 6A Couch on Insurance 3d, *supra* note 16, § 94:1.

subsequent."[27] And we had specifically held in cases preceding *Krause* that failure to comply with policy conditions related to increased physical hazards were subject to the statutory contribute-to-the-loss standard.[28]

[11] In 1907, before the Legislature enacted § 44-358, this court strictly enforced a vacancy clause that forfeited coverage by allowing the insurer to treat the policy as void upon breach of the condition, even though the breach was unrelated to the loss.[29] Statutory provisions like § 44-358 that limit an insurer's ability to avoid liability for breach of increased hazard conditions exist because the conditions are often so broad that an insured's violation of them is not causally relevant to the loss.[30] But in *Krause*, we nullified the purpose of § 44-358 because we accepted the insurer's characterization of the policy provision as an exclusion of coverage for air travel except under its specified conditions.

Omaha Sky Divers Parachute Club, Inc. presented a similar classification problem. The certification provision excluded coverage unless the pilot possessed the necessary medical certification, which was proof of the pilot's medical fitness. The proof was intended to protect the insurer from the increased hazard of a pilot with health problems flying the plane.[31] And other courts have interpreted the same provision as imposing a condition for coverage.[32] And further confusing the distinction,

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[27] *Id.*, § 94:3 at 94-12, citing *Knoff v. United States Fidelity and Guaranty Co.*, 447 S.W.2d 497 (Tex. Civ. App. 1969).

[28] See, *Johnson v. Caledonian Ins. Co.*, 125 Neb. 759, 251 N.W. 821 (1933); *Mayfield v. North River Ins. Co.*, 122 Neb. 63, 239 N.W. 197 (1931); *Hannah v. American Live Stock Ins. Co.*, 111 Neb. 660, 197 N.W. 404 (1924).

[29] See *Farmers & Merchants Ins. Co. v. Bodge*, 76 Neb. 35, 110 N.W. 1018 (1907) (on rehearing).

[30] See Robert Works, *Insurance Policy Conditions and the Nebraska Contribute to the Loss Statute: A Primer and A Partial Critique*, 61 Neb. L. Rev. 209 (1982).

[31] See *id.*

[32] See, e.g., *Global Aviation Ins. Managers v. Lees*, 368 N.W.2d 209 (Iowa App. 1985), *abrogated on other grounds, Schneider Leasing v. U.S. Aviation Underw.*, 555 N.W.2d 838 (Iowa 1996).

even insurers have argued that increased hazard provisions were not exclusions when state law put the burden on insurers to prove exclusions.[33] Insurers have often, as in this policy, included vacancy clauses as conditions "'suspending or restricting insurance'"[34] or voiding the policy upon the insured's breach.[35] And we have specifically treated vacancy provisions as conditions for coverage that the insurer may enforce, but not as exclusions of coverage.[36]

[12] These cases illustrate that insurers have couched increased hazard provisions as both conditions and exclusions. But we do not believe that the application of § 44-358 should hinge upon the policy's labeling. We conclude that regardless of an insurer's labeling, a clause that requires an insured to avoid an increased hazard is a condition subsequent for coverage. To the extent that *Omaha Sky Divers Parachute Club, Inc.* and *Krause* can be read to hold that increased hazard provisions are exclusions, they are overruled.

(c) Our Decision in *Coppi v. West Am. Ins. Co.* Incorrectly Held That the Contribute-to-the-Loss Standard Does Not Apply to Promissory Warranties

Markel argues that even if the vacancy provision is a condition or warranty, it is a "'promissory warranty'" to which § 44-358 does not apply.[37] Markel relies on our decision in *Coppi v. West Am. Ins. Co.*,[38] but we conclude that *Coppi* was also incorrectly decided.

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[33] See, *Stortenbecker v. Pottawattamie Mutual Ins. Ass'n*, 191 N.W.2d 709 (Iowa 1971); *AIG Aviation, Inc. v. Holt Helicopters*, 198 S.W.3d 276 (Tex. App. 2006).

[34] See *Zweygardt v. Farmers Mut. Ins. Co.*, 195 Neb. 811, 814, 241 N.W.2d 323, 325 (1976).

[35] See *Farmers & Merchants Ins. Co. v. Bodge*, 76 Neb. 31, 106 N.W. 1004 (1906), *vacated on other grounds, Bodge, supra* note 29.

[36] See, *Schmidt v. Williamsburgh City Fire Ins. Co.*, 95 Neb. 43, 144 N.W. 1044 (1914); *Bodge, supra* note 29; *Bodge, supra* note 35; *Home Fire Ins. Co. v. Kuhlman*, 58 Neb. 488, 78 N.W. 936 (1899).

[37] Brief for appellee at 24.

[38] *Coppi, supra* note 13.

In *Coppi*, a business owner's policy, which covered loss by theft up to $10,000, contained an "iron-safe" clause. The clause required the business to keep record from which losses could be determined. The issue on appeal was whether the trial court erred in failing to rule that § 44-358 prevented the insurer from denying coverage. We held the insured could not rely on § 44-358 because his breach of the recordkeeping provision was a promissory warranty to which the contribute-to-the-loss standard did not apply. We set out the following definitions regarding warranties, promissory warranties, and conditions precedent:

> A warranty has been defined as a statement or promise the untruthfulness or nonfulfillment of which in any respect renders the policy voidable by the insurer. . . . It enters into and forms a part of the contract itself, defining the precise limits of the obligation, and no liability can arise except within those limits. . . . That is to say, a warranty serves to establish a condition precedent to an insurer's obligation to pay. . . . A condition precedent is a condition which must be performed before the parties' agreement becomes a binding contract, or a condition which must be fulfilled before a duty to perform an existing contract arises. . . .
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> A warranty may be express or implied, and affirmative or promissory. . . . A "promissory" or "executory" warranty is one in which the insured undertakes to perform some executory stipulation, as that certain acts shall or will be done, or that certain facts shall or will continue to exist. . . . A promissory warranty requires certain action or nonaction on the part of the insured after the policy has been entered into in order that its terms shall not thereafter be breached.[39]

Consistent with what other courts had held, we concluded that the recordkeeping provision was a promissory warranty. We recognized that we had previously held that § 44-358 cannot apply to the breach of postloss conditions, those "terms of

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[39] *Id.* at 8, 524 N.W.2d at 811 (citations omitted).

a policy which could arise only after the loss has occurred."[40] We explained that postloss conditions include notice of loss provisions and proof of loss provisions.[41] We also recognized that the recordkeeping provision was not a postloss condition. Yet we concluded that

> § 44-358 deals with warranties which are conditions precedent to the very existence of an insurance contract, *not with promissory warranties the fulfillment of which are conditions precedent to recovery* under an insurance contract which has come into being. Thus, § 44-358 has no application to the situation at hand . . . .[42]

Upon further analysis, we were wrong. Before *Coppi*, we had already implicitly held that the contribute-to-the-loss standard does not apply to warranties that function as conditions precedent to the existence of a contract (i.e., fraudulent statements in an application for insurance).[43] The plain language of the statute compels this conclusion.

Section 44-358 has two sentences. The first sentence provides:

> No oral or written misrepresentation or warranty *made in the negotiation for a contract or policy* of insurance by the insured, or in his behalf, shall be deemed material or defeat or avoid the policy, *or prevent its attaching*, unless such misrepresentation or warranty deceived the company to its injury.[44]

[13,14] By its terms, the first sentence applies only to warranties made in the negotiations for a contract of insurance,

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[40] See *id.* at 9, 524 N.W.2d at 812, citing *First Security Bank v. New Hampshire Ins. Co.*, 232 Neb. 493, 441 N.W.2d 188 (1989); *Ach v. Farmers Mut. Ins. Co.*, 191 Neb. 407, 215 N.W.2d 518 (1974), *abrogated on other grounds, Herman Bros. v. Great West Cas. Co.*, 255 Neb. 88, 582 N.W.2d 328 (1998); and *Clark v. State Farmers Ins. Co.*, 142 Neb. 483, 7 N.W.2d 71 (1942).

[41] See *Coppi, supra* note 13.

[42] *Id.* at 9-10, 524 N.W.2d at 812 (emphasis supplied).

[43] See *Gillan v. Equitable Life Assurance Society*, 143 Neb. 647, 10 N.W.2d 693 (1943).

[44] § 44-358 (emphasis supplied).

i.e., those that relate to whether the contract is effective. So, to the extent that Nebraska law permits an insured's statements in the negotiation for a contract to be treated as warranties, the first sentence of § 44-358 applies only to warranties that function as conditions precedent to the policy's being effective.[45] Warranties that are relevant to an insurance policy's being effective are classified as "affirmative" warranties:

> An affirmative warranty is one which asserts an existing fact or condition, and appears on the face of the policy, or is attached thereto and made a part thereof. As a general rule, it is in the nature of a condition precedent to the validity of the policy, and if broken in its inception the policy never attaches.[46]

[15] In contrast to misrepresentations and affirmative warranties, the second sentence of § 44-358 applies only to the breach of warranties and conditions that exist *at the time of the loss*. But an insurer can rescind a policy for breach of an affirmative warranty or condition precedent to the policy's being effective as soon as it learns of the relevant facts, regardless of whether a loss has occurred; its failure to act until a loss occurs will result in a waiver of the defense if it has continued to accept premiums with knowledge of the facts constituting a breach.[47] So, the Legislature clearly did not intend the second sentence of § 44-358 to apply to conditions precedent or affirmative warranties (e.g., statements relevant to insurability). Instead, as we have previously recognized, the first and second sentences of § 44-358 are mutually exclusive in their application, and the contribute-to-the-loss standard of the second sentence applies to breaches of conditions after the risk attaches and the policy is effective.[48] That is, the contribute-to-the-loss standard applies

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[45] See, *Gillan, supra* note 43; Neb. Rev. Stat. § 44-502(4) (Reissue 2004).

[46] See 6 Couch on Insurance 3d, *supra* note 9, § 81:13 at 81-27 to 81-28. Compare *Coryell v. Old Colony Ins. Co.*, 118 Neb. 303, 224 N.W. 684 (1929), *vacated on other grounds* 118 Neb. 312, 229 N.W. 326 (1930).

[47] See, e.g., *Lowry v. State Farm Auto. Ins. Co.*, 228 Neb. 171, 421 N.W.2d 775 (1988).

[48] See, *Gillan, supra* note 43; *Muhlbach v. Illinois Bankers Life Ass'n*, 108 Neb. 146, 187 N.W. 787 (1922).

to breaches of conditions subsequent and continuing warranties that function as conditions subsequent.

[16] In *Coppi*, we correctly characterized a promissory warranty as a stipulation that the insured will act or refrain from acts to maintain a term of the policy.[49] But we failed to recognize that a promissory warranty is a continuing warranty that functions as a condition subsequent for coverage: "A promissory warranty is one by which the insured stipulates that something shall be done or omitted after the policy takes effect and during its continuance, and has the effect of a condition subsequent."[50]

In *Sanks v. St. Paul Fire & Marine Ins. Co.*,[51] we held that the contribute-to-the-loss standard applied to a provision that we characterized as a promissory warranty. It is true that *Sanks* arguably involved a postloss warranty or condition to which we have since held that § 44-358 does not apply.[52] But as stated, we have also specifically held that the contribute-to-the-loss standard applies to provisions that function as conditions subsequent.[53]

Moreover, if our conclusion in *Coppi* were correct—that the contribute-to-the-loss standard does not apply to promissory warranties—then the second sentence does not apply to any warranty in an insurance policy. This result is obviously contrary to the statutory interpretation principles and the Legislature's intent. It appears that we got off track in *Coppi* because we failed to recognize how the term "condition subsequent" is applied to insurance policies.

As noted, in *Coppi*, we classified the recordkeeping provision as a promissory warranty, which functions as a condition precedent to the insurer's obligation to pay. But we jumped from that principle to our holding that the contribute-to-the-loss standard

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[49] See 6 Couch on Insurance 3d, *supra* note 9, § 81:14.

[50] *Id.* at 81-29.

[51] *Sanks v. St. Paul Fire & Marine Ins. Co.*, 131 Neb. 266, 267 N.W. 454 (1936).

[52] See *First Security Bank, supra* note 40.

[53] See, *Johnson, supra* note 28; *Mayfield, supra* note 28; *Hannah, supra* note 28.

applies only to "warranties which are conditions precedent to the very existence of an insurance contract" (e.g., insureds' insurability statements).[54] In *Coppi*, we failed to distinguish between conditions precedent and conditions subsequent or to recognize that a breach of either type of condition (or related warranty) will avoid the insurer's liability absent statutory intervention.[55]

Any warranty that must be strictly satisfied will serve as a condition precedent to an insurer's obligation to pay. Warranties are effectively policy stipulations that function as conditions on an insurer's obligation to pay a loss.[56] But in insurance law, we believe it is more precise to refer to any condition that must be satisfied after the risk of loss attaches as a "condition subsequent" to distinguish it from a condition precedent to the policy's being effective.

[17] Using the term "condition subsequent" to refer to any insurance policy condition that applies after the risk of loss has attached is different from its meaning in a noninsurance context. Conditions subsequent are less common in noninsurance contracts because they can permit a party to avoid its obligation *after its duty to perform* has been triggered.[57] A true condition subsequent is the equivalent of a postloss condition in an insurance policy: e.g., after a loss has occurred, an insured's failure to comply with a notice of loss provision may result in the insurer's avoidance of liability.[58] But for insurance policies, the term condition subsequent comprises both preloss conditions (e.g., keep records), to which the contribute-to-the-loss standard applies, and postloss conditions (e.g., provide notice of loss), to which the standard does not apply.

[18] In *Coppi*, we did not recognize this use of the term condition subsequent. So we failed to recognize that the

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[54] *Coppi, supra* note 13, 247 Neb. at 9, 524 N.W.2d at 812.

[55] See 6 Couch on Insurance 3d, *supra* note 9, § 83:30.

[56] See *id.*, § 81:10.

[57] See *Schmidt v. J. C. Robinson Seed Co.*, 220 Neb. 344, 370 N.W.2d 103 (1985).

[58] See *Herman Bros., supra* note 40.

contribute-to-the-loss standard in the second sentence of § 44-358 applies to preloss conditions subsequent and promissory warranties. To the extent that *Coppi* holds the contribute-to-the-loss standard does not apply to promissory warranties and applies only to conditions precedent to the existence of an insurance contract, it is overruled.

[19] In sum, we determine that a vacancy clause in an insurance contract is not an exclusion; it is a condition subsequent to which the contribute-to-the-loss standard applies. We conclude that the court erred in refusing to permit D&S to argue that § 44-358 precluded Markel from denying liability.

2. Waiver and Estoppel Do Not Apply

The court refused to instruct the jury on waiver and estoppel. It concluded that even if Markel knew about the level of occupancy, it had no duty to inform D&S of the coverage implications. D&S contends that Markel has waived the vacancy provision or should be estopped from denying liability. D&S argues that Markel waived the vacancy provision because it accepted premiums after it knew the building's occupancy was below the required level.

[20,21] Initially, we note that waiver and estoppel are distinct legal concepts.[59] But we do not strictly apply the elements of equitable estoppel when an insured claims that an insurer has waived a policy provision.[60] Instead, if the evidence shows that the insurer has waived a policy provision, it may be "estopped from denying liability where, by its course of dealing and the acts of its agent, it has induced the insured to pursue a course of action to his detriment."[61]

[22,23] A waiver is a voluntary and intentional relinquishment of a known right, privilege, or claim, and may be

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[59] See 17 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 239:96 (2006).

[60] See *Kuhlman, supra* note 36. See, also, 44A Am. Jur. 2d *Insurance* § 1543 (2003).

[61] *Keene Coop. Grain & Supply Co. v. Farmers Union Ind. Mut. Ins. Co.*, 177 Neb. 287, 291, 128 N.W.2d 773, 777 (1964).

demonstrated by or inferred from a person's conduct.[62] We have long held that an insurer may waive any provision of a policy that is for the insurer's benefit,[63] including vacancy provisions.[64]

[24-26] Ordinarily, to establish a waiver of a legal right, there must be a clear, unequivocal, and decisive act of a party showing such a purpose, or acts amounting to an estoppel on his or her part.[65] A party may waive a written contract in whole or in part, either directly or inferentially.[66] A party may prove the waiver by (1) a party's express declarations manifesting the intent not to claim an advantage or (2) a party's neglecting and failing to act so as to induce the belief that it intended to waive.[67]

[27] An insurer is precluded from asserting a forfeiture when, after acquiring knowledge of the facts constituting a breach of condition, it has retained the unearned portion of the premium or has failed to return or tender it back with reasonable promptness.[68] But we have also stated that this rule is most applicable where the breach or ground for forfeiture is of such character as to render the policy void from its inception.[69] And we have specifically held that an insurer may waive conditions that void the policy if it becomes vacant or unoccupied, or be estopped from relying on those conditions as a defense to an

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[62] *Daniels v. Allstate Indemnity Co.*, 261 Neb. 671, 624 N.W.2d 636 (2001).

[63] See *id.*, quoting *Schoneman v. Insurance Co.*, 16 Neb. 404, 20 N.W. 284 (1884).

[64] *Zweygardt, supra* note 34; *German Ins. Co. v. Frederick*, 57 Neb. 538, 77 N.W. 1106 (1899), *overruled on other grounds, Gillan, supra* note 43.

[65] *Daniels, supra* note 62.

[66] See, *Davenport Ltd. Partnership v. 75th & Dodge I, L.P.*, 279 Neb. 615, 780 N.W.2d 416 (2010); *Jelsma v. Scottsdale Ins. Co.*, 231 Neb. 657, 437 N.W.2d 778 (1989).

[67] *Id.*

[68] See, *Dairyland Ins. Co. v. Kammerer*, 213 Neb. 108, 327 N.W.2d 618 (1982); *Hawkeye Casualty Co. v. Stoker*, 154 Neb. 466, 48 N.W.2d 623 (1951).

[69] *Id.*

action upon the policy.[70] Although in that case, the agent had knowledge that the building was vacant when the policy was issued, we have recognized waiver of a vacancy provision when the vacancy occurred after the policy became effective.[71] We have similarly held an insurer waived other types of increased hazard conditions after the risk attached when it had knowledge of the breach before the loss occurred and failed to take steps to cancel the policy.[72] So whether an insurer may waive an increased hazard condition does not depend upon whether the insured's breach of the condition occurred before or after the risk attached.

But Markel argues that these cases are distinguishable because the insured's breach of the condition resulted in a forfeiture of the policy—whereas D&S' breach did not. As stated, we have held that an insurer may waive any provision in a policy[73] and that an insurance contract may be waived in whole or in part.[74] These rules are obviously broad enough to include any defense to an action to enforce a policy, not just claims that the policy is void or forfeited. And that is the rule in other jurisdictions.[75] But there is a critical distinction between forfeiture of the policy and forfeiture of a particular coverage in determining whether waiver can be shown solely by an insurer's continued acceptance of premiums.

[28] When an insurer knows of a breach of condition or warranty that permits it to treat the policy as void, and the

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[70] *Zweygardt, supra* note 34.

[71] *Hunt v. State Ins. Co.*, 66 Neb. 125, 92 N.W. 921 (1902) (on rehearing); *Kuhlman, supra* note 36. See, also, *Rochester Loan & Banking Co. v. Liberty Ins. Co.*, 44 Neb. 537, 62 N.W. 877 (1895). Accord, *North River Insurance Co. v. Rawls*, 185 Ky. 509, 214 S.W. 925 (Ky. App. 1919); *Security Ins. Co. v. Cook*, 99 Okla. 275, 227 P. 402 (1924); *Republic Ins. Co. v. Dickson*, 69 S.W.2d 599 (Tex. Civ. App. 1934).

[72] See, *Kor v. American Eagle Fire Ins. Co.*, 104 Neb. 610, 178 N.W. 182 (1920); *Slobodisky v. Phenix Ins. Co.*, 52 Neb. 395, 72 N.W. 483 (1897); *Grand Lodge v. Brand*, 29 Neb. 644, 46 N.W. 95 (1890).

[73] See *Daniels, supra* note 62.

[74] See *Jelsma, supra* note 66.

[75] See 17 Couch on Insurance 3d, *supra* note 59, § 239:93.

insurer continues to accept premiums, its conduct shows its intent to treat the policy as valid despite the breach.[76] The insurer's acceptance of premiums is inconsistent with treating the breach as voiding the policy. But waiver does not apply when the insured's breach of an increased hazard provision does not result in an absolute forfeiture of the policy and the insurer continues to be liable for loss from other covered causes.[77]

It is true that the Nebraska endorsement to the policy permitted Markel to treat the breach as voiding the policy "if such breach exists at the time of loss and contributes to the loss." Markel certainly knew that *if* a loss occurred during the period of a breach that contributed to the loss, it could treat the policy as void. But it could not have treated the policy as void until a loss occurred and Markel had reason to believe that the breach of the vacancy condition contributed to the loss. And until that time, Markel was liable for any other covered losses. A loss was entirely speculative when Markel had the building inspected. Thus, Markel's continued acceptance of premiums is insufficient to show that it intended to abandon a defense based on D&S' breach. We conclude that the court did not err is refusing to instruct the jury on D&S' waiver and estoppel theory.

VI. CONCLUSION

We conclude that the district court erred in refusing to permit D&S to instruct the jury, or permit D&S to argue, that the contribute-to-the-loss standard under § 44-358 applied to preclude Markel from denying liability for its loss. But we conclude that the court was correct in refusing to instruct the jury on Markel's alleged waiver and estoppel. The evidence was insufficient to show that Markel intended to abandon a defense based on D&S' breach of the vacancy condition. Accordingly, we remand the cause for further proceedings limited to the

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[76] See *id.*, § 239:121.

[77] See, *Crites v. Modern Woodmen of America*, 82 Neb. 298, 117 N.W. 776 (1908); *Modern Woodmen of America v. Talbot*, 76 Neb. 621, 107 N.W. 790 (1906).

issue of whether D&S' breach of the vacancy condition contributed to the loss.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.