Roberts) that the fact of escaped livestock is, standing alone, insufficient to raise an inference of negligence against Gentrup. However, as discussed, because McLaughlin presented other evidence in conjunction with the fact of escaped livestock, § 25-21,274 does not bar McLaughlin's claim.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the district court and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

SYLVIA DEVESE, PERSONAL REPRESENTATIVE OF THE ESTATE OF STEPHEN O'BRYANT, DECEASED, APPELLANT, V. TRANSGUARD INSURANCE COMPANY OF AMERICA, INC., A FOREIGN CORPORATION, APPELLEE.

798 N.W.2d 614

Filed June 17, 2011. No. S-10-250.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all favorable inferences deducible from the evidence.
3. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
4. **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.
5. **Insurance: Contracts: Words and Phrases.** A condition subsequent is a provision that allows insurers to suspend or avoid coverage for a loss that occurs while a failure of the condition exists after the risk has attached.
6. **Insurance: Contracts.** Regardless of an insurer's labeling, a clause that requires an insured to avoid an increased hazard is a condition subsequent for coverage.

Petition for further review from the Court of Appeals, IRWIN, MOORE, and CARLSON, Judges, on appeal thereto from the District Court for Douglas County, LEIGH ANN RETELSDORF, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Betty L. Egan and Mark A. Weber, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

Walter E. Zink II and Jarrod P. Crouse, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Stephen O'Bryant was a commercial truckdriver. He was killed during the course of his employment as the result of a motor vehicle accident. The representative of his estate sought to recover under O'Bryant's occupational accident policy with Transguard Insurance Company of America, Inc. (Transguard). Transguard denied the claim on the ground that O'Bryant did not have a valid commercial driver's license (CDL) at the time of the accident, and the personal representative brought this action against Transguard for breach of contract and bad faith. The policy stated that no benefits would be paid for any "[i]njury, loss or claim caused or contributed to by or resulting from . . . any loss occurring while the Insured Person . . . is operating a Vehicle without a valid [CDL]." The trial court granted summary judgment in favor of Transguard, and the personal representative appeals. We find that Neb. Rev. Stat. § 44-358 (Reissue 2010) applies so as to require a showing of causation between the breach and the loss, despite the language of the policy.

BACKGROUND

On September 19, 2003, O'Bryant, a member of the National Association of Independent Truckers, LLC, entered into a group vehicle master policy with Transguard. The policy,

which was effective until July 1, 2004, included occupational accident coverage.

An insured person is defined under the policy as an independent contractor who is a member of the National Association of Independent Truckers in good standing and who is a certificate holder of the coverage. Under the "General Exclusions and Limitations" section, the policy states: "This Coverage Part does not cover and no benefits will be paid for any Injury, loss or claim caused or contributed to by or resulting from: . . . any loss occurring while the Insured Person, covered Co-Driver, Partner or Helper is operating a Vehicle without a valid [CDL]." On April 14, 2004, O'Bryant's CDL was suspended due to an unsatisfied judgment arising out of an automobile accident.

On June 30, 2004, O'Bryant was involved in a semi-truck collision and sustained injuries resulting in his death. It is undisputed that O'Bryant's CDL was still suspended at the time of the accident. O'Bryant's beneficiaries made a claim with Transguard for benefits under the occupational accident coverage of the policy. Transguard denied the claim, and Sylvia Devese, as the personal representative for O'Bryant's estate, brought this action against Transguard for breach of contract and bad faith.

Relying on the CDL provision quoted above, Transguard moved for summary judgment. Devese responded that Transguard was required to show causation between the absence of a valid CDL and the accident and that Transguard had failed to present any such evidence. The trial court granted summary judgment in favor of Transguard.

Devese appealed. On December 20, 2010, the Nebraska Court of Appeals summarily affirmed the judgment in favor of Transguard, citing *Omaha Sky Divers Parachute Club, Inc. v. Ranger Ins. Co.* (*Omaha Sky Divers*).[1] We granted Devese's petition for further review on the ground that *Omaha Sky*

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

Divers was recently overruled by *D & S Realty v. Markel Ins. Co.* (*D & S Realty*).[2]

ASSIGNMENTS OF ERROR

Devese asserts that the Court of Appeals erred in (1) affirming the order of the trial court granting Transguard's motion for summary judgment and (2) holding that *Omaha Sky Divers* was controlling.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[3]

[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all favorable inferences deducible from the evidence.[4]

[3] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.[5]

ANALYSIS

In *Omaha Sky Divers*,[6] we addressed an aircraft insurance policy clause which stated, under the exclusions section, that the policy did not apply to any occurrence while the aircraft was operated by someone other than a pilot as set forth under the declarations section. The declarations section, in turn, specified that only pilots having a valid medical certificate will operate the aircraft. We held that the exclusion was clear

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[2] *D & S Realty v. Markel Ins. Co.*, 280 Neb. 567, 789 N.W.2d 1 (2010).

[3] *Riggs v. Nickel, ante* p. 249, 796 N.W.2d 181 (2011).

[4] *Id.*

[5] *State v. Peterson*, 280 Neb. 641, 788 N.W.2d 560 (2010).

[6] *Omaha Sky Divers, supra* note 1.

and unambiguous. Despite the fact that the accident was not contributed to by any medical issues of the pilot, the insurance company was not required under the contract to show causation between the breach and the accident.

We further held that the exclusion did not constitute a warranty or a condition within the meaning of § 44-358. Section 44-358 states in part:

> 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.

Because § 44-358 did not apply to impose a causation requirement as a matter of law, the plain language of the policy controlled and we affirmed judgment in favor of the insurer.

At the hearing on its motion for summary judgment, Transguard argued that the language of the policy in this case was similar to the one discussed in *Omaha Sky Divers.* We agree. Both policies clearly make coverage dependent upon the existence of valid, specified licenses. We do not read the policies as requiring causation between those licenses and the loss.

But in *D & S Realty*,[7] we overruled *Omaha Sky Divers* to the extent that we had concluded § 44-358 did not apply so as to require, as a matter of law, a showing of causation between the absence of the required license and the accident. *D & S Realty* involved a property insurance contract which stated that the carrier would not pay for loss caused by water damage if the building was vacant for more than 60 consecutive days prior to the loss. Looking at the provision's purpose and function, we found that the relevant clause was a "condition," as contemplated by § 44-358, and not an "exclusion." Therefore, despite the plain language of the insurance contract, the insurer was required by § 44-358 to demonstrate a causal connection between the condition and the loss in order to avoid liability.

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[7] *D & S Realty, supra* note 2.

[4-6] We explained in *D & S Realty* that a condition subsequent is distinct from an exclusion. An exclusion is a limitation of liability, or a carving out of certain types of loss, to which the insurance coverage never applied.[8] A preloss condition subsequent, in contrast, is a provision that allows insurers to suspend or avoid coverage for a loss that occurs while a failure of the condition exists after the risk has attached.[9] We held that "increased hazard" clauses, such as the vacancy clause of the property insurance policy in issue in that case, were conditions subsequent and not exclusions. We said, "[R]egardless of an insurer's labeling, a clause that requires an insured to avoid an increased hazard is a condition subsequent for coverage."[10]

We said that *Omaha Sky Divers* 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."[11] We overruled *Omaha Sky Divers* to the extent that it could be read to hold that increased hazard conditions are exclusions.[12]

As explained, the policy provision in *Omaha Sky Divers* avoided coverage for an occurrence while the plane was operated by a pilot without a medical certification. And the risk of loss had clearly attached. Thus, as a postattachment, preloss condition (subsequent) to the insurer's obligation to pay benefits, the insured was required to maintain proof of a pilot's medical fitness.

Maintaining proof of an insured's qualification to perform a covered activity is the type of condition subsequent that § 44-358 was intended to address. The policy in *Omaha Sky Divers* did not provide that coverage would be voided for loss

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[8] See *id.*

[9] See *id.*

[10] *Id.* at 581, 789 N.W.2d at 13.

[11] *Id.* at 580, 789 N.W.2d at 13.

[12] *D & S Realty, supra* note 2.

caused by the plane's being operated by a medically unfit pilot. Clearly, the insurer could limit its coverage to loss occurring when the plane was operated by a qualified and medically fit pilot. That was the insured risk. But by requiring the insured to maintain *proof* of a pilot's medical fitness regardless of any causal connectedness to the loss, the insurer avoided liability for a failure of condition that "in no way contributed to the accident,"[13] which was caused by a brake failure.

As we explained in *D & S Realty*, § 44-358 was intended to limit an insurer's ability to avoid liability for a failure of preloss conditions subsequent that are "so broad that an insured's violation of them is not causally relevant to the loss."[14] Thus, we erred in *Omaha Sky Divers* by holding that the contribute-to-the-loss standard under § 44-358 did not apply to a preloss condition subsequent that required the insured to maintain proof of a pilot's medical fitness to fly a plane.

Similarly, the issue here involves the distinction between an insured's qualification to perform an activity and proof of the insured's qualification. "License" has more than one meaning. It can be authorization to do what would otherwise be illegal.[15] But a license is also proof that the holder is qualified to perform an activity.[16] It is the latter sense that is relevant here. The policy does not purport to avoid coverage if the insured violated a motor vehicle statute.

We agree that an insurer can require an insured to have a valid CDL as a condition for coverage, because the license functions as proof that the insured is qualified to operate commercial vehicles. But if licensure is a requisite to being a qualified insured, the insurer would have presumably required this proof as part of the application process. Further, if an

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[13] *Omaha Sky Divers, supra* note 1, 189 Neb. at 612, 204 N.W.2d at 163.

[14] *D & S Realty, supra* note 2, 280 Neb. at 580, 789 N.W.2d at 13.

[15] See *Syracuse Rur. Fire Dist. v. Pletan*, 254 Neb. 393, 577 N.W.2d 527 (1998).

[16] See, *Mulholland v DEC Int'l*, 432 Mich. 395, 443 N.W.2d 340 (1989); *Osborn v. Hertz Corp.*, 205 Cal. App. 3d 703, 252 Cal. Rptr. 613 (1988); *Asdourian v. Araj*, 38 Cal. 3d 276, 696 P.2d 95, 211 Cal. Rptr. 703 (1985).

insured had falsely represented his or her qualifications in the application, then the insurer would have had reason to seek a revocation.

The availability of a revocation defense shows that the license provision was not intended to relieve Transguard of liability because an insured was never qualified to operate a commercial vehicle. Instead, the unlicensed driver provision operated to avoid liability for a loss, after the risk attached, if an insured was operating a commercial vehicle while he or she had failed to *maintain* a valid CDL. An insurance provision that conditions benefits based solely on whether the insured has failed to comply with a licensing or certification requirement seeks to broadly control a potential cause of loss—an unqualified insured.[17]

We conclude in this case that Transguard sought to avoid the risk of loss of an unqualified driver. As applied to the insured, the license requirement functions as a condition for coverage that the insured maintain proof of his or her continuing qualification. Because the provision imposes conditions for coverage on the insured's conduct after the risk has attached, it is a preloss condition subsequent. As we explained in *D & S Realty*, there is no meaningful difference between a policy that excludes coverage unless specified conditions are met and one that provides coverage if specified conditions are met.[18]

But the lack of the license, in itself, did not show that O'Bryant was unqualified to operate a commercial vehicle. Transguard's failure of a condition defense illustrates that the condition was broader than necessary to protect Transguard from assuming liability for the risk that O'Bryant was unqualified to operate commercial vehicles.[19] A significant difference exists between a suspension of a license for failure to pay a judgment and a revocation or refusal of a license for reasons

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[17] 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).

[18] See, *D & S Realty, supra* note 2; Works, *supra* note 17.

[19] See Works, *supra* note 17.

that show the licensee is unfit to drive a commercial vehicle. By requiring O'Bryant to maintain his CDL as a condition for coverage without any requirement that the loss occurred because the insured was unqualified to operate a commercial vehicle, Transguard could avoid liability for technical reasons. That is, it could avoid liability if O'Bryant's license lapsed or was suspended for reasons that were unrelated to his qualifications.

Because of the condition's excessive breadth and its failure to require any causal connectedness to the loss, it is the type of condition to which § 44-358 was intended to apply. Thus, Transguard could not avoid liability unless it showed that O'Bryant's breach of the condition contributed to the loss.

We also disagree with Transguard that it has demonstrated a causal link between the breach and the loss because it was undisputed that O'Bryant was driving when he was not supposed to. The mere act of driving was not a breach of the condition. The breach was failing to maintain a valid CDL. Under § 44-358, Transguard was required to demonstrate a causal connection between the breach and the loss.

Transguard did not present any evidence as to the cause of the accident or O'Bryant's abilities as a commercial driver. Therefore, viewing the evidence in the light most favorable to Devese, it was inappropriate to issue summary judgment in favor of Transguard. We reverse the decision of the Court of Appeals summarily affirming the trial court's order of summary judgment and remand the cause to the Court of Appeals with directions to remand the cause to the trial court for further proceedings consistent with this opinion.

CONCLUSION

For the foregoing reasons, we reverse the decision of the Court of Appeals and remand the cause with directions.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating.