I. Are pre-injury waivers/releases of claims for injury or death enforceable in Nebraska?

Pre-injury waivers/releases of claims for injury or death are enforceable in Nebraska for cases involving claims for injury or death resulting from ordinary negligence. *Mayer v. Howard*, 220 Neb. 328, 370 N.W.2d 93 (1985). In *Mayer*, the Nebraska Supreme Court upheld a waiver and release of liability signed by a motorcycle race participant who claimed injury due to a latent design defect of the race track. The Court enforced the waiver, reasoning that the intent of the waiver was to ensure the participant knew and would comprehend the dangers to which he was voluntarily exposing himself and, therefore, the waiver constituted an assumption of the risk. *Mayer*, 370 N.W.2d at 98.

An exception to this general rule exists for cases involving gross negligence and willful and wanton misconduct. The Nebraska Supreme Court has held that waivers of liability for gross negligence and willful and wanton misconduct are void as against public policy. *New Light Co. v. Wells Fargo Alarm Servs., Div. of Baker Protective Servs., Inc.*, 247 Neb. 57, 525 N.W.2d 25 (1994). In *New Light Co.*, the Court weighed the threat to the general safety of the community against the individual parties’ right to freedom of contract and found exculpatory clauses disclaiming liability and/or limiting liability to a nominal sum for gross negligence and willful and wanton misconduct void as against public policy. *Id.* at 64, 525 N.W.2d at 30. Specifically, the Court refused to enforce a contract clause limiting defendant’s liability to a nominal sum for gross negligence in installation and maintenance of a fire alarm system. *Id.* at 65, 525 N.W.2d at 31.

II. Are pre-injury waivers of jury trials enforceable in Nebraska?

Pre-injury waivers of jury trials are probably not enforceable in Nebraska, although there is no Nebraska statutory or case law directly addressing the issue. The Nebraska Constitution provides a constitutional right to a jury trial with limited restrictions. NEB. CONST. art. I, § 6. The Nebraska Supreme Court has held that this guaranty of a jury trial is part of Nebraska’s fundamental law. *Jacobson v. Shresta*, 288 Neb. 615, 619, 849 N.W.2d 515, 519 (2014) (citing *State v. Kennedy*, 224 Neb. 164, 396 N.W.2d 722 (1986) and *State ex rel. Simpson v. Vondrasek*, 203 Neb. 693, 279 N.W.2d 860 (1979)). The Court has also held that the constitutional provision for a jury trial preserves the right to a jury trial as it existed under the common law when the Nebraska Constitution was adopted in 1875. *Id.* at 619-20, 849 N.W.2d at 519 (citing *Eihusen v. Eihusen*, 272 Neb. 462, 723 N.W.2d 60 (2006)). At common law, legal claims (including claims for negligence and personal injury) were tried by a jury and equitable claims were tried by a court. *Id.* (citations omitted).

Further, statutory law provides that a court may find that a party has waived the right to a jury trial and provides that trial by jury may be waived “by the parties in actions arising on contract, and with assent of the court in other actions (1) by the consent of the party appearing, when the other party fails to appear at trial by himself or attorney; (2) by written consent, in person or by attorney, filed with the clerk; and (3) by oral consent in open court on the journal.” NEB. REV. STAT. § 25-1126. In *Jacobson, supra*, the Nebraska Supreme Court applied the principal of expression unius est exclusion alterius (the expression of one thing is the
exclusion of the others) to hold that NEB. REV. STAT § 25-1126 provides an exclusive list of the manner in which parties can waive their right to a trial by jury in civil matters. Given the Court’s decision in Jacobson, it seems likely that Nebraska courts would find that NEB. REV. STAT. 25-1126 provides an exclusive list of ways a party can waive the right to a jury trial and therefore precludes pre-dispute agreements to waive trial by jury. It is important to note, however, that Jacobson arose in the context of waiver by silence, as opposed to a knowing, voluntary and intelligently made waiver and did not implicate parties’ right of freedom to contract. Therefore, though it seems likely Nebraska courts will find pre-dispute waivers of jury trial unenforceable, this question has yet to be addressed in the appropriate context to provide a final answer.

III. Are agreements restricting claims for injury or death to binding arbitration enforceable in Nebraska?

Agreements restricting claims for injury or death to binding arbitration are not enforceable in Nebraska. Despite legislation allowing contractual agreements to require claims be submitted to arbitration, the statute specifically provides that pre-dispute agreements to submit claims to arbitration are not enforceable for claims “arising out of personal injury based in tort.” NEB. REV. STAT. § 25-2602.01(f)(1).