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

Under Utah law, preinjury waivers/releases of claims for ordinary negligence are valid and enforceable. See Penunuri v. Sundance Partners, LTD., 2013 UT 22, ¶ 25, 301 P.3d 984, 991; see also, Pearce v. Utah Ath. Found., 2008 UT 13, ¶ 16, 179 P.3d 760, 765 (“[T]hose who are not engaged in public service may properly bargain against liability for harm caused by their negligence in performance of a contractual duty. Thus, a preinjury release that does not violate public policy is valid and enforceable . . . .”). However, pre-injury waivers/releases are inapplicable to gross or wanton negligence. See Penunuri, 2013 UT 22 at ¶ 25, 301 P.3d at 991; see also, Russ v. Woodside Homes, 905 P.2d 901, 904 (Utah Ct. App. 1995). It must be noted that the law generally disfavors such pre-injury releases. See Berry v. Greater Park City Co., 2007 UT 87, ¶ 14, 171 P.3d 442, 446. Accordingly, Utah courts apply the “clear and unequivocal standard” developed for release, indemnity, and exculpatory agreements to evaluate these pre-injury contracts that also seek to release, shift, or avoid potential liability for negligence. See Russ 905 P.2d at 905; see also Pearce, 2008 UT 13 at ¶ 22, 179 P.3d at 767 (stating that “[p]reinjury releases…must be communicated in a clear and unequivocal manner”). As a result, pre-injury waivers/releases that are unclear or ambiguous are unenforceable. See Pearce, 2008 UT 13 at ¶ 21, 179 P.3d at 767; Rothstein v. Snowbird Corp., 2007 UT 96, ¶ 6, 175 P.3d 560, 562.

In addition to gross negligence situations, there are other situations where the courts have determined that these agreements will not be enforced: (1) releases that offend public policy, (2) releases for activities that fit within the public interest exception; and (3) releases that are unclear or ambiguous. Pearce, 2008 UT 13 at ¶ 21, 179 P.3d at 767, (citing Rothstein v. Snowbird Corp., 2007 UT 96, ¶ 6, 175 P.3d 560, 562); Berry, 2007 UT 87 at ¶ 16, 171 P.3d at 447. A pre-injury release does not need to include the word negligence so long as the parties’ intent to release, shift, or avoid potential liability for loss or injury is clearly and unequivocally expressed. Russ, 905 P.2d at 906.

There are also statutory implications affecting the enforceability of these agreements. For example, the Utah Inherent Risks of Skiing Act, Utah Code Ann. §§ 78B-4-401 to 78B-4-404, was enacted to address recovery against ski area operators and, among other purpose, to provide that “no person engaged in that sport shall recover from a ski operator for injuries resulting from [the] inherent risks [of skiing].” Utah Code Ann. § 78B-4-401. Despite this legislation, the Utah Supreme Court has rejected the enforceability of a pre-injury release in favor of a ski area operator. Rothstein v. Snowbird Corp., 2007 UT 96, 175 P.3d 560. The court noted the Act’s stated policy of encouraging the availability of affordable insurance for ski area operators and determined that the operator in question had breached this public policy bargain because, “[t]he legislative goal expressed in the [Skiing] Act of easing the task of ski area operators to insure themselves against noninherent risks creates the presumption that ski area operators will confront those risks through insurance and not by extracting contractual releases from skiers.” Id. at ¶¶ 16, 19, 175 P.3d at 564-565. Shortly before this decision, the same court had held a pre-injury release enforceable by distinguishing between competitive and recreational skiing activities, concluding the release in question was enforceable primarily because of the competitive nature of skiercross racing compared to the recreational sport of skiing. Berry, at ¶¶ 17-34, 171 P.3d at 447-451. This distinction was later rendered moot by further legislative
Another area of statutory activity is the Utah Equine and Livestock Activities Act, which sets forth the requirement for an equine or livestock activity sponsor “to provide notice to participants of the equine or livestock activity that there are inherent risks of participating and that the sponsor is liable for certain of those risks.” Utah Code Ann. § 78B-4-203(1). The Equine Act specifically lists: “[n]otice shall be provided by…providing a document or release for the participant, or the participant’s legal guardian if the participant is a minor, to sign.” Utah Code Ann. § 78B-4-203(2)(b) (emphasis added). In Penunuri v. 301 P.3d at 993, the Utah Supreme Court explicitly concluded “that the Equine Act does not invalidate preinjury releases for ordinary negligence.” Id. at ¶ 34. In reaching this conclusion, the supreme court determined the Legislature’s use of the word “release” in section 203 evidenced its contemplation that equine sponsors might seek preinjury releases from participants and, therefore, the sponsors remain free to assert all applicable defenses, including release. Id. at ¶¶ 20–23, 301 P.3d at 990. The supreme court also concluded the waiver in question did not violate public policy because the Equine Act was silent as to the public policy “behind the Legislature’s decision to eliminate liability for inherent risks for equine activities,” unlike Utah’s Inherent Risks of Skiing Act in Rothstein. Id. at ¶¶ 32–33, 301 P.3d at 992.

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

There is no Utah law regarding the enforceability of pre-injury jury waivers.

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

Under Utah law, pre-injury arbitration agreements are generally favored as a matter of public policy. See Stewart v. Bova, 2011 UT App 129, ¶ 7, 256 P.3d 230, 233; Central Florida Investments, Inc. v. Parkwest Associates, 2002 UT 3, ¶ 16, 40 P.3d 599, 606; Utah Code Ann. §§ 78B-11-101 to 78B-11-131. This includes personal injury claims. Utah Code Ann. § 78B-10a-102(1) ( “any party to an action for personal injury or property damage as a result of tortious conduct may elect to submit all bodily injury claims and property damage claims to arbitration…”). Under Utah’s Uniform Arbitration Act, an arbitration agreement is “valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.” Utah Code Ann. § 78B-11-107(1). Pre-injury arbitration agreements for injury/death claims must specifically follow the statutorily created requirements to be valid and enforceable. See Stewart, at ¶ 7, 256 P.3d at 233; Utah Code Ann. §§ 78B-3-401 to 78B-3-426. Pre-injury arbitration agreements for injury/death claims must also meet the standards applicable to all contracts to be enforceable. See Sosa v. Paulos, 924 P.2d 357, 359 (Utah 1996); see also Utah Code Ann. § 78B-11-107(1).

Pre-injury arbitration agreements for injury/death claims that are procedurally and substantively unconscionable are unenforceable. See Sosa, 924 P.2d at 360-361; see also Utah
Code Ann. § 78B-11-107(1). In analyzing the substantive unconscionability of the arbitration agreement, the court will consider “the contents of the agreement, examining the relative fairness of the obligations assumed . . . , whether its terms [are] so one-sided as to oppress or unfairly surprise an innocent party,” or “whether there exists an overall imbalance in the obligations and rights imposed by the bargain.” *Sosa*, 924 P.2d at 361 (internal quotation marks omitted). In analyzing the procedural unconscionability of the arbitration agreement, the court focuses “on the manner in which the contract was negotiated and the circumstance of the parties.” *Id.* at 362. The court looked at the following six factors bearing on procedural unconscionability:

1. whether each party had a reasonable opportunity to understand the terms and conditions of the agreement,
2. whether there was a lack of opportunity for meaningful negotiation,
3. whether the agreement was printed on a duplicate or boilerplate form drafted solely by the party in the strongest bargaining position,
4. whether the terms of the agreement were explained to the weaker party,
5. whether the aggrieved party had a meaningful choice or instead felt compelled to accept the terms of the agreement,
6. whether the stronger party employed deceptive practices to obscure key contractual provisions.

*Id.*

It is possible that Utah courts will, in some instances, enforce oral arbitration agreements under the theory of partial performance. See *Jenkins v. Percival*, 962 P.2d 796 (Utah 1998). However, arbitration agreements between a patient and health care provider must comply with the specific requirements of the arbitration statute of the Utah Health Care Malpractice Act. See *Stewart*, 2011 UT App 129 at ¶ 7, 256 P.3d at 233; Utah Code Ann. § 78B-3-421. These requirements include terms that must be contained in the arbitration agreement, information the patient must be provided in writing, and information the patient must be verbally told. Utah Code Ann. § 78B-3-421. In *Stewart v. Bova*, the Utah Court of Appeals concluded the arbitration agreement was not validly executed in compliance with the Malpractice Act when the plaintiff was not verbally encouraged to read the agreement or ask any questions; therefore, the agreement was unenforceable. The court rejected the defendant’s argument that where the objectives of the statute have been satisfied, substantial compliance was sufficient. *Id.* at ¶ 10, 256 P.3d at 234-235.

In addition to the health care setting, there are statutes which allow arbitration of injury claims in the area of motor vehicle accidents. For example, both Utah Code Ann. § 31A-22-305(9), dealing with Uninsured Motorists, and Utah Code Ann. § 31A-22-305.3(8), dealing with Underinsured Motorists, provide that an insured claimant may elect arbitration to resolve the claim against an uninsured/underinsured motorist. Further, Utah Code Ann. § 31A-22-321(1) allows “[a] person injured as a result of a motor vehicle accident may elect to submit all third party bodily injury claims to arbitration by filing a notice of the submission of the claim to binding arbitration…” This statute does not, however, preempt an already existing arbitration agreement between the parties.