**03.04A VIOLATION OF STATUTE – NEGLIGENCE PER SE**

A [state law] [municipal ordinance] provides:

 [Quote applicable statute, regulation, or ordinance.]

If you find that the defendant violated this law, then you must find that [he][she] was negligent, unless you find that the violation is excused.

The violation is excused if:

1. the defendant lacked the capacity to comply with the law;

2. the defendant did not know and should not have known that [he] [she] needed to follow the law;

3. the defendant was unable after reasonable care to comply with the law;

4. the defendant faced an emergency not caused by [his] [her] own misconduct;

5. compliance with the law would have created a greater risk of harm to the plaintiff or to others than noncompliance; or

6. the meaning of the law was obscure or unreasonable and the defendant acted with reasonable care in attempting to obey it.

*Option 1:* If you find that the defendant complied with this law [or that any violation was excused], you must find the defendant was not negligent.

*Option 2:* If you find that the defendant complied with this law [or that any violation was excused], you maystill find that [he][she] was negligent if you decide that a reasonable person would have taken precautions in addition to those required by this law.

Directions for Use

This instruction should be used when the court has determined that the standard of care applicable to a claim in the case is established by statute, regulation or ordinance. If this is the sole standard of care in the case, Option 1 should be given. If the reasonable person standard also applies to a claim in the case, Option 2 should be given and the jury should also be instructed on principles of ordinary negligence.

If there is no evidence of excuse, the jury should not be instructed on the issue.

If the court decides a statute, regulation or ordinance does not set out the standard of care applicable to the case, but that its violation may constitute some evidence of negligence, Instruction 3.04B (Violation of Statute-Evidence of Negligence) should be given instead of this instruction.

This instruction addresses only the issues of duty and breach of duty and must be followed by Instruction 3.07 (Substantial Factor).

Comment

This instruction is based on Alaska negligence per se opinions and also on sections 286, 288A, and 288B of the [Restatement (Second) of Torts](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0101577&FindType=Y&SerialNum=0290694009) [(1965)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0101577&FindType=Y&SerialNum=0290694013) which were held to apply to Alaska negligence per se cases in *Ferrell v. Baxter*, 484 P.2d 250, 263-64 (Alaska 1971). *See, e.g., Pagenkopf v. Chatham Electric, Inc.*, 165 P.3d 634 (Alaska 2007); *Getchell v. Lodge*, 65 P.3d 50, 54–55 (Alaska 2003); *Cable v. Shefchik*, 985 P.2d 474, 480 n.16 (Alaska 1999); *Sweet v. Sisters of Providence*, 881 P.2d 304, 314 (Alaska 1994).

In a negligence per se case, a statute, regulation or ordinance replaces the normal standard of care for claims based on violation of the statute, but causation must still be shown. *See Ferrell*, 484 P.2d at 259-60 (“Violation of statute cases really have nothing to do with causation . . . [A] violation of a statute only determines if the actor's conduct is negligent.”) (internal citation omitted).

The trial court has the discretion to adopt a statute, regulation or ordinance as the standard of care in a case where there is evidence upon which the jury could conclude the law was violated. *E.g., Bailey v. Lenord*, 625 P.2d 849, 855 (Alaska 1981) (The test for determining whether there is sufficient evidence to support a negligence per se instruction is "whether the facts and resulting inferences are such that reasonable people, viewing the evidence in the light most favorable to the party seeking the instruction could justifiably have different views on the question."); *Sweet*, 881 P.2d at 314. But the court should only do so when the law sets out the rule of conduct in specific and concrete terms. *Bailey*, 625 P.2d at 856 (Alaska 1981); *Bachner v. Rich*, 554 P.2d 430, 441‑42 (Alaska 1976). If the law sets out the rule in general or abstract terms, it should not be adopted as the standard of care. *See Breitkreutz v. Baker*, 514 P.2d 17, 20–24 (Alaska 1973)(administrative regulation directing drivers not to drive at a speed greater than is reasonable and prudent did not set out specific and definite enough standard of care so that violation would be negligence per se.) Negligence per se may be applied to a child who is being held to an adult standard of care. *Ardinger v. Hummel*, 982 P.2d 727, 734 (Alaska 1999).

Negligence per se only applies if the court determines the plaintiff is within the class the law was intended to protect from the type of harm that occurred. *E.g., Ferrell*, 484 P.2d at 263 (“[B]efore a plaintiff is entitled to an instruction defining the violation as negligence per se, he must first demonstrate that he is among the protected class and, second, that the injury was caused by a harm against which the law was designed to protect.”) If these conditions are met, the court’s discretion to decline to give a negligence per se instruction is primarily limited to those cases where the law is “‘so obscure, oblique or irrational that [it] . . could not be said as a matter of law’ to provide an adequate standard of due care, or to those where the enactment amounts to little more than a duplication of the common law tort duty to act reasonably under the circumstances.” *Cable v. Shefchik*, 985 P.2d 474, 477 (Alaska 1999).

Negligence per se has been applied to a number of different types of laws. *Sweet*, 881 P.2d at 311, 314 (maintenance of medical records and informed consent); [*Loeb v. Rasmussen*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=0&SerialNum=1991202966), 822 P.2d 914, 917 (Alaska 1991)(liquor vendor statute); [*Osborne v. Russell*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=661&FindType=Y&SerialNum=1983142772), [669 P.2d 550, 553–54 (Alaska 1983)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=661&FindType=Y&SerialNum=1983142772)(National Electrical Code); [*Harned v. Dura Corporation*,](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=661&FindType=Y&SerialNum=1983128816)  [665 P.2d 5, 10 n.17 (Alaska 1983)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=661&FindType=Y&SerialNum=1983128816) (design and construction standards for pressure vessels set out in the American Society of Mechanical Engineers (ASME) Code); *Farnsworth v. Steiner*, 601 P.2d 266, 271 (Alaska 1979)(FAA Regulations); *Bachner*, 554 P.2d at 439 (General Safety Code); *Ferrell*, 484 P.2d at 257-58 (administrative traffic regulations).

Section 288A [Restatement (Second) of Torts](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0101577&FindType=Y&SerialNum=0290694009) [(1965)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0101577&FindType=Y&SerialNum=0290694013) sets out the excuses enumerated in paragraphs (1) through (5) of this instruction. *Ferrell*, 484 P.2d at 264. Excuse (6) is based on case law. *E.g., id.* at 265. There may be other excuses available depending on the facts of the case. The court must decide in the first instance whether there is sufficient evidence to instruct the jury on a particular excuse. *Id.* at 265 n.26. An evidentiary hearing may be required. *Sweet*, 881 P.2d at 314.

The party asserting the excuse bears the burden of proof. *E.g., Getchell*, 65 P.3d at 54 n.9; *Ferrell*, 484 P.2d at 257, 266 (once plaintiff establishes traffic lane violation, burden shifts to defendant to show excuse). *See generally Sweet*, 881 P.2d at 312. An excused violation of a statute, regulation, or ordinance is not negligence. *Ferrell*, 484 P.2d at 263.

Alaska cases have addressed a number of excuses. *Getchell*, 65 P.3d at 54 (moose in road as sudden emergency); *Sweet*, 881 P.2d at 312 (reasonable diligence, obscurity); *Ferriss v. Texaco*, 599 P.2d 161, 164 (Alaska 1979) (obscurity); *McLinn v. Kodiak Elec. Ass’n, Inc*., 546 P.2d 1305, 1314 (Alaska 1976) (ignorance of operative facts); *Ferrell*, 484 P.2d at 260-61 (obscurity, irrationality, arbitrariness); *Breitkreutz*, 514 P.2d at 26 (inability to comply).

A case may include more than one standard of care: negligence per se and the ordinary standard of care. *Ferrell*, 484 P.2d at 265 n.28 (If a reasonably prudent person would take precautions in addition to those statutorily required, a person may be found negligent for failing to do so).