**3.15A Negligent Infliction of Emotional Distress: Preexisting Duty**

[Plaintiff] claims that [s/he] suffered severe emotional distress as a result of [defendant]’s negligence when [describe event/incident]. In order to find in favor of [plaintiff] on this claim, you must find that it is more likely true than not true that:

1. [Defendant] negligently breached his/her duty to [plaintiff] to [describe duty]; and
2. [Defendant]’s negligence caused [plaintiff] to experience severe emotional distress.

You must find both of these elements present to compensate [plaintiff] for negligent infliction of emotional distress.

Severe emotional distress is distress that is so substantial or enduring that no reasonable person should be expected to endure it. Severe emotional distress exists when a reasonable person would be unable to adequately cope with the mental stress caused by the circumstances. Examples include neuroses, [psychoses](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ic6c75a10475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), chronic depression, phobia, post-traumatic stress disorder, and shock. But temporary fright, disappointment, or regret do not qualify as severe emotional distress.

**Use Note**

Use this instruction in a negligence case where the only damages sought are for emotional distress. A claim for negligent infliction of emotional distress allows a plaintiff to recover for severe emotional distress even in the absence of physical injury. The Alaska Supreme Court has recognized two subtypes of this cause of action: bystander and preexisting duty. This instruction is for use in a preexisting duty case. Where defendant and plaintiff have no preexisting relationship and the NIED claim is instead based upon plaintiff being a bystander to an accident, instruction 3.15B (Negligent Infliction of Emotional Distress: Bystander) should be given. Appropriate negligence instructions also should be given; these will include 3.03A/B (Negligence Defined) and 3.07 (Substantial Factor), as well as others that may be relevant based on the particulars of the case.

**Comment**

Not all preexisting duties are sufficient to enable a NIED claim to proceed. “A defendant must stand in either a fiduciary or contractual relationship with the plaintiff in order to create such a preexisting duty.” *Kallstrom v. United States*, 43 P.3d 162, 166 (Alaska 2002). A generalized duty of care to the public at large is not sufficient. *Id.* In addition, a breached contractual duty must be “highly personal and laden with emotion” such that it is “particularly likely to result in serious emotional disturbance” if breached. *Hancock v. Northcutt*, 808 P.2d 251, 258-59 (Alaska 1991). In *Hancock*, the Alaska Supreme Court held that a house construction contract does not meet this standard, but cited with approval cases finding that the following duties are “so highly personal and laden with emotion” that they properly support an NIED claim: contracts to marry, to conduct a funeral, to sell a sealed casket, to conduct a cesarean birth, to surgically rebuild a nose, to provide promised maternity medical coverage, to provide medical services, and to keep a daughter informed about her mother’s health. *Id.* (citing cases). Under *Hancock*, the court determines as a matter of law whether a preexisting duty is legally sufficient to support the NIED claim. If the court determines that a legally sufficient duty exists, it should instruct the jury as to the nature of the duty. If a factual dispute requires the jury to determine the nature or existence of the alleged duty, that question can be added as an element in this instruction.

Whether a plaintiff’s injury rises to the level of “severe emotional distress” is a question for the jury. *Chizmar v. Mackie*, 896 P.3d 196, 204-05 (Alaska 1995). The language defining “severe emotional distress” is taken from *Sowinski v. Walker*, 198 P.3d 1134, 1166 (Alaska 2008), in which the Alaska Supreme Court affirmed a very similar instruction.

Although Comment j to Restatement (Third) of Torts § 46 suggests that there may be a difference between “serious emotional distress” and “severe emotional distress,” the Alaska Supreme Court uses the terms interchangeably. *Fyffe v. Wright*, 93 P.3d 444, 456 n.34 (Alaska 2004), *partially disavowed on other grounds by Burton v. Fountainhead Dev., Inc.*, 393 P.3d 387, 392-93 & n.20 (Alaska 2017).