

1022.2 NEGLIGENCE OF GENERAL CONTRACTOR: INCREASING RISK OF INJURY TO EMPLOYEE OF SUBCONTRACTOR

A general contractor who sublets all or a part of a contract to a subcontractor has a duty not to commit an affirmative act which would increase the risk of injury to an employee of the subcontractor.

An affirmative act is an act of commission – that is, something that one does – as opposed to an act of omission, which is something one fails to do.

COMMENT

This instruction was approved in 1973. The comment was updated in 1989, 2010, and 2020. The 2020 revision updated case law citations.

This instruction deals with the “retained-control” exception to the general immunity of one who hires an independent contractor.

Barth v. Downey Co., 71 Wis.2d 775, 239 N.W.2d 92 (1976); Lemacher v. Circle Constr. Co., 72 Wis.2d 245, 240 N.W.2d 179 (1976).

Failure to check the credentials of an independent contractor or make other inquiries is not “active misconduct constituting an affirmative act.” Wagner v. Continental Casualty Co., 143 Wis.2d 379, 390, 421 N.W.2d 835 (1988). Negligent hiring does not by itself constitute an affirmative act of negligence upon which the liability of a principal employer can be based. Wagner, supra at 390.

Negligence of General Contractor: Increasing Risk of Injury to Employee of Subcontractor. A general contractor who fails to warn a subcontractor about the dangers of asbestos, fails to investigate or test for the health effects of asbestos, and who fails to instruct a subcontractor on precautionary measures when dealing with asbestos has committed an omission, not an affirmative act of negligence. Tatera v. FMC Corp., 2010 WI 90, ¶29, 328 Wis.2d 320, 786 N.W.2d 810. Additionally, supplying an unsafe asbestos-containing product is not an affirmative act of negligence because the failure to warn of danger is an omission. Id., ¶30.