

RENDERED: December 3, 2004; 2:00 p.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-002416-MR

SUE VANDERBUR JENKINS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE THOMAS B. WINE, JUDGE  
ACTION NO. 02-CI-007294

ATLAS SIDING AND WINDOW  
COMPANY; FRANK MILLER;  
AND DAVID P. MILLER

APPELLEES

OPINION

AFFIRMING

\*\* \*\* \* \* \*

BEFORE: DYCHE AND McANULTY, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>

DYCHE, JUDGE: Sue Vanderbur Jenkins was assaulted and robbed  
inside her home on May 7, 2002. The assailant/robber was David

---

<sup>1</sup> Senior Judge Thomas D. Emberton, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and KRS 21.580.

Miller, an employee of Atlas Siding and Window Company. Sue brought this action against Atlas, alleging that Atlas was negligent in hiring a person with a past as violent as David's, and that that negligence was the proximate cause of her injuries. The circuit court granted Atlas a summary judgment, CR 56, finding that David was not acting within the scope of his employment at the time of the burglary, assault, and robbery, and that any risk to Atlas's customers created by its hiring of David was not reasonably foreseeable. Sue now appeals, again arguing that Atlas knew of David's "dangerous propensities," and that his assault on Sue was legally foreseeable. We disagree on the latter issue and affirm.

Sue and her husband hired Atlas to put windows and gutters on a new sunroom on their home. For the purposes of this appeal, we will assume that David was an employee of Atlas, being hired by his father, whom we will also assume to be an employee.

It is unquestioned that David has had some incidents of violence in his past. He had served some jail time for an assault on his wife; he had an altercation with a co-worker which he claimed to be self-defense; and he had some unspecified trouble in Georgia as a juvenile.

We will also assume that Atlas knew of each of these incidents. The trial court found that

these facts are still too far removed from the incident on May 7, 2002, to find that Atlas knowingly created a foreseeable risk to Ms. Jenkins. . . . The Court does not agree with Jenkins that it was foreseeable that a sub-employee would return to the residence of a customer several weeks later to burglarize the home and assault the owner.

Sue argues that it was foreseeable that "David Miller would avail himself of this access" to Atlas's customers' homes to break into those homes and assault the owners. She maintains that the trial court erred in two "important regards": weighing the facts on a summary judgment motion, and construction of the relatively new tort of negligent hiring.

The weighing of the facts, if done, would have been error. It is, however, harmless, as we base our analysis on the facts as seen in a light most favorable to Sue: as we have stated above, that Atlas knew of ALL of David's alleged prior acts of violence.

As far as misconstruing the tort of negligent hiring, we must agree with the trial court. David's actions were too remote in time and completely unrelated to his employment with Atlas to be foreseeable by Atlas. His prior actions were not of the same type as the crimes he committed against Sue. Atlas's hiring of David was not the proximate cause of Sue's injuries.

The judgment of the Jefferson Circuit court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR  
APPELLANT:

Paul J. Hershberg  
Seiller & Handmaker, LLP  
Louisville, Kentucky

BRIEF FOR APPELLEE ATLAS  
SIDING AND WINDOW COMPANY:

A. Campbell Ewen  
William P. Carrell II  
Ewen, Kinney & Rosing  
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEE  
ATLAS SIDING AND WINDOW  
COMPANY:

A. Campbell Ewen  
Ewen, Kinney & Rosing  
Louisville, Kentucky