

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 0307

BRENDON PRESTON

VERSUS

SOUTHERN UNIVERSITY, THROUGH THE BOARD OF SUPERVISORS OF  
SOUTHERN UNIVERSITY AGRICULTURAL AND MECHANICAL  
COLLEGE

Judgment Rendered: SEP 14 2011

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APPEALED FROM THE NINETEENTH JUDICIAL DISTRICT COURT  
IN AND FOR THE PARISH OF EAST BATON ROUGE  
STATE OF LOUISIANA  
DOCKET NUMBER C586376, DIVISION "28"

THE HONORABLE, TRUDY M. WHITE, JUDGE

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the Board of Supervisors of Southern  
University Agricultural and  
Mechanical College

BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

*Hughes, J., concurs.*

**McDONALD, J.**

Brendon Preston, the plaintiff herein, was working for Benbrook Contracting, L.L.C., at Southern University Agricultural and Mechanical College (Southern University) in Baton Rouge, performing debris cleanup after Hurricane Gustav. Mr. Preston asserted that while he was working, he trimmed a large tree branch, and then stepped aside to allow the branch to fall to the ground, at which time he slipped and fell into a large hole in the ground. Mr. Preston thereafter filed suit against Southern University, through its Board of Supervisors (hereafter Southern University), asserting that Southern University was negligent in allowing an unreasonably dangerous condition to exist on its premises and by failing to warn of the condition.

Southern University filed an exception of insufficiency of service of process, and filed an exception of vagueness. Southern University asserted that La. R.S. 13:5107 requires that in all suits filed against the State of Louisiana or a state agency, the attorney general of Louisiana and the department, board, commission, or agency head through which suit is to be filed must be served. Furthermore, Southern University asserted La. R.S. 39:1538 requires that in tort litigation, in claims against the state or a state agency for damages, the head of the department concerned, the office of risk management, and the attorney general must be served.

Southern University further asserted that in this case, service of process was requested and served upon "Southern University, through the Board of Supervisors of Southern University Agricultural and Mechanical College, through their agent for service of process James D. "Buddy" Caldwell, Attorney General of the State of Louisiana" but service was "not properly sent to or received by the head of the department concerned, or the office of risk management, as required." Therefore, Southern University asserted, Mr. Preston had not properly completed service upon the State of Louisiana, thus, Mr. Preston should be ordered to properly serve the

State within a delay ordered by the court, and if he failed to do so, the case should be dismissed. Further, Southern University asserted that the petition was vague because it did not name the parish, the state, or the location of the Southern University campus where the alleged incident took place. Southern University prayed that Mr. Preston be ordered to amend his petition to more specifically state the events that occurred to trigger the lawsuit.

Mr. Preston thereafter filed a first supplemental and amending petition, asserting that he was at the Baton Rouge campus, in East Baton Rouge Parish when the incident occurred. On May 24, 2010, a hearing was held on the exceptions of vagueness and improper service, and the trial court orally rendered judgment at the close of the hearing. Afterward, Mr. Preston amended his petition with respect to the exception of vagueness, and the trial court signed the written judgment on June 2, 2010, acknowledging Mr. Preston's amended petition that made the earlier ruling as to vagueness moot, and allowing Mr. Preston to amend his petition on the service issue.

On June 30, 2010, Southern University filed a motion to dismiss the suit, asserting that the trial court had allowed Mr. Preston 15 days to amend his petition for damages and to correct defects in the service of process, that Mr. Preston failed to amend his petition, and that in addition to not serving all of the parties required and not naming the proper agent for service of process as required by La. R.S. 13:5107 and 39:1538, Mr. Preston also failed to effect service within 90 days of filing suit, as required by La. R.S. 13:5107(D).

On September 14, 2010, Southern University's motion to dismiss was heard by the trial court. The trial court granted the motion, and dismissed the suit. The judgment was signed on September 24, 2010, with notice of judgment sent the same date. On December 3, 2010, plaintiff fax-filed a motion and order for devolutive appeal. The original was filed, and the fees paid, on December 9, 2010.

Thereafter, Southern University filed a motion to dismiss the appeal, asserting that it was untimely and should be dismissed. This court denied the motion to dismiss and maintained the appeal. **Preston v. Southern University, Through the Board of Supervisors of Southern University Agricultural and Mechanical College**, 2011-0307 (La. App. 1 Cir. 5/16/11) (unpublished).

Thereafter, Southern University filed a motion to remand the suit to the trial court, based upon the decision in **Burnett v. James Construction Group**, 2010-2608 (La. 7/1/11), \_\_So.3d\_\_, which Southern University asserts renders the issue in this appeal moot. This court denied the motion to remand on August 3, 2011.

In **Burnett v. James Construction Group**, the issue to be resolved was whether it is sufficient to serve only the attorney general or whether it is necessary to also serve other entities/individuals when a tort action is brought against the Department of Transportation and Development. The **Burnett** court found that, since La. R.S. 39:1538 neither imposes a time constraint on the service required by La. R.S. 39:1538(4) nor provides for dismissal for the failure to effectuate service. Burnett's failure to request service on the department head and the office of risk management within 90 days of commencement of his action did not entitle DOTD to the dismissal of his claims against it pursuant to La. C.C.P. art. 1672.

Thus, following the **Burnett** case, we reverse the trial court judgment which dismissed this case for insufficient service of process, and we remand the case to the trial court to allow Mr. Preston a reasonable amount of time to cure the defect in service of process.

#### **DECREE**

Thus, the trial court judgment sustaining Southern University's exception of insufficiency of service of process is affirmed, but amended so as to allow Mr. Preston a reasonable period of time, to be set by the trial court on remand of this matter, in which to cure the defect in service. This case is remanded to the trial

court for further proceedings. Costs of the appeal are assessed against Southern University.

**AFFIRMED AS AMENDED, AND REMANDED.**