

**FILED**

JUN 07 2016

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**NO. 339742**

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**COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON**

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**LIZ TATE,**

**Appellant,**

**vs.**

**TATE TRANSPORTATION, INC., a Washington  
corporation,**

**Respondent.**

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**APPELLANT'S REPLY BRIEF**

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**TABLE OF CONTENTS**

I. ARGUMENT ..... 1

II. CONCLUSION ..... 7

## TABLE OF AUTHORITIES

### Cases

<i>Greaves v. Medical Imaging Systems, Inc.</i> , 124 Wn2d 389, 879 P.2d 276 (1994) .....	2,5
<i>Roberts v. Arco</i> , 88 Wn.2d 887, 568 P.2d 764 (1977) .....	2,4,5
<i>Foley v. Interactive Data Corp.</i> , 47 Cal.3d 654, 765 P.2d 373 (1988) .....	5,6

I.  
**ARGUMENT**

The first cause of action in the Complaint filed by appellant Liz Tate is for breach of implied employment agreement. This claim was based in part upon the following factual allegations contained in the Complaint:

After the sale of the business to Ray Nulph, LIZ TATE was urged by Ray and Chris Nulph to stay on as an essential and integral member of the management team to ensure continuity of the company's operations. The management of TATE TRANSPORTATION, principally Ray and Chris Nulph, repeatedly represented to LIZ TATE that she had a position with the company as long as she wanted to continue working. LIZ TATE was encouraged by Chris Nulph to take up more duties with the company and to work more hours to assist the trucking company going forward. **LIZ TATE understood these representations from Ray and Chris Nulph to mean that there was an agreement for continued employment for an indefinite period and that LIZ TATE could only be terminated for just cause.**

CP 1-9.

The Complaint went on to make further related factual allegations:

On both of these occasions, LIZ TATE conferred with Ray and Chris Nulph and requested assurances that their agreement was still in place for continued employment. LIZ TATE relied upon the representations of management that she had an employment agreement and would only be terminated for just cause. At all times the parties had an agreement that Liz Tate was to continue to work at Tate Transportation as long as she performed her duties in a satisfactory and effective manner.

**The intent of the parties with respect to the agreement with LIZ TATE was that she would continue working with TATE TRANSPORTATION for an indefinite period to ensure a smooth transition and operations.**

CP 1-9.

Appellant Liz Tate established genuine issues of material fact concerning the alleged implied employment agreement. In fact, respondent concedes that all the discussions between the parties did in fact occur. Therefore, a reasonable trier of fact could conclude that the parties reached an agreement that there was indefinite employment and just cause termination.

As stated in *Greaves v. Medical Imaging Systems, Inc.*, 124 Wn.2d 389, 879 P.2d 276 (1994):

The courts will find an implied agreement between the employer and the employee if employment was intended to be permanent or for a certain duration. In cases where an employee sues for damages because termination was without just cause, the courts will look at the alleged understanding, the intent of the parties, business custom and usage, the nature of the employment, the situation of the parties, and the circumstance of the case to ascertain the terms of the claimed agreement.

The *Greaves* court cited to the precedential case of *Roberts v. Arco*, 88 Wn.2d 887, 568 P.2d 764 (1977), where the court stated that a contract for permanent employment is terminable by the employer only for just cause if: "(1) there is an implied

agreement to that effect, or (2) the employee gives consideration in addition to the contemplated services.”

The allegations in the Complaint advance the argument that the parties through their discussions, conduct and the nature of their trucking business reached an agreement that appellant Liz Tate was to be employed by Tate Transportation for an indefinite period and would only be terminated for just cause. Respondent was determined to keep Liz Tate in management so that the transition was smooth and the company operated profitably in the difficult trucking industry. Appellant Liz Tate provided evidence of the implied employment agreement, including the letter that was written to the Homeland Security Department indicating that Liz Tate’s “position is important to the company, as she is the one who handles all of the Federal Department of Transportation compliance requirements, controlled substance testing, accident investigation, hiring and termination of all regulated drivers.” Liz Tate also agreed to train Chris Nulph in her job duties and responsibilities so that he could take over the company at a later date.

As was mentioned previously, when analyzing the alleged understanding of the parties, the courts look at “the intent of the parties, business custom and usage, the nature of the employment,

the situation of the parties, and the circumstances of the case” to ascertain the terms of the claimed agreement. *Roberts v. Arco*, 88 Wn.2d 887, 894, 568 P.2d 764 (1977). The intent of the parties is clear: both sides wanted Liz Tate to continue in her role as Safety Director indefinitely and that she would only be terminated for just cause. Respondent wanted to give appellant Liz Tate that measure of job security so that she would stay to manage the transition from one ownership to another. The nature of the employment was such that Liz Tate was the only person in the management team that was familiar with the myriad Federal Department of Transportation compliance requirements and all the other rules and regulations governing the trucking industry. The situation of the parties was such that Tate Transportation needed Liz Tate to remain in her position as Safety Director indefinitely so that Chris Nulph would receive the level of training and experience needed to run a multi-million dollar trucking company. Chris Nulph had no experience in the trucking industry prior to his father’s purchase of Tate Transportation. And, finally, the circumstances of this case strongly indicate that the parties reached an agreement for indefinite employment and just cause termination because for an indefinite period of time Tate Transportation needed to retain a critical

management employee, Liz Tate, and in order to ensure that she remained with Tate Transportation provided job security and indefinite employment.

The statute of frauds does not preclude enforcement of the implied employment agreement. The implied employment agreement was that appellant Liz Tate agreed to continue to work for defendant Tate Transportation as long as she wanted to and could only be terminated for just cause. The first cause of action for breach of implied employment agreement is premised on the employment being for an indefinite term, not a fixed period of time.

The Brief of Respondent does not adequately address the California case of *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 765 P.2d 373 (1988). The plaintiff in that case, Daniel Foley, had an identical cause of action in his Complaint that he had an oral contract with the company not to fire him without good cause. California has a statute of frauds practically identical to Washington. The *Foley* court stated that the courts of California have held that such contracts, indefinite in duration but where the employer can discharge for cause, are not within the statute of frauds.

This understanding of the statute of frauds explains why the courts in *Greaves* and *Roberts* refer to implied agreements for termination for cause. These implied agreements are viable and may be enforced despite the mandate of the statute of frauds because all of these agreements are capable of being performed within one year. The summation in *Foley* provides the correct legal analysis here:

In sum, the contract between plaintiff and defendant could have been performed within one year of its making; plaintiff could have terminated his employment within that period, or defendant could have discharged plaintiff for cause. Thus, the contract does not fall within the statute of frauds and the fact that it was an implied oral agreement is not fatal to its enforcement

*Foley*, at 675.

Summary judgment should not have been granted on the first cause of action for breach of implied employment agreement. There were multiple genuine issues of material fact regarding the parties' implied employment agreement that Liz Tate would be employed for an indefinite period of time and that she would only be terminated upon just cause.

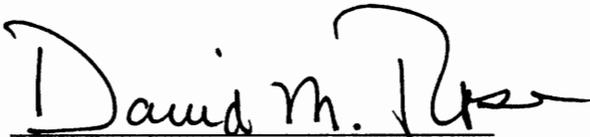
II.

**CONCLUSION**

The superior court erred when it granted summary judgment on the first cause of action for breach of implied employment agreement. There was ample evidence of such an implied employment agreement based on the discussions and representations of the parties, the intent of the parties, business custom and usage, the nature of the employment, the situation of the parties, and the circumstances of the case. The terms of the claimed agreement were that appellant Liz Tate would have indefinite employment with Tate Transportation through the transition and the training of Chris Nulph and her employment would only be terminated for just cause. The implied employment agreement did not run afoul of the statute of frauds because the agreement could have been performed within one year.

DATED this 6<sup>th</sup> day of June, 2016.

MINNICK-HAYNER, P.S.

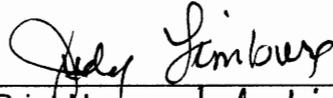
By:   
David M. Rose, WSBA #32849  
Of Attorneys for Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that on the 6 day of June, 2016, I caused to be served a true and correct copy of **APPELLANT'S REPLY BRIEF** by the method indicated below, and addressed to the following:

Jared N. Hawkins  
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X U.S. Mail, Postage Prepaid



Print Name: Judy Limburg  
Signed this 6 day of June, 2016  
at Walla Walla, Walla Walla County, WA