

**FILED**

MAR 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 BRIEF**

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I.

**ASSIGNMENT OF ERROR**

**A. The Trial Court Erred In Granting Defendant's *Motion For Summary Judgment And Dismissing All Plaintiff's Claims.***

1. There are genuine issues of material fact regarding the cause of action for breach of implied employment contract.

2. The Statute of Frauds does not apply.

II.

**STATEMENT OF THE CASE**

**A. Factual Background.**

Liz Tate and her former spouse Tom Tate owned and operated Tate Transportation for approximately twenty years until the business was sold to Ray Nulph in May 2008. CP 111-128 After the sale of the business, Liz Tate was urged by Ray and Chris Nulph to remain as Safety Director and member of the management team to ensure continuity of the company's operations. CP 111-128 Over the ensuing years, Liz Tate was repeatedly informed that there was an agreement between Liz Tate

and the Nulphs for continued employment for an indefinite period and that Liz Tate would only be terminated for just cause.

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 efficient operation of Tate Transportation CP 111-128. This intent was reflected in a writing signed by management. In a letter signed by secretary/treasurer Chris Nulph on June 20, 2012, Tate Transportation acknowledged in writing the Agreement between the parties that Liz Tate would continue on with Tate Transportation indefinitely or until she chose to leave. CP 111-128

Chris Nulph expressly represented to the Department of Homeland Security that Liz Tate's position **"is considered a long-term temporary position. She has agreed to stay on as an employee at least until January 2017."** CP 111-128 The context for this agreement was that Liz Tate was a unique and critical employee for Tate Transportation. Liz Tate was the only employee who had a Safety Director Certification. CP 111-128 Her importance to the company was acknowledged by Chris Nulph when he stated in writing 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.”**

In consideration of the Agreement for job security, Liz Tate agreed to provide substantial notice of at least one year before she decided to leave Tate Transportation so that she could train her successor. CP 111-128 Liz Tate also agreed to be available 24/7 to assist the company, even while on vacation. Liz Tate went to school to obtain additional knowledge and skills to improve her performance as Safety Director. CP 111-128 Liz Tate agreed to train Chris Nulph so that he could take over management of Tate Transportation. Liz Tate agreed to all this in exchange for the definite promises of job security. CP 111-128

Liz Tate in her role as Safety Director would frequently raise health and safety and other legal issues with Tate Transportation management. CP 111-128. Tate Transportation management was displeased and angry that Liz Tate was raising so many health and safety and legal issues and believed that her complaints were interfering with the operation of the trucking business. CP 111-128 Tate Transportation management also was displeased with Liz Tate's frequent complaints about a hostile work environment that

Tate Transportation management was aware of and allowed to occur and fester over several months. CP 111-128 Liz Tate made complaints of hostile work environment just a few weeks before she was terminated. CP 111-128. On May 30, 2014, Liz Tate was summarily discharged from her position as Safety Director for the purported reason that Tate Transportation needed to implement some “cost-cutting measures.” CP 111-128

**B. Procedural History.**

Defendant, Tate Transportation, filed a Motion for Summary Judgment on September 23, 2015. CP 15 Plaintiff, Liz Tate, opposed the Motion for Summary Judgment arguing that there were genuine issues of material fact that precluded the granting of summary judgment. CP 88-110 The Superior Court filed an Order Granting Summary Judgment on November 5, 2015. CP 174-176

Plaintiff, Liz Tate, filed a Motion for Reconsideration on November 16, 2015. CP 179-227 The Superior Court, in a letter to counsel, denied the Motion for Reconsideration on November 23, 2015. CP 230

### III.

#### ARGUMENT

##### A. Standard of Review.

This is an appeal from an Order Granting Summary Judgment. In reviewing an Order of Summary Judgment a Court of Appeals engages in the same inquiry as a trial court. *Callahan v. Walla Walla Housing Auth.*, 126 Wn. App. 812, 818, 110 P.3d 782 (2005). A Court of Appeals reviews an Order Granting Summary Judgment de novo. *Hill v. Sacred Heart Med. Ctr.*, 143 Wn. App. 438, 445, 177 P.3d 1152 (2008). Summary judgment is appropriate only if the nonmoving party fails to produce sufficient evidence which, if believed, would support the essential elements of his/her/their claim. *Id.* *Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001).

The appellate court should consider all facts and reasonable inferences in a light most favorable to the nonmoving party. *Woodall v. Freeman Sch. Dist.*, 136 Wn. App. 622, 628, 146 P.3d 1242 (2006). The court must determine whether a genuine issue of material fact exists and must not resolve an existing factual issue. *Woodall v. Freeman Sch. Dist.*, 136 Wn. App. at 628; *Thoma v. C.J. Montag & Sons, Inc.*, 54 Wn.2d 20, 26, 337 P.2d 1052 (1959). A

material fact is a fact upon which the outcome of the litigation depends, in whole or in part. *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974).

**B. The Trial Court Erred In Granting Defendant's Motion For Summary Judgment And Dismissing All Plaintiff's Claims.**

**1. There are genuine issues of material fact regarding the cause of action for breach of implied employment contract.**

The general rule in Washington is that an employer has the right to discharge an employee with or without cause in the absence of a contract for a specified period of time. *Roberts v. Arco*, 88 Wn.2d 887, 891, 568 P.2d 764 (1977). However, "In some circumstances, **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." *Greaves v. Medical Imaging Systems, Inc.*, 124 Wn.2d 389, 393, 879 P.2d 276 (1994)(*emphasis added*). In cases where an employee sues for damages because a termination was made 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.”** *Roberts v. Arco*, 88 Wn.2d at 894 (emphasis added).

In *Roberts v. Arco*, the plaintiff claimed he could only be discharged for cause because there was an implied agreement between the parties. The court in *Roberts v. Arco* determined that a contract for permanent or steady 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.” *Roberts v. Arco*, 88 Wn.2d at 894. The plaintiff in *Roberts* only provided evidence of his own personal understanding that he would be employed as long as he performed satisfactorily. The *Roberts* court found no evidence of an implied agreement.

In this case, there is ample evidence of an agreement for permanent or steady employment terminable by the employer only for just cause. Chris Nulph, on behalf of Tate Transportation, signed a letter to Department of Homeland Security representing that Liz Tate’s employment “is considered a long-term temporary position. She has agreed to stay on as an employee at least until January 2017.” CP 126 Chris Nulph represented 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.” CP 126 This creates a genuine issue of material fact as to what were the terms of the implied agreement

Further evidence supporting the implied agreement is the repeated representations of Chris Nulph, witnessed by Tom Tate, that Liz Tate was promised job security for the indefinite future.

I was in a meeting with Chris Nulph and Liz Tate where Liz expressly asked Chris whether her position as Safety Director was secure for the indefinite future. **Chris Nulph would respond by saying that she could stay in her position as long as she wanted to continue** and that he appreciated her work as Safety Director and her extensive effort to train him in her duties and help him better understand the company policy and procedures that were in place. I also heard Chris Nulph state to Liz Tate that he wanted her agreement that she would provide one year notice to the company before she would leave so that she would be able to properly train her successor. Liz Tate indicated to me and Chris Nulph that that was agreeable and that she wanted to make sure that any transition was smooth and efficient.

CP 130-131. The express and definite statements by Chris Nulph, binding on Tate Transportation, assist the court to “ascertain the terms of the claimed agreement.” *Roberts at 894*. This is not

based on plaintiff's "own personal understanding" of the agreement.

*Roberts at 895.*

Liz Tate also provided additional consideration for the implied agreement for job security. Specifically, Liz Tate agreed to be "on call" at all times on a 24/7 basis. She did this and even performed duties for Tate Transportation while on vacation. No other employee was available for work at all times. CP 117-118. Liz Tate went back to school to receive additional training for health and safety issues concerning Tate Transportation. CP 118. Liz Tate agreed to train Chris Nulph in management of a trucking operation. And finally, Liz Tate agreed to provide ample notice of her intent to leave Tate Transportation and agreed to properly train her successor as Safety Director. CP 112-116.

This Agreement for employment of indefinite duration terminable only for just cause is not unenforceable as a result of the Statute of Frauds. The Statute of Frauds provides that in the following cases, "any agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith . . ." RCW 19.36.010 (emphasis added). In this case, we have a signed writing, namely the letter Chris Nulph sent

to the United States Department of Homeland Security representing that Liz Tate and Tate Transportation had an Agreement that Liz Tate would remain as an employee of Tate Transportation at least until January 2017. CP 126. Defendant should be prevented by equitable estoppel from taking a position contrary to a representation previously made by the party. Liz Tate justifiably relied on the Homeland Security letter representation. *Brevick v. City of Seattle*, 139 Wn. App. 373, 160 P.3d 648 (2007).

In addition, the Agreement between Liz Tate and Tate Transportation that promised the atmosphere of job security contained no specific time period and therefore was for an indefinite time period. CP 115. This agreement does not fall within the Statute of Frauds. *Becket v. Cosby*, 73 Wn.2d 825, 440 P.2d 831 (1968).

Finally, there are material issues of disputed fact regarding the so-called "just cause" for dismissal. CP 121,124. There is a factual dispute as to whether Tate Transportation needed to terminate Liz Tate as a cost cutting measure. There are also disputed facts regarding the insubordination of Liz Tate. In an email sent to Liz Tate, one of defendant's declarants stated: "Your attitude towards your drivers and others is incredibly refreshing. To

find anyone that actually cares about others in today's world is pretty damn rare to be honest with you, and your caring attitude about your employees is obvious in everything you say and do. Thanks again!" CP 128.

There are disputed issues regarding just cause in the context of Chris Nulph requesting, shortly before the dismissal, that Liz Tate become a full-time employee and take on more duties and responsibilities. "On May 27, 2014, Chris came to my office and said he was considering buying the trucking division from Norpac in Oregon and asked if I was willing to go to full-time and take on more responsibilities." CP 121. If Liz Tate was so toxic and problematic in the workplace, Chris Nulph would not have offered her a full-time position on May 27, 2014, just days before her termination. **The offer of full-time employment days before the discharge contradicts most of the contentions in the Chris Nulph Declaration.** Chris Nulph would not have visited the home of Liz Tate nor invited Liz Tate to his home if he were sincerely outraged by her behavior. CP 122. There are genuine issues of material fact regarding the termination of plaintiff.

**2. The Statute of Frauds does not apply.**

Defendant prevailed on the Motion for Summary Judgment by advancing two principal legal arguments that the implied employment agreement claim was unenforceable as a matter of law. The first argument was that the implied contract theory was invalid because of the Statute of Frauds. This was a superficially attractive position as the parties both agreed that LIZ TATE was to be employed by TATE TRANSPORTATION for a lengthy period of time. However, if this contention were valid there could be no enforceable implied agreement to be terminated only for just cause.

The Washington cases, however, repeatedly refer to an implied agreement terminable only for just cause. If this type of implied agreement automatically ran afoul of the Statute of Frauds, there would be no legal reason for a court to even evaluate whether an implied agreement claim could be alleged, much less adjudicate the claim in a case.

The Statute of Frauds does not preclude enforcement of what Plaintiff has alleged in the first cause of action, namely that the parties had an agreement and understanding that Plaintiff could continue to work for Defendant as long as she wanted to and could only be terminated for just cause. The first cause of action for

breach of implied employment contract is premised on the agreement that Plaintiff's employment was for an indefinite term not a fixed period of time. CP 6-7

The seminal case in this area of the law comes from the Supreme Court of California, *Foley v. Interactive Data Corp*, 47 Cal.3d 654, 765 P.2d 373 (1988). The Plaintiff, Daniel Foley, in his second cause of action, alleged that he had an oral contract with the company not to fire him without good cause. The Trial Court sustained a demurrer without leave to amend on the principal ground that enforcement of any such contract would be barred by the Statute of Frauds.

California has a Statute of Frauds practically identical to Washington. Civil Code §1624, Subdivision (a) invalidates "An agreement that by its terms is not to be performed within a year from the making thereof" unless the contract is in writing signed by the party to be charged. Previous California cases had held that this portion of the Statute of Frauds applies only to contracts which **by their terms cannot possibly be performed within one year.**

In this case, the alleged implied agreement by its terms can be performed within one year. "Because the employee can quit or the employer can discharge for cause, even an agreement that

strictly defines appropriate grounds for discharge can be completely performed within one year – or within one day for that matter." *Foley v. Interactive Data Corp.*, at 673. 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**. The *Foley* Court cited a number of other jurisdictions that came to similar legal conclusions. *Foley* at 673.

The *Foley* Court also cited to an 1897 case from the Supreme Judicial Court of Massachusetts, *Carnig v. Carr (1897)* 167 Mass. 544. The Massachusetts Supreme Judicial Court rejected an employer's contention that the Statute of Frauds invalidated an oral agreement for "permanent employment" so long as the Plaintiff, an enameled, performed his work satisfactorily. "The majority, including Chief Justice Field and Justice Holmes, rejected the employer's defense. It has been repeatedly held that, if an agreement whose performance would otherwise extend beyond a year may be completely performed within a year on the happening of some contingency, it is not within the Statute of Frauds. In this case, we say nothing of other contingencies. The

contract would have been completely performed if the Defendant had ceased to carry on business within a year.” *Foley at 674.*

This understanding of the Statute of Frauds explains why the Courts in *Greaves, Roberts, and Flower v. T.R.A. Industries, Inc.*, 127 Wn.App. 13, 14 P.3d 1192 (2005) 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.*

The same reasoning was applied in *Duncan v. Alaska USA Federal Credit Union*, 148 Wn.App. 52, 199 P.3d 991 (2008). “A contract for continuing performance that fails to specify the intended duration is terminable at will and is therefore outside of the Statute of Frauds. This is because it can be performed at any time after its inception or terminated within the duration of a year.” *Duncan at 73.*

The same reasoning applies to this case, as there is no agreement for a specific duration of the employment and the contract can be performed within one year as Plaintiff is free to leave employment and Defendant can discharge Plaintiff for cause. Accordingly, the ruling by the Superior Court that the alleged implied contract is void under the Statute of Frauds is wrong and contrary to the overwhelming judicial authority in this area of law. **Foley** has been cited by the Washington Supreme Court three times, *Gaglideri v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 815 P.2d 1362 (1991); *Reninger v. D.O.C.*, 134 Wn.2d, 437, 951 P.2d 782 (1998); *Smith v. Bates Technical College*, 138 Wn.2d 783, 991 P.2d 1135 (2000).

In **Greaves**, the Statute of Frauds applied because *Greaves'* contract of employment was for a term of five years and therefore RCW 19.36.010 required it to be in writing to be enforceable. **Greaves** at 396. This case is similar to *Roberts*, which alleged an indefinite contract of employment that could only be terminated for just cause. The Statute of Frauds was not mentioned in **Roberts** because it did not apply to an indefinite period of employment. This is the situation in this case.

#### IV.

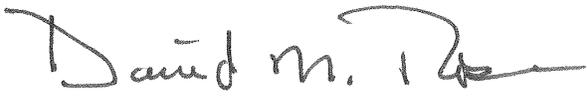
#### CONCLUSION

The Order granting Defendant Summary Judgement on the first cause of action for breach of the implied employment agreement was erroneous. There was substantial evidence that the parties reached an agreement that the plaintiff would have job security and indefinite employment and she could only be terminated for just cause. There were genuine issues of material fact regarding the implied employment agreement and what were the terms of the implied employment agreement based upon the alleged understanding, the intent of the parties, the business custom and usage, the nature of the employment, the situation of the parties, and the circumstances of the case.

It was also judicial error to invoke the Statue of Frauds to invalidate the implied employment agreement. An implied employment agreement of indefinite duration terminable by the employee or by the employer for just cause does not implicate the Statue of Frauds as it is capable of being performed within the one year period. The Order granting Summary Judgment should be reversed, and this case should be remanded to the Superior Court for a trial on the merits.

DATED this 4<sup>th</sup> day of March, 2016.

MINNICK-HAYNER, P.S.

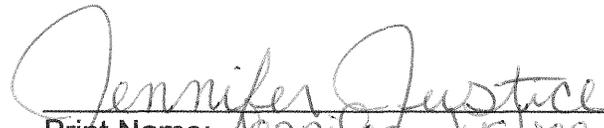
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 4 day of March, 2016, I caused to be served a true and correct copy of **APPELLANT'S BRIEF** by the method indicated below, and addressed to the following:

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

  
Print Name: Jennifer Justice  
Signed this 4 day of March, 2016  
at Walla Walla, Walla Walla County, WA