IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

IN THE MATTER OF:	)	
	)	E1999-00270-COA-R3-CV
THE LIQUIDATION OF UNITED AMERICAN BANK OF KNOXVILLE, TENNESSEE	)	Appeal As Of Right From The KNOX COUNTY CHANCERY COURT
SECURITY PACIFIC EQUIPMENT LEASING, INC.,	)	
Claimant/Appellant	)	HON. DARYL R. FANSLER CHANCELLOR
vs.	)	
FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER OF UNITED AMERICAN BANK,	)	
Respondent/Appellee	)	

For The Appellant:

Steven D. Lipsey
Eric J. Morrison
Stone & Hinds, P.C.
700 First American Center
507 Gay Street, S.W.
Knoxville, TN 37902

For the Appellee FDIC:

Boyd W. Venable, III
Ogle & Venable
121 Court Avenue
Sevierville, TN 37862

For the Appellee Attorney General:

Paul G. Summers
Attorney General & Reporter

Michael E. Moore
Solicitor General

Janet M. Kleinfelter
Senior Counsel
Financial Division
425 5th Avenue North
Nashville, TN 37243

AFFIRMED Swiney, J.

O P I N I O N

Appellant leased equipment to United American Bank ("UAB") for a seven year term. Three years into the lease, UAB was closed by the Tennessee Commissioner of Banking and FDIC

was appointed as receiver. Appellant filed a claim with FDIC seeking recovery of the full amount due on the lease. The Trial Court granted summary judgment to FDIC, thus upholding the constitutionality and applicability of T.C.A. § 45-2-1504(b), which provides that lessors can recover a maximum of two months' lease payments after a Tennessee bank fails and is closed. In this appeal, lessor contends that T.C.A. § 45-2-1504(b) violates the Equal Protection Clauses of the U.S. and Tennessee Constitutions by treating lessors differently from other contract claimants and that the application of the statute results in an unconstitutional taking of its property without due process of law in violation of the Fourteenth Amendment to the U.S. Constitution and Article I, Section 21 of the Tennessee Constitution. For the reasons herein stated, we affirm the judgment of the Trial Court.

Background

On June 20, 1978, Security Pacific Equipment Leasing Inc. ("SPELI"), leased bank equipment and furniture to United American Bank ("UAB") for a term of seven years. On February 14, 1983, the Tennessee Commissioner of Banking declared UAB to be insolvent and closed UAB. On February 18, 1983, SPELI informed FDIC by letter that the UAB lease was in default and sought recovery of damages in the amount of $845,939.63. On March 19, 1983, FDIC sent notice to SPELI that it was terminating the lease and that SPELI's recovery from FDIC as receiver was limited to no more than the amount due for sixty days' rent from the date of the FDIC letter, pursuant to T.C.A. § 45-2-1504(b). On October 12, 1984, SPELI filed a Proof of Claim in the Knox County Chancery suit for liquidation of UAB, asserting a claim of $760,939.63. FDIC objected to the claim on the basis of the statutory limit set out in T.C.A. § 45-2-1504(b).

FDIC filed a motion for summary judgment. SPELI filed a response and counter-motion for summary judgment. The Chancery Court issued a Memorandum Opinion upholding FDIC's interpretation of T.C.A. § 45-2-1504(b). The Court concluded that the Legislature intended for a lessor who receives 60 days' notice of the Commissioner's election to terminate the lease to have no claim for rent or for damages for such termination except rent accrued to the date of termination. The Court then directed SPELI to comply with Rule 24.04 of the Tennessee Rules of

Civil Procedure by notifying the Tennessee Attorney General if SPELI intended to challenge the constitutionality of the statute. On December 17, 1996, SPELI notified the Attorney General, who intervened for the sole and limited purpose of defending the constitutionality of the statute. On August 7, 1998, the Chancery Court issued a "Second Memorandum Opinion on Motions for Summary Judgment."

Addressing SPELI's first constitutional challenge to T.C.A. § 45-2-1504(b), the Trial Court held that the application of T.C.A. § 45-2-1504(b) does not result in the unconstitutional impairment of contract rights in violation of Article 1, Section 10, Clause 1 of the United States Constitution and Article I, Section 20 of the Tennessee Constitution because the statute was in effect when the lease was executed. The Court held that, since laws affecting the construction or enforcement of a contract existing at the time of its making form a part of the contract, T.C.A. § 45-2-1504(b) became a part of the agreement between SPELI and UAB. Consequently, the application of that statute does not impair SPELI's rights under the lease.

Addressing SPELI's second constitutional challenge, the Court held that the application of T.C.A. § 45-2-1504(b) does not result in an unconstitutional taking without due process of law. The Trial Court found no evidence to indicate that SPELI was deprived of its ownership interest or possessory rights in the leased property when the master lease was terminated.

Finally, addressing SPELI's third constitutional challenge, the Trial Court held that T.C.A. § 45-2-1504(b) does not violate the equal protection clauses of the United States Constitution or the Tennessee Constitution. The Trial Court held that the General Assembly stated the purpose of the Tennessee Banking Act of 1962, of which T.C.A. § 45-2-1504(b) is a part, in T.C.A. § 45-1-102(a), that States are accorded wide latitudes in the regulations of their local economies under their police powers, and that the statute at issue is rationally related to the State's legitimate interest in conserving and maintaining the sufficiency of the assets of the liquidated bank. Accordingly, the Trial Court concluded that the statute does not violate the United States or Tennessee Constitutions on equal protection grounds.

The Court then denied SPELI's motion for summary judgment. The Court also denied FDIC's motion for summary judgment, finding that FDIC had failed to allege in its motion that there is no genuine issue of fact. FDIC filed a renewed motion for summary judgment, alleging " that there are no material issues of fact and judgment can be rendered on the basis of the application of the law alone." SPELI filed a response which complained that FDIC had failed to comply with Tenn. R. Civ. P. 56.03 and therefore summary judgment could not be granted. FDIC filed a Rule 56.03 Statement of Facts. On January 21, 1999, the successor to SPELI by merger filed yet another response to FDIC's motion for summary judgment, this time raising these three issues:

1. "Summary judgment in favor of the FDIC-Receiver is improper because the application ot T.C.A. § 45-2-1504(b) results in a unconstitutional taking of property without due process of law.

2. There is no rational basis for singularly classifying lessors apart from non-lessor contract claimants under T.C.A. § 45-2-1504(b).

3. Genuine and material factual disputes exist as to whether lessor and certain non-lessor contract claimants are similarly situated.

On May 18, 1999, the Chancery Court held that T.C.A. § 45-2-1504(b) was not unconstitutional on any of the grounds asserted by SPELI and granted FDIC's motion for summary judgment. SPELI appeals this judgment.

Discussion

In this appeal, SPELI raises the following issues, which we quote verbatim:

4. Whether the Trial Court erred in holding that Tenn. Code Ann. § 45-2-1504(b) did not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the equal protection provisions of the Tennessee Constitution when the questioned statute arbitrarily singles out lessors as the only class of contract claimants to be completely denied any damage remedy?

5. Whether the Trial Court erred in holding that the application of Tenn. Code Ann. § 45-2-1504(b) did not result in an unconstitutional taking of property without due process of law in violation of the Fourteenth Amendment to the United States Constitution and Article I, Section 21 of the Tennessee Constitution when the rights and remedies of only lessors are summarily terminated and extinguished while all other contract claimants are allowed an adequate remedy?

Since this appeal challenges the Trial Court's granting of summary judgment to FDIC, it involves a question of law. A Trial Court's conclusions of law are subject to our *de novo* review with no presumption of correctness. *Ganzevoort v. Russell*, 949 S.W.2d 293 (Tenn. 1997). However, when the review involves a consideration of the constitutionality of a statute, we must indulge every presumption and resolve every doubt in favor of the constitutionality of the statute. *Vogel v. Wells Fargo Guard Servs.*, 937 S.W.2d 856, 858 (Tenn. 1996); *Petition of Burson*, 909 S.W.2d 768, 775 (Tenn. 1995).

Equal Protection

SPELI first raises the issue that the Trial Court erred in holding that T.C.A. § 45-2-1504(b) did not violate the equal protection provisions of the United States and Tennessee Constitutions when it "arbitrarily singles out lessors as the only class of contract claimants to be completely denied any damage remedy."

We initially observe that SPELI has not been "completely denied any damage remedy." FDIC was ordered to pay SPELI the statutorily prescribed rent on its property, $39,582.24. Additionally, SPELI retained its ownership of the leased property. SPELI mitigated its damages by leasing or selling some of the property to First Tennessee Bank, thus reducing its claimed damages from $760,939.63 to $546,556.05.

Our Supreme Court has consistently held that the United States and Tennessee Constitutions confer the same protection to our citizens. Therefore, in analyzing equal protection challenges, we follow the analytical framework developed by the United States Supreme Court which, depending on the nature of the right asserted, applies one of three standards of scrutiny: (1) strict scrutiny, (2) heightened scrutiny, or (3) reduced scrutiny, applying the rational basis test. *Brown v. Campbell County Bd. Of Educ.*, 915 S.W.2d 407, 413 (Tenn. 1995). Our Supreme Court in *Brown* explained:

> Compared to heightened and strict scrutiny, the reduced scrutiny test imposes upon those challenging the constitutionality of a statute the greatest burden of proof.

Tennessee Small School Sys. v. McWherter, 851 S.W.2d at 153. The test has been described as follows:

> The concept of equal protection espoused by the federal and our state constitutions guarantees that 'all persons similarly circumstanced shall be treated alike.' Conversely, things which are different in fact or opinion are not required by either constitution to be treated the same. The initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States, and legislatures are given considerable latitude in determining what groups are different and what groups are the same. In most instances the judicial inquiry into the legislative choice is limited to *whether the classifications have a reasonable relationship to a legitimate state interest.*

State v. Tester, 879 S.W.2d at 828 (emphasis in original) (quoting *Tennessee Small School Sys. v. McWherter,* 851 S.W.2d at 153). Thus, if a reasonable basis exists for the difference in treatment under the statute, or if any set of facts can reasonably be conceived to justify it, the statute is constitutional. *Id.; see also Newton v. Cox,* 878 S.W.2d at 110. Equal protection does not require absolute equality. Nor does it mandate that everyone receive the same advantages. *Tennessee Small School Sys. v. McWherter,* 851 S.W.2d at 153 ("If [the different treatment] has a rational basis, it is not unconstitutional merely because it results in some inequality.") (quoting *Harrison v. Schrader,* 569 S.W.2d 822, 825 (Tenn. 1978)); *see also Genesco, Inc., v. Woods,* 578 S.W.2d 639, 641 (Tenn. 1979). Unless the individual challenging the statute can establish that the differences are unreasonable, the statute must be upheld. *Tennessee Small School Sys. v. McWherter,* 851 S.W.2d at 154 (quoting *Harrison v. Schrader,* 569 S.W.2d at 826.)

While no bright line rule for determining reasonableness exists, there are some helpful parameters. The classification must be naturally and reasonably related to that which it seeks to accomplish. Some reason to distinguish and prefer the particular individual or class must exist.

> *There must be reasonable and substantial differences in the situation and circumstances of the persons placed in different classes which disclose the propriety and necessity of the classification.* If legislation arbitrarily confers upon one class benefits, from which others in a like situation are excluded, it is a grant of a special right, privilege, or immunity, prohibited by the Constitution, and a denial of the equal protection of the laws to those not included . . . . *The fundamental rule is that all classifications must be based upon substantial distinctions which make one class really different from another; and the characteristics which form the basis of the classification must be germane to the purpose of the law . . . .*

State v. Tester, 879 S.W.2d at 829 (emphasis in original).
Brown v. Campbell Co. Bd. of Educ., 915 S.W. 2d at 413-414.

In the case now before us, it is uncontested that the rational basis standard governs the determination of whether T.C.A. § 45-2-1504(b) violates the equal protection clauses of the U.S.

and Tennessee constitutions. Therefore, we must find the statute to be constitutional if any set of facts can reasonably be conceived to justify the difference in treatment between lessors and other creditors. In making that determination, we recognize that the initial discretion to determine what is 'different' and what is 'the same' resides in the Legislature, which is given considerable latitude in determining what groups are different and what groups are the same. *Tester,* 879 S.W.2d at 828. Moreover, the United States Supreme Court has held:

> When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a state interest.
>
> * * *
>
> In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines; in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.

New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976).

T.C.A. § 45-2-1504(b) provides:

> (b) Within six (6) months of the commencement of liquidation [of a state bank], the commissioner may elect to terminate any executory contract under which the state bank has contracted either to receive or to provide services, such services specifically including advertising, or any obligation of the bank as a lessee. A lessor who receives sixty (60) days' notice of the commissioner's election to terminate the lease shall have no claim for rent other than rent accrued to the date of termination or for claims for damages for such termination.

SPELI argues that the statute violates the equal protection clauses by depriving it, without any rational basis, of a contractually-based property right which others similarly situated enjoy. The basis for classifying groups of creditors differently is rational if it is germane to the pupose of the statute. The Legislature set out the purpose of the Tennessee Banking Act, which

includes T.C.A. § 45-2-1504(b), in T.C.A. § 45-1-102, which provides:

Purpose - Standards for exercise of authority by commissioner - Rules of construction.

> (a) It is the underlying purpose of this chapter and chapter 2 of this title to provide the citizens of Tennessee with a sound system of state chartered banks by providing for and encouraging the development of such banks while restricting their activities to the extent necessary to safeguard the interests of depositors.
>
> (b) This underlying purpose includes, but is not limited to, providing for:
>
> (1) The sound conduct of the business of banks subject to chapters 1 and 2 of this title;
>
> (2) *The conservation of their assets* [emphasis added];

While we find the plain meaning of the phrase "conservation of their assets" to be sufficient for a determination of the Legislature's purpose in enacting the statute, we have reviewed the Legislative debate which preceded the passage of the Act and find it informative and consistent with the plain language of the statute. House debate includes comments such as:

> This bill has been designed as a result of as much study as I can ever remember going into a piece of legislation by the legislative counsel and the banking industry, both federal and state . . . . This bill puts the state banks on more of a par with the federal banks. . . . This banking code is designed to eliminate the inequities between federal banks and state banks.

Senate debate on the purpose of the Act includes:

> One of the purposes of this bill was to bring State banks on a par with national banks as far as their rights and powers are concerned, with the national banks in Tennessee.
>
> * * *
>
> Between 1960 and 1966, there were 280 or 281 state chartered banks that went over to national chartered banks. They took over twenty billion three hundred million dollars away from state chartered banks. We have enjoyed a dual banking system all these years, but . . . something must be done to put state chartered banks on the same level with national chartered banks.
>
> * * *
>
> This bill does just one thing, and nothing else . . . just gives the authority to a state chartered bank to do nothing more, and nothing less, than the things a national chartered bank can do.

86th TENNESSEE GENERAL ASSEMBLY, HOUSE REC. 74,76, 77, March 20, 1969; SENATE REC. # 41, 42, March 19, 1969.

With this legislative purpose in mind, we review the basis of the Trial Court's finding to determine whether it comports with the Legislature's desire to "put state chartered banks on the same level with national chartered banks . . . bring state banks on a par with national banks as far as their rights and powers are concerned." The Trial Court in this case found:

> [T.C.A. § 45-2-1504(b)] allows the liquidator of a state bank to terminate executory contracts, i.e., contracts which have not been performed, and to limit the amount of damages a lessor can recover for such termination [and] is rationally related to the State's legitimate interest in conserving and maintaining the sufficiency of the assets of the liquidated bank.

United States Code Annotated Title 12, Banks and Banking, Chapter 16 - Federal Deposit Insurance Corporation, § 1821(d)(13)(E) provides:

> **Disposition of assets.** In exercising any right, power, privilege, or authority as conservator or receiver in connection with any sale or disposition of assets acquired by the Corporation under section 1823(d)(1) of this title, the Corporation shall conduct its operations in a manner which-
>
> (i) Maximizes the net present value return from the sale or disposition of such assets;
> (ii) Minimizes the amount of any loss realized in the resolution of cases;

Section 1821(e)(1), **Authority to Repudiate Contracts,** provides:

> **Leases under which the institution is the lessee:**
>
> (A) **In general.** If the conservator or receiver disaffirms or repudiates a lease under which the insured depository institution was the lessee, the conservator or receiver shall not be liable for any damages (other than damages determined pursuant to subparagraph (B)) for the disaffirmance or repudiation of such lease.
>
> (B) **Payments of rent.** Notwithstanding subparagraph (A), the lessor under a lease to which such subparagaph applies shall-
>
> (i) be entitled to the contractual rent accuring before the later of the date
>
> (I)the notice of disaffirmance or

> repudiation is mailed, or
>
> (II) the disaffirmance or repudiation becomes effective,
> unless the lessor is in default or breach of the terms of the lease;
>
> (ii) have no claim for damages under any acceleration clause or other penalty provision in the lease; and
>
> (iii) have a claim for any unpaid rent, subject to all appropriate offsets and defenses, due as of the date of the appointment which shall be paid in accordance with this subsection and subsection (i) of this section.

12 U.S.C. § 1821(e)(1)(B)(5).

We find that the Trial Court correctly held that T.C.A. § 45-2-1504(b)'s treatment of lessors differently from other creditors accomplishes a legitimate state goal, by conserving bank assets, maximizing the value from the disposition of the asset and providing for the disposition of assets of Tennessee state banks consistent with the disposition of assets of both state and national banks as prescribed in federal legislation governing the powers of the FDIC.

The class of creditors which T.C.A. § 45-2-1504(b) addresses includes holders of "any executory contract either to receive or to provide services, such services specifically including advertising, or any obligation of the bank as a lessee." The statute then dictates that, as to a sub-classification of "lessors who receive 60 days' notice of the commissioner's election to terminate the lease," those lessors "shall have no claim for rent other than rent accrued to the date of termination. . . ." SPELI argues that installment sales contracts are essentially the same type of contracts as leases, yet holders of installment sales contracts are not limited by T.C.A. § 45-2-1504(b), and therefore the different treatment is unconstitutional. Specifically, SPELI argues that:

> There are substantial factual similarities between leases and installment sales contracts. For instance, both documents are used by individuals, entities and financial institutions to allow individuals and entities to obtain possession and use of personal property. Both leases and installment sales contracts provide for periodic payments to the financial institution. The lease agreements, contracts, and the Uniform Commerical Code govern the rights of the parties to the lease and installment sales contract. In the event of default, a financial institution has the right to repossess the leased property or the collateral and to sell the same with net proceeds applied to the debt due and owing to the financial institution. In the event

> there is a deficiency balance due and owing to the financial institution after repossession sale, then the financial institution may pursue collection of the deficiency from the obligor on the lease agreement or the installment sales contract.

SPELI focuses on the *similarities* between leases and installment sales contracts. However, in affirming the Trial Court's determination that the statute is not unconstitutional, we focus on whether there are *differences* which have a reasonable relationship to the purposes of the statute. One readily apparent difference is that ownership of leased property remains vested in the lessor, while ownership of property purchased by installment contract is transferred to the purchaser. When an insolvent, closed bank pays an installment sales contract in full, it acquires title to personal property, thereby increasing its assets. However, if that bank pays an executory lease in full, it acquires no property. Plainly, the goal of conservation of bank assets would not be furthered by payment of an executory lease by an insolvent bank. In fact, as the Attorney General points out, it is unquestionable that limiting lessors' recovery on executory contracts to rent accrued will result in almost every instance more assets for the liquidated bank to be distributed among the depositors and all creditors.

Another rational basis for treating lessors differently from holders of installment sales contracts is that a lessor whose contract is terminated can take immediate possession and ownership of the leased property and re-lease or sell it, thus mitigating its damages. In fact, that is what SPELI did in this case.

SPELI has failed to meet its burden of proving that T.C.A. § 41-2-1504(b) has no reasonable relationship to a legitimate state interest. We find there is a reasonable basis for treating holders of executory leases differently from other contract claimants. Since the classification is not arbitrary, the Trial Court's determination that the statute does not violate the equal protection clauses of the U. S. or Tennessee Constitutions is affirmed.

Substantive Due Process

SPELI next raises the issue that the Trial Court erred in holding that the application

of T.C.A. § 45-2-1504(b) did not result in an unconstitutional taking of its property without due process of law in violation of the Fourteenth Amendment to the United States Constitution and Article I, Section 21 of the Tennessee Constitution. The Trial Court held that SPELI had produced no evidence to indicate an unconstitutional taking of its property without due process of law.

SPELI argues that "valid contracts have the status of property for the purpose of the guarantee of due process of law, and as such are protected from being taken without just compensation. *See* 16B Am.Jr. 2d Constitutional Law § 594 (1998)." SPELI contends that the application of T.C.A. § 45-2-1504(b) deprives it of a constitutionally protected right to an adequate contractual remedy in violation of substantive due process, citing *Charles v. Baesler,* 910 F.2d 1349, 1356-57 (6th Cir. 1990). SPELI concedes that 11 U.S.C. § 502(b)(6), part of the federal bankruptcy law, includes provisions similar to T.C.A. § 45-2-1504 which limit lease claims in bankruptcy proceedings. However, SPELI argues that § 502(b)(6) narrowly applies only to real property leases, not personal property leases, and allows a claim for the greater of one year or 15 percent of the remaining lease term not to exceed three years. Therefore, T.C.A. § 45-2-1504(b), which limits the lessors' remedy to sixty days' rent, "oversteps its constitutional bounds" because is does not provide as much relief to lessors as the federal bankruptcy statute does, and constitutes an unconstitutional taking of property without due process of law.

The constitutional provisions at issue are:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

> That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or proerty, but by the judgment of his peers or the law of the land.

TENN. CONST. art. I, § 8.

Both SPELI and FDIC, as well as the Attorney General, cite *Charles v. Baesler,* 910

F.2d 1349, 1353 (6th Cir. 1990) as instructive on the issue of whether SPELI's lease is entitled to the constitutional protection of substantive due process set out in the U.S. and Tennessee Constitutions. In *Baseler*, a fire department captain sued the mayor, the director of personnel and the Lexington-Fayette Kentucky Urban County Government for failure to promote him to the rank of major. The United States District Court for the Eastern District of Kentucky held that Defendants had deprived Plaintiff of a contractually-based property right without due process of law and entered partial summary judgment for the plaintiff. The 6th Circuit Court of Appeals reversed, holding that plaintiff did not have a substantive due process right to promotion and that failure to promote him did not violate the contracts clause of the United States Constitution or his equal protection rights. On the issue of substantive due process, the *Baseler* Court held:

> The Fourteenth Amendment's Due Process Clause protects life, liberty and property. Charles does not claim a life or liberty interest in job promotion. He does claim a property interest on the basis of his employment contract. No doubt exists that contractual rights are a species of property within the meaning of the Due Process Clause (citations omitted).
>
> * * *
>
> . . . Baseler and Cooke did indeed breach their contract to promote Charles, or, in constitutional parlance, deprived Charles of a contractually-based property interest.
>
> We do not believe, however, that the deprivation occurred without due process of law. In any due process case, after the plaintiff establishes deprivation of life, liberty or property, "the question remains what process is due." Due process may impose either substantive or procedural limitations upon a particular deprivation. The present case, as Charles insistently repeats in his brief, involves substantive, not procedural, due process. In other words, Charles does not contend that the government and its officials could not deny his promotion without first according him fair notice and hearing. Rather, Charles argues that he could not constitutionally be denied promotion at all. He asserts a categorical substantive due process right to promotion.
>
> We conclude that no such right exists. Most, if not all, state-created contract rights, while assuredly protected by procedural due process, are not protected by substantive due process. The substantive Due Process Clause is not concerned with the garden variety issues of common law contract. Its concerns are far narrower, but at the same time, far more important. Substantive due process "affords only those

> protections 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " It protects those interests, some yet to be enumerated, "implicit in the concept of ordered liberty," like personal choice in matters of marriage and the family (citations omitted).
>
> State-created rights such as Charles' contractual right to promotion do not rise to the level of "fundamental" interests protected by substantive due process. Routine state-created contractual rights are not "deeply rooted in this Nation's history and tradition," and although important, are not so vital that "neither liberty nor justice would exist if [they] were sacrificed" (citations omitted).
>
> In the present case, we do not believe liberty and justice are threatened, in the constitutional sense, by the failure of the government and its officials to abide by their contract with Charles. Governments breach contracts virtually every day without dire consequences ensuing to the human dignity or basic autonomy of the promisees. Indeed, legal philosophers have debated the degree to which the law should properly characterize any breach of contract as an "injustice" in the sense of moral default. In any event, we are satisfied that in the usual breach of contract case such as this, failure to meet contractual obligations cannot be equated with the sort of injustice inherent in "egregious abuse of government power." Similarly, any claim that Charles' right to promotion, which stems from the adoption of section 23-20 in 1980, is deeply rooted in our national history and tradition is both legally and historically indefensible (citations omitted).

Charles v. Baesler, 910 F.2d 1349, 1353-55 (6th Cir. 1993).

The Sixth Circuit has applied the substantive due process principles explained in *Baesler* in a Tennessee contract case, *Geren v. Bradley County*, 12 F.3d 212 (6th Cir.1993). In that case, bus drivers sued Bradley County after the county, in a cost-saving move, eliminated their contracted school bus routes. The 6th Circuit Court of Appeals found the plaintiffs' substantive due process claims to be:

> . . . totally without merit. No fundamental right was involved in the Board's action. A public body must have leeway in changing such contractual relations as those the Board had with the plaintiffs in order to be able to carry out its essential tasks – in this case, the education of the children of Bradley County. As the district court noted, this court has held that "substantive due process does not protect . . . run-of-the-mill contractually-based property interest[s]. . . ." *Charles v. Baesler*, 910 F.2d 1349, 1351 (6th Cir. 1990). If the plaintiffs had a property interest, clearly it would be a run-of-the-mill type.

Geren v. Bradley County, 12 F.3d 212, 214 (6th Cir. 1993).

The 6th Circuit again summarized the extent of protection afforded to citizens under constitutional substantive due process provisions in an Ohio case, *LRL Properties v. Portage Metro Housing Authority,* 55 F.3d 1097 (6th Cir. 1995). In that case, plaintiffs sued a local housing authority which had rejected their contract proposal for a housing rehabilitation project. Plaintiffs raised several issues, including an alleged violation of their constitutional substantive due process rights. The Trial Court dismissed the complaint. The 6th Circuit Court of Appeals affirmed, finding in part, that plaintiffs did not have a cognizable liberty or property interest which was protected by due process. The Court explained:

> Substantive due process claims are of two types. The first type includes claims asserting denial of a right, privilege, or immunity secured by the Constitution or by federal statute other than procedural claims under "the Fourteenth Amendment simpliciter."
>
> The other type of claim is directed at official acts which may not occur regardless of the procedural safeguards accompanying them. The test for substantive due process claims of this type is whether the conduct complained of "shocks the conscience" of the court.

LRL Properties v. Portage Metro Housing Authority, 55 F.3d 1097, 1111 (6th Cir. 1995). The Court then found that the termination of bus routes neither implicated a right secured by the Constitution or was the type of conduct which shocked the conscience of the court.

In the case now before us, SPELI argues that its substantive due process right includes the right to an adequate contractual remedy, the denial of which renders the application of T.C.A. § 45-2-1504(b) to its lease unconstitutional. However, as the Sixth Circuit Court of Appeals has stated:

> most, if not all, state-created contract rights, while assuredly protected by procedural due process, are not protected by substantive due process. The substantive Due Process Clause is not concerned with the garden variety issues of common law contract.

Baseler, 910 F.2d at 1352. SPELI has cited no cases, and we find none, which elevate a lease to more than a "garden variety issue of common law contract" for constitutional analysis purposes. We find no basis upon which to ascribe to SPELI's lease the status of a "fundamental interest . . . deeply

rooted in this Nation's history and tradition . . . so vital that neither liberty nor justice would exist if [it] were sacrificed." Certainly, the application of T.C.A. § 45-2-1504 to this lease cannot be said to be an "egregious abuse of government power." *Geren* instructs that "substantive due process does not protect . . . run-of-the-mill contractually-based property interest." *LRL Properties* describes the test as whether the conduct "shocks the conscience of the court." By any of these standards, SPELI has utterly failed to demonstrate a violation of substantive due process protected by the U.S. and Tennessee constitutions.

Both the FDIC and the Attorney General also argue in support of the Trial Court's decision on this issue that when SPELI and UAB entered into the master lease agreement, T.C.A. § 45-2-1504(b) was law in the State of Tennessee. A statute that affects the construction, enforcement, or discharge of a contract become a part of that contract at its inception. *Robbins v. Life Ins. Co.*, 89 S.W. 2d 340, 341 (Tenn. 1936); *Carey v. Carey*, 675 S.W. 2d 491, 493 (Tenn. Ct. App. 1984). T.C.A. § 45-2-1504(b) was a part of the contract between SPELI and UAB. SPELI's contractually provided damage remedies were limited by the statute if the lease was terminated pursuant to T.C.A. § 45-2-1504-(b). Appellant's argument fails because T.C.A. § 45-2-1504(b) was a part of the lease, and, therefore, no violation of substantive due process occurred.

Conclusion

For the reasons herein stated, the judgment of the Trial Court is affirmed and this cause is remanded to the Trial Court for such further proceedings as may be required, if any, consistent with this Opinion and for the collection of costs below. Costs on appeal are assessed against the Appellant, Security Pacific Equipment Leasing, Inc.

D. MICHAEL SWINEY, J.

CONCUR:

_____
HOUSTON M. GODDARD, P.J.

_____
HERSCHEL P. FRANKS, J.