**IN THE DISTRICT COURT OF APPEAL**
**IN AND FOR THE STATE OF FLORIDA,**
**SECOND DISTRICT**

RICHARD BRADBURY,
**Appellant,**

**vs.**

**CASE No.**: 2D07-423
L.T. Case No. 03-006649-CI
Sixth Judicial Circuit
BAR NO.: 0234052

MELVIN SEMBLER
and BETTY SEMBLER,

**Appellees.**
_____________________________/

# APPELLANT'S INITIAL BRIEF


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## INTRODUCTION

Citations to the record will be made by the use of the letter "R" followed by the page number(s) set forth by the Clerk of Court. In this brief there are multiple citations to record deposition testimony. These citations correspond to the actual deposition pages and lines. The Appellant, Richard Bradbury is referred to by his name or merely "The Appellant." The Appellees, Melvin Sembler and Betty Sembler are referred to by their names, or as "The Semblers, as appropriate. Each of the depositions referred to are of record: Richard Bradbury's at R-408-770; Melvin Sembler's at R-969-1004; Betty Sembler's at R 772-935; and Marlene McCord's at R 1304-1347.

## ISSUES ON APPEAL

1. Whether or not Chapter 784.048 legally applies to The Appellant's conduct, and if so, whether or not the language of 748.048(b) is constitutional.

## STATEMENT OF THE CASE

Melvin Sembler and Betty Sembler obtained an *ex parte* injunction against The Appellant, without notice, claiming he was stalking them in violation of 784.048 Fla. Stat.. They also brought claims for Invasion of Privacy and Intentional Inflection of Emotional Distress. Bradbury then filed a motion to dissolve the *ex parte* injunction and the other claims on constitutional grounds, arguing that Bradbury's activity was protected by the First Amendment to the United States Constitution, and that the and that Chapter 784.048 Fla. Stat as applied to the facts of this case is unconstitutional. R-59-68. The motion was denied R - 69-72. The Semblers later amended their complaint to add punitive damages, but the issues initially raised remained the same. R-102-108 and R 109-117.

After the completion of discovery the Appellant moved for Summary Judgment on all three counts. Other than having definitive proof that the Plaintiffs are public figures, the Appellant basically made the same arguments first raised in his Motion to Dismiss. R-1005-1052. The morning Motion for Summary Judgment was to be heard the Semblers took voluntary dismissals of the two tort claims. At the same time the Appellant stipulated that he had engaged in the course of conduct about which the Semblers complained, but held to the that

Chapter 784.048 Fla. Stat. does not apply to him and is unconstitutional as applied to the facts of this case. The Court then dismissed the Tort claims and entered a Final Judgment permanently enjoining Bradbury from various activities and upholding the Constitutionality of the statute. R - 1097, R 1098-1100 and R-1101-1103. It is from this Final Judgment on the statutory claim from which Bradbury has timely appealed. R-1104-1107 and R-1108-1111.

## STATEMENT OF THE FACTS

Richard Bradbury, has been a vocal opponent of a defunct drug prevention program known as "Straight" as well as similar programs that remain in existence and which follow Straight's model. R-48-53 and R -109-114. Melvin and Betty Sembler, have been active supporters of Straight by virtue of their rendition of financial contributions, and by Betty Sembler's service on Straight's Board of Directors. From 1989 through 2003, Bradbury has engaged in protesting Straight, picketing, making web postings against it, and actively participating in a group known as "The Straights" who claim they were victimized by that program. See Exhibit 9 attached to Deposition of Richard Bradbury R-408 et seq.

Bradbury also admits that from 1993 through approximately 2002, he would drive by the Sembler's home, and when their garbage was placed outside for collection he would go through it, find items of interest to him and keep them. He also admits in May of 2003, he placed an ad in the Pasco edition of the St. Petersburg Times offering for sale a pump which once belonged to Sembler. See Exhibit 9 attached to Deposition of Richard Bradbury R-408 et seq.

In July of 2003, Bradbury received a "cease and desist letter" from the Semblers' attorney . See Exhibit 3 to Bradbury Deposition R-408 et seq. His response to this was to write a letter to their attorney See Exhibit 4 to Bradbury

deposition R 408, et seq., and to place an advertisement for the pump, now identified as having once belonged to Melvin Sembler, and now confirmed to be a medical device by virtue of the publication of the aforesaid "cease and desist letter on E-Bay. The Sembler's responded with the filing of this lawsuit.

Discovery in this case shows a paucity of direct or indirect contact between Richard Bradbury and the Semblers between 1989 and 2003. Betty Sembler recalls seeing him once in her life prior to her deposition. Betty Sembler Depo. P 11 l-1; Melvin Sembler only saw him once before, when Bradbury was on a television show of some kind. Sembler Depo. P 71 -l 6-11. There is nothing in the record to show that any of the activity in which Bradbury ever engaged was in any illegal. Melvin Sembler testified the person with most knowledge of Bradbury's activities vis-a-vis himself and his wife was his assistant Marlen McCord, who, he said kept records on Richard Bradbury's activities between 1989 and 2003. Melvin Sembler Depo. P 60. Ms. McCord's testimony visit by Bradbury to the Sembler offices in the mid nineties, without incident other than a chance encounter in the parking lot of the same building with the Semblers' adult son and his wife. This was reported to McCord the following day. McCord Depo. P 33 l 11-34 and P 34 l 11-9. Ms. McCord also recalls receiving some mail and some protest literature in the mid nineties, she recalls an internal memo from

someone in the Sembler Company monitoring anti-Straight Websites, one telephone call from Bradbury to Melvin Sembler (Bradbury was told he wasn't available and that was the extent of it) along with some notes about the penile pump, the E-Bay ad and a call from a local television station reporting on that incident. McCord's matter-of -fact deposition testimony of these direct and indirect contacts is worthy of reading in its entirety as a juxtaposition to the hysterical hyperbole laced throughout the plaintiffs' pleadings. There is no record of any further direct contact between the parties until this lawsuit arose.

## II.

## FIRST ARGUMENT:

## DEFENDANT'S CONDUCT WAS LAWFUL

Before the Court may address the constitutionality of Chapter 784.048 is an appropriate threshold that it find a remedy that is less harsh than it striking down as unconstitutional Chapter 784.048(b) proscribes that "Constitutionally protected activity is not included within the meaning of "course of conduct." Accordingly, if Bradbury's actions are found to have been Constitutionally protected, this Court has the power to reverse the trial court without having to reach the ultimate issue of constitutionality. The Semblers have maintained that Bradbury's course of conduct over a span of fourteen years constitutes "stalking" as defined by 784.048 Fla.Stat. Clearly from the evidence adduced in discovery, especially by Marlene McCord, Bradbury never spoke to either of the Semblers, ever. His other contacts were minimal, and his periodic rummaging through their garbage was not known to the Semblers until 2003. Instead of seeking an injunction available with or without notice as proscribed by Fl. R. Civ. P. 1.610, the Semblers chose to throw their lot with the strictures of Chapter 784.048, and now they must live with it. The Supreme Court of the United States has held that there can be no expectation of privacy once the owner of anything, places it in his

or her garbage. "It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops and other members of the public. Accordingly, having deposited their garbage in an area particularly suited for public inspection, and, in a manner of speaking, public consumption for the express purpose of having other persons take it, respondents could have no reasonable expectation of privacy in the inculpatory items they discarded (footnotes and citations omitted)." *California v. Greenwood,* 486 U.S.35, 39, 40,108 S. Ct.1625, 1629, 100 L. Ed 2d 30 (1988). This case resolved for once and for all a split of authority on this issue which had previously existed among the states, and it upheld earlier Florida law as set forth in *State v. Schultz*, 388 So. 2d 1326 (Fla. 4th DCA 1980).

While *California v. Greenwood* supra. dealt with the expectation of privacy of criminal defendants, the doctrine that there is no expectation of privacy in garbage place out for collection extends to everyone. Thus a reporter for a tabloid newspaper who gathered information from the garbage left outside for pickup outside the residence of Henry Kissinger was held not to have violated Kissinger's right to privacy when he published the contents of it to the public at large. See, Footnote 4 in *California v. Greenwood,* supra.

It is so widely recognized that there is neither an ownership interest nor an

expectation of privacy in public figures' trash, an entire cottage industry known as "dumpster diving," has grown up. A *Goggle* internet search using that term reveals such websites as www.thedumpsterlady.com and others as well. See R 59-68.

The next issue is whether or not what Bradbury did rises to the level of Intentional Infliction of Emotional Distress. Here, the court must navigate the shoals of Bradbury's First Amendment Rights and the right of the Semblers to live without the burden of being concerned about troublesome, non-violent dissidents. Without question, if Bradbury had defamed these public figures, his speech would not be protected. Since defamation was never an issue, however the Semblers elected to proceed on an Intentional Infliction of emotional distress claim. This ruse had previously been tried by Jerry Falwell, the late evangelist, after Hustler Magazine wrote that the first time he (Falwell) had sex was in an outhouse, with his mother. Unlike the facts here, those allegations were patently untrue. The late Chief Justice William Rhenquist writing for the majority said, "We conclude that public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the ones here *without showing in addition that the publication contains a false statement of fact which was made with 'actual malice'*..." *Hustler Magazine v. Falwell,* 485 U.S.

46 , 108 S. Ct. 876, 882, 99 L.Ed. 2d 41 (1988) (emphasis added).

The plaintiffs are public figures, and they say so in their pleadings. Mr. Sembler is a well known land developer, and a two time Ambassador. Both plaintiffs are also famous for their political activism, for their philanthropic work, and also for their ongoing involvement in supporting Straight and its successor programs. Laudable as their accomplishments many consider to be, the fact is their involvement in the public arena invites dissent and controversy. This makes the level of protected speech against them far higher than speech used against private figures. *See. New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L. Ed. 2d 686 (1964).

The Appellant is a former participant in the Straight program, and at one time was considered to be a leader and a mentor among participants in Straight. He has long been active in a movement which condemns the Straight Program, and by association, its successor organizations, as well as its financial sponsors such as the plaintiffs. The defendant believes, as do others similarly situated, that Straight and its successors are rapacious, "cult"-like enterprises which use unlawful means – including abduction of minors, child abuse, starvation, brainwashing, insurance fraud and other such acts – to attain a worthy end – the elimination of illegal substance abuse. They also believe that friends and

associates of the plaintiffs have benefitted financially from the activities of these programs.

The appellant has engaged in picketing, demonstrating, and otherwise making himself heard on his views for many years. In his opinion what happened to him and others at Straight is the moral equivalent to a holocaust. See e.g. Exhibit 9 to Bradbury Depo. R-408 et seq.

Whether or not the appellant's opinion is "correct" or " incorrect" is not for this or any court to say. By relying on the statutory language of what does and does not serve a "legitimate purpose", the plaintiffs are asking the Court to inject itself into a political controversy which has been going on for nearly two decades.

In their carefully worded application for the injunction without notice, R-9-14, the Semblers artfully mingled a number of emotionally charged catch phrases without specifying the few of dates, times, places and events when they had direct or indirect contact with Bradbury over the subject fourteen years. They mention a fifteen year old burglary charge against the plaintiff without discussing its outcome, or the fact that the charge had to do with activities related to Straight, not the Semblers themselves. They mention an injunction of identical vintage, but fail to mention that it was temporary, and ultimately lifted. Indeed, Melvin Sembler wrongly believed that injunction was still in force at the time he filed this case.

Melvin Sembler Depo. P. 19 ll 7-16.

Since Bradbury did not break the law in retrieving this disposed of item, then what Bradbury has posted in the St. Petersburg Times and on E-Bay is truthful information which was lawfully obtained. No statute or code can prevent the publication of such information no matter how offensive it may be. Thus, having committed no crime, having not invaded the Semblers' privacy, and having not defamed them in any way by the publication of false information, Bradbury's speech, offensive as it may have been to the Semblers is protected speech and thus exempt from the reach of 784.048 Fla. Stat.

**THE OPERATIVE LANGUAGE RELIED ON IN 748.08 Fla. Stat. IS VAGUE AND OVER BROAD**

This case is about whether a well intentioned but flawed statute, as applied to the facts of this case violates Bradbury's right to freedom of speech. Bradbury's standing to challenge the constitutionality of this statute rooted in the First and Fourteenth Amendments to the United States Constitution, and Article 1 Section 9 of the Florida Constitution because he specifically contends the injunction issued pursuant to the offending statute impermissibly interferes with his right to speak. See, *Broadrick v. Oklahoma* , 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 830 (1973).

Since the record is devoid of evidence that Bradbury "followed" " cyber-stalked," or "threatened" the Semblers, the only way they can obtain an injunction is by showing that Bradbury's speech was not protected and that he "harassed" them. Chapter 784.048(a) Fla. Stat states that "harassment" is engagement in a course of conduct which is directed against a specific person, which causes substantial emotional distress and which "serves no legitimate purpose."

This language is a statutory accident waiting to happen. A close look at Appellate decisions regarding the constitutionality of this statute unanimously say its being struck down is not a case of "if", but " when."

There is little jurisprudence relating to the constitutionality of this statute, an analysis of it is necessary to show that the issues raised here have not been raised before. In *Pallas v. State of Florida*, 636 So. 2nd 1358 (3rd DCA1994), one John Pallas made fifty or more calls to the parents of his estranged wife during the course of one day. During those calls, he made threats to "get them;" said that he "had a gun" and that he "was going to kill them." The victims called the police, and Pallas was charged with the crime of aggravated stalking. Pallas claimed that the statute was unconstitutionally vague because the term "harass" as defined also includes a subjective standard for the result of harassment, namely "substantial emotional distress." Pallas argued that a victim who is unusually

sensitive may suffer "substantial emotional distress" as the result of entirely innocent conduct. This, he claimed, rendered the statute too vague and uncertain to be enforceable. In rejecting this contention, the Third District Court of Appeal focused on Pallas' specific conduct, and on the fact that the definition of "harassment" as set forth by the statute provided Pallas with sufficient information by which he knew or should have known that fifty telephone calls in one day combined with a death threat, would cause a reasonable person to have a "well founded fear" that there was an imminent threat of violence.

The *Pallas* Court also made it very clear that the distinction between "vagueness" and "overbreadth" is tied directly to protected speech, even though the issue of speech did not dominate that case. Thus the *Pallas* Court correctly ruled that the statute as applied to the facts of the Pallas case, was not overbroad. In so ruling, however, the *Pallas* Court was prescient when it left open the proposition that the issue of overbreadth may be applicable to some other person under some other set of facts by its deference to the holding in *Broadrick v. Oklahoma,* supra. stating, "The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *Pallas,* at 1361.

Certainly, the *Pallas* facts and the Bradbury facts bear little resemblance to one another.

*Bouters v State of Florida,* 659 So. 2d 235 (Fla 1995) , *Varney v. State of Florida* 659 So. 2nd 234 (Fla 1995); *Gilbert v. State of Florida*, 659 So. 2nd 233 (Fla. 1995); and *Koshel v. State of Florida*, 659 So. 2nd 232 (Fla 1995), Is a quartet of cases published on the same day by the Florida Supreme Court. *Bouters,* like *Pallas,* focused on whether or not the 784.048 was vague because it created a subjective standard for the term "substantial emotional distress." There, Bouters was telephoning a former girlfriend five or six times a day after having previously beaten her and threatened to kill her. Thereafter, he entered her house without permission, but left when he realized that she was at that moment on the telephone with the Sheriff's office. Bouters claimed that almost any emotionally charged activity could result in arrest so long as a police officer determined the activity served "no legitimate purpose" ***and*** the victim exhibited "substantial emotional distress." The court made a sharp distinction between Bouters' conduct and other activity which would be constitutionally protected. Indeed the court specifically found that Bouters' conduct was "clearly criminal and is unprotected by the First Amendment." *Bouters* supra. *at* 237. As for the term no "legitimate purpose" the *Bowers* court noted that the same statute expressly provides that "[constitutionally protected activity such as "...picketing or other organized

protests" does not fall within the ambit of the statute. Moreover, the *Bouters* court made it plain that invocation of the statute must involve a "credible threat 'with the intent to place [the victim] in reasonable fear of death or bodily injury.' " *Bouters* at 737.

As applies to this case therefore, the *Bouters* court, like the *Pallas* court places Bradbury's conduct outside Chapter 748 altogether. To that end the injunction issued by this Court is a misapplication of *Bouters*, at best. At worst, it is an interpretation of the phrase *"no legitimate purpose,"* which the defendant attacks here.

*Varney* simply follows *Bouters*, although Justice Kogan dissented and questioned the facial constitutionality of the statute. He and believed the court was acting imprudently and suggested that the matter should have been re-briefed and set for oral argument.

The same analysis applies to *Gilbert and Koshel.*

By the Semblers' and McCord's own admissions, Bradbury never committed a crime, never trespassed on property, never threatened anyone, and never defamed anyone. While their subjective implication is that his conduct constituted a credible threat to their physical safety, they offered nothing objective to prove that point, and so we are left with the question: did Bradbury's public revelations serve "no legitimate purpose?"

There is no case law which addresses what a "legitimate purpose" is or is not, and it is unnecessary for Bradbury to prove that his own activities are constitutionally protected, and thus "legitimate." See, *Bigelow v. Virginia*, 421 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 830 (1975).

While Florida Appellate Courts have thus far held that various provisions of the subject anti-stalking statute are constitutional, none of them have addressed the specific issues raised here, because the underlying conduct either involved unprotected speech, or outright criminal conduct. That is not the case here.

It is a fundamental requirement of due process that a statute must clearly delineate the conduct it prohibits. See, *Grayned v. City of Rockford*, 408 U.S. 104, 99 S.Ct. 2294, 33 L.Ed.2d 22 (1972). Further where a statute does not provide fair notice of the proscribed conduct to persons of ordinary intelligence and understanding it must be held void. See, *Warren v. State*, 572 So. 2d 1376, 1377 (Fla. 1991). What this means is if people of reasonable intelligence are forced to guess at the meaning and application statutory language then by definition that language is void. See, *Conally v. General Construction Co.*, 269 U.S. 385, 48 S. Ct. 127, 70 L. Ed. 322 (1926).

The term "legitimate," has been held to be vague in *K.L.J. v. State,* 581 So 2d 920 (Fla. 1st DCA 1991). In that case, a curfew ordinance which permitted an exception for the conduct of "legitimate business" was held to both vague *and*

overbroad. A minor, who was convicted for a curfew violation under this statute challenged the term “legitimate business” as both vague and overbroad. Reversing a trial court, the First District Court of Appeal adopted the test set forth by the Florida and the United States Supreme Courts in *Papachristou v. City of Jacksonville,* 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed 2d 110 (1972).

The First District Court of Appeal also relied on a New Jersey decision, *Allen v. Bordentown,* 216 N.J. Super. 557 (1987), which held that the term “legitimate business” did not provide sufficient guidance to parties as to what conduct was prohibited. Quoting *Allen,* the First District stated:

> The word “legitimate” is not defined. Does it mean business permitted by law? Is business “legitimate because the minor so believes? Who is to say what is “legitimate business?” Again this definition will be supplied on a subjective basis permitting the discriminatory enforcement of the ordinance.

The language in Florida's stalking statute which concerns itself with whether or not an activity is “legitimate” is as fatal to its enforcement as it was in *K.L.J.* Both statutes seek to permit purposes which are “legitimate” but the meaning of legitimacy is anyone's guess.

Our sister Court in the Thirteenth Judicial circuit has declared the criminal prosecution of this statute to be unconstitutional for the very reasons set forth here in *State v. Stephens Foster*, Case No. 93-5513. A copy of this unpublished Order is appended to this brief as “Appendix A.”

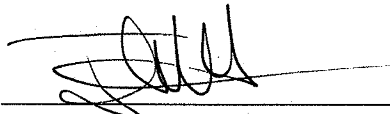
## CONCLUSION

Because Bradbury's speech was protected, Chapter 784.048 should not even apply to him, but if it does, the term "no legitimate purpose" is overbroad and does not put a reasonable person that legal conduct may nonetheless muzzle his right to speak, let alone to put him or someone in his shoes in prison. Accordingly, the Judgment of the Trial Court should be reversed with instructions to vacate the Final Judgment on the grounds that Bradbury's speech was protected, and/or that the use of 784.048 to muzzle him is overbroad and unconstitutional.

Respectfully Submitted.

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been sent via regular first class US mail to: Leonard S. Englanders, Esquire, Englander & Fischer, P.A., 721 First Avenue North, St. Petersburg, FL 33701 this 12 day of October, 2007.



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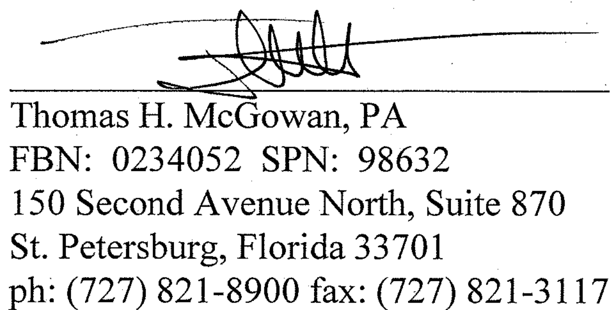
## CERTIFICATE OF COMPLIANCE

**I HEREBY CERTIFY** that this Initial Brief satisfies the requirements of the Florida Rules of Appellate Procedure 9.100 and is being submitted in Times New Roman 14-point font, and is accompanied by three copies and a floppy disk.



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IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY
CRIMINAL JUSTICE DIVISION

STATE OF FLORIDA — CASE NO: 93-5513

VS. — DIVISION: A

STEPHENS FOSTER

ORDER

THIS CAUSE having come on to be heard on July 2, 1993 and the Court being fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Defendant's Motion to Dismiss and to Declare 784.048 Florida Statute (1992) unconstitutional is granted.

DONE AND ORDERED at Tampa, Hillsborough County, Florida, this 7th day of ~~August~~ Sept, 1994.

DIANA M. ALLEN
CIRCUIT COURT JUDGE
THIRTEENTH JUDICIAL CIRCUIT
HILLSBOROUGH COUNTY, FLORIDA

/kac

Copies furnished to:

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