

# EXHIBIT 6

Westlaw.

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**H**SEE TX R RAP RULE 47.2 FOR DESIGNATION  
AND SIGNING OF OPINIONS.

Court of Appeals of Texas, Dallas.

The ASSOCIATED PRESS, Belo Corp., and The  
Dallas Morning News, L.P. d/b/a The Dallas Morn-  
ing News, Appellants

v.

Samuel L. BOYD, Appellee.

No. 05-04-01172-CV.

May 16, 2005.

On Appeal from the 68th Judicial District Court,  
Dallas County, Texas, Trial Court Cause No.  
030-03269-C.Thomas S. Leatherbury, William D. Sims, Jr., Mi-  
chael L. Raiff and Eileen R. Youens, for Belo Corp.  
& Dallas Morning.David H. Donaldson Jr., and Peter D. Kennedy, for  
The Associated Press.

J. Ken Nunley, for Samuel L. Boyd.

Before Justices MORRIS, FRANCIS and LANG-  
MIERS.

## MEMORANDUM OPINION

Opinion by Justice FRANCIS.

\*1 In this interlocutory appeal, media defendants/appellants The Associated Press, Belo Corp., and The Dallas Morning News, L.P. d/b/a The Dallas Morning News challenge the trial court's denial of their summary judgment motions with respect to appellee Samuel Boyd's libel suit against them. The facts of this case are well known to the parties, and we need not recite them in detail. Because all issues are well settled, we issue this memorandum opinion. See TEX.R.APP. P. 47.4. For the reasons that follow, we reverse the trial court's order and render

judgment that Boyd take nothing.

This matter arises out of two articles published after trial began in a federal civil lawsuit the U.S. Securities Exchange Commission filed against Boyd. An Associated Press (AP) reporter attended the first day of the trial and filed a wire report summarizing the SEC attorney's opening statement and Boyd's response. The Dallas Morning News republished a condensed, eight-sentence version of the AP wire report the next day. Both articles reported the SEC attorney's allegations that Boyd, a Dallas attorney, helped securities broker Robert Wilson defraud investors. The reports also noted Wilson was convicted in 1998 and currently serving a five-year prison term. They further summarized Boyd's denial of the SEC allegations and his claims that he was merely Wilson's lawyer and not involved in any of Wilson's wrongdoing. Neither article, however, expressly stated the SEC lawsuit against Boyd was a civil proceeding or that the SEC does not prosecute criminal violations of federal securities laws. The articles also did not specify the details of Wilson's 1998 federal criminal convictions, which were not for security fraud but wire fraud, money laundering, and tax evasion.

Boyd filed this lawsuit alleging the gist of the articles gave the false impression that the SEC was criminally prosecuting Boyd for securities fraud by making untrue representations, omitting material facts and misleadingly juxtaposing events. Appellants moved for summary judgment on both traditional and no evidence grounds. The trial court denied the motions. This interlocutory appeal was filed pursuant to section 51.014(a)(6) of the Texas Civil Practice and Remedies Code.

When reviewing the denial of summary judgment, we apply the same well known standards applicable to the granting of summary judgment. See *Associated Press v. Cook*, 17 S.W.3d 447, 451 (Tex.App.-Houston [1st Dist.] 2000, no pet.). For their traditional summary judgment motions, appel-

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lants had the burden to show no genuine issue of material fact existed and that they were entitled to judgment as a matter of law. See TEX.R. CIV. P. 166a(c); *Swilley v. Hughes*, 488 S.W.2d 64, 67 (Tex.1972). With respect to appellants' no-evidence summary judgments, Boyd had the burden to present sufficient evidence to raise a genuine issue of material fact on the challenged elements of his defamation claims. See *Gen. Mills Rest., Inc., Texas Wings, Inc.*, 12 S.W.3d 827, 832033 (Tex.App.-Dallas 2000, no pet.).

\*2 Among other things, appellants moved for summary judgment on the grounds that there was no evidence the articles were false and that the reports were a substantially true account of the SEC allegations as a matter of law. For his defamation cause of action to succeed, Boyd must prove appellants: (1) published a false statement about him; (2) that was defamatory; (3) while acting with either actual malice, if he is considered a public official or public figure, or negligence, if he is a private individual, regarding the truth of the statement. See *Carr v. Brasher*, 776 S.W.2d 567,569 (Tex.1989). Boyd asserts that the articles as a whole presented a false and defamatory impression of events. He contends the gist or sting of the articles at issue falsely implied that he was being criminally prosecuted by the SEC for securities fraud, that the SEC had previously prosecuted Wilson for the same crimes resulting in Wilson's five-year prison sentence, and that Boyd too would be imprisoned if the SEC won its lawsuit against him.

A publication can convey a defamatory meaning by omitting or juxtaposing facts, even though each individual statement considered alone might be literally true or nondefamatory. See *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 114 (Tex.2000). A plaintiff alleging defamation based on an article as a whole must prove the article's "gist" or "sting" is false and defamatory. *Id.* at 115. In such a case, the plaintiff may recover even if the discrete facts are literally or substantially true, provided they are published in such a way that they create a substan-

tially false and defamatory impression by omitting material facts or juxtaposing facts in a misleading way." *Id.* at 115. Whether an article is capable of a defamatory meaning is initially a question for the court. *Id.* at 114. An allegedly defamatory publication should be construed as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it. *Id.* at 114. Such a person exercises care and prudence, but not omniscience, when evaluating allegedly defamatory communications. *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 157 (Tex.2004).

In *Turner*, a television broadcast questioned mayoral candidate/attorney Turner's involvement in a former client's life insurance scam. *Turner*, 38 S.W.3d at 111. Although the broadcast correctly reported such details as Turner's drafting and probating of the client's will, as a whole, the report also gave the false impression that Turner participated in the conspiracy to fake the client's death. *Id.* at 117-19. The supreme court went on to conclude the broadcast as a whole was substantially false and defamatory because it "cast more suspicion on Turner's action than an accurate account would have warranted." *Id.* at 119.

In the case before us, the "gist" or "sting" of the articles in question was that in its lawsuit against Boyd, the SEC alleged in opening statement that Boyd knowingly participated in a complex security fraud scheme masterminded by Wilson and that Boyd denied any wrongdoing. The "sting" of the publications clearly lies in the reporting of the federal agency's assertions that Boyd helped Wilson in his scheme to defraud securities investors. Boyd does not dispute that the SEC made such allegations against him nor does he assert that these allegations were incorrectly reported. See *Dolcefino v. Randolph*, 19 S.W.3d 906, 918, (Tex.App.-Houston [14th Dist.] 2000, pet. denied) (media defendants need only prove third-party allegations reported were made, not that the allegations themselves were true). Instead, Boyd claims the articles' failure to specify the SEC trial was a civil proceeding, to-

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gether with their juxtaposition of Wilson's conviction and prison sentence, affected the overall gist of the articles by creating the false impression that Boyd was being criminally tried by the SEC for the same or similar crimes perpetrated by Wilson who was previously convicted by the SEC and currently serving jail time. The inclusion of phrases such as [Boyd] "did not know about Mr. Wilson's illegal actions," and use of the word "lure" when the SEC attorney never used that word in his opening, added to the false impression, according to Boyd.

\*3 Boyd argues the false suggestion of criminal prosecution casts more suspicion on his conduct than the accurate reporting of the SEC allegations that he participated in a fraudulent securities scheme and was now being tried civilly for his actions. To support his position, Boyd offers little or no analysis but cites several cases stating the general proposition that falsely charging a person with the commission of a crime or criminal conduct constitutes defamation per se. *See e.g., Dallas ISD v. Finlan*, 27 S.W.3d 220, 238 (Tex.App.-Dallas 2000, pet. denied); *Gray v. HEB Food Store No. 4*, 941 S.W.2d 327, 329 (Tex.App.-Corpus Christi 1997, writ denied); *Bayoud v. Sigler*, 555 S.W.2d 913, 915 (Tex.Civ.App.-Beaumont 1977, writ dismissed w.o.j.). While we agree with this broad statement as a matter of general law, it does not help Boyd overcome the hurdle created by the fact that the "sting" of the articles of which he complains was the accurate reporting of the SEC allegations of his participation in securities fraud and not the omission of whether it was a criminal or civil proceeding. Moreover, none of the cases cited by Boyd involved a media defendant accurately reporting allegations of wrongful conduct.

Here, it is undisputed that Boyd had been accused of the unlawful conduct of participating in securities fraud. The forum in which those accusations were made, be it criminal or civil, did not materially affect the sting caused by the accurately reported allegations of Boyd's participation in a fraudulent scheme. Specifically, both articles correctly re-

ported the SEC allegations that Boyd caused investors to lose millions when he helped persuade them to invest in several companies with poor prospects for success; that he helped lure investors to a Canadian mining company under investigation by Canadian authorities; and helped Wilson collect \$15 .3 million in investor's funds which were not used to make investments but were used to pay off earlier investors and people involved in a loan scheme as well as to cover some of Wilson's personal expenses. An implication that Boyd may have committed a crime came from the very nature of the acts alleged rather than the omission of the words "civil trial" from the articles.

After reviewing both articles in their entirety, in light of surrounding circumstances and based upon how a person of ordinary intelligence would perceive them, we conclude as a matter of law that appellants' coverage of the opening statements in Boyd's trial did not create a substantially false and defamatory impression by omitting material facts or juxtaposing facts in a misleading way. Simply stated, had the articles specifically noted that the SEC proceeding was civil in nature, it would not have materially changed the gist or sting of the publications in the average reader's mind. Our resolution of this issue makes it unnecessary to address appellants' remaining issues.

We reverse the trial court's order and render judgment that Boyd take nothing on his claims against appellants.

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