IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

TELLUS OPERATING GROUP, LLC,
BAXTERVILLE OIL ACQUISITIONS, LLC,
MISSISSIPPI OIL ACQUISITIONS, LLC,
NOMS, LLC, SNIP, LLC, BAX, LLC,
VICKERY PROPERTIES, LLC, AND
SUTHERLAND ENERGY CORP. APPELLANTS

ES

v. NO. 2009-CA-01040

TEXAS PETROLEUM INVESTMENT CO., ET AL. APPELLEES

Consolidated with

TEXAS PETROLEUM INVESTMENT CO. CROSS-APPELLANT

v. NO. 2009-CA-01174

TELLUS OPERATING GROUP, LLC, et al. CROSS-APPELLEES

Appeal from the Circuit Court of Lamar County, Mississippi

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# SUPPLEMENTAL REPLY BRIEF OF APPELLEE/CROSS-APPELLANT TEXAS PETROLEUM INVESTMENT COMPANY AND APPELLEES BRUCE SALLEE AND WILLIAM CRAWFORD

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## INTRODUCTION

In their initial brief, Texas Petroleum Investment Company, Bruce Sallee, and William Crawford[1] argued that the Court should affirm because three unchallenged defense theories supported the jury's general defense verdict: (1) there was sufficient evidence to support the Court's Instruction No. 7 that there was no gas in the shallow zones of the Bilbo A-1 well during the years in question; (2) there was sufficient evidence that Texas Petroleum employees took no gas; and (3) there was sufficient evidence to support the Court's Instruction No. 8 that the statute of limitations expired. Brief of Appellees and Cross-Appellant (hereinafter "Texas Pet. Br.") at 10, 13-21. In neither of its briefs authorized by the Mississippi Rules of Appellate Procedure did Tellus Operating Group, LLC,[2] contend that the evidence was insufficient to support those defenses. Indeed, in its reply brief Tellus said that "there was sufficient evidence to support either a plaintiffs' or a defense verdict." Tellus Reply Br. at 1.

However, in its supplemental brief on the two-issue rule, Tellus argues, for the first time, that evidence was insufficient to support a verdict based on Instruction No. 8 (statute of limitations). Tellus Supp. Br. at 12. Tellus still does not dispute that the evidence supports a defense verdict on either of the other two theories. Tellus also argues that trial error affected all of Texas Petroleum's defense theories, *id.*, at 10, although it made no such argument in its two briefs under the Rules.

In the first place, Tellus waived these new arguments by failing to assign them as error on appeal in its original brief. But, second, and more importantly, the arguments are wrong.

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[1] This brief refers to all three appellees collectively as Texas Petroleum unless the context otherwise requires.

[2] Consistent with its earlier filed briefs in this matter, Texas Petroleum collectively refers to all appellants as "Tellus."

If the jury followed Instruction No. 7, which it is presumed to have done, and believed that there was no gas in the shallow zones of the Bilbo A-1 well, which is supported by the evidence, the jury was instructed to return a defense verdict. No error in the commingling instruction would have had any bearing on that because, before commingling could occur, some gas must exist in the shallow zones.

Similarly, the jury could have followed Instruction No. 8 and found that, if there was ever any gas in the shallow sands, such gas ran out three years or more before Tellus filed suit. As Tellus long ago acknowledged, if the jury believed that there was no gas in the shallow sands after 2001, then the commingling instruction would have been irrelevant. Tellus Reply Br. at 5. As noted in Texas Petroleum's initial brief, before Tellus's commingling theory could apply, Tellus bore the burden to establish that shallow gas existed which was capable of being commingled. Texas Pet. Br. at 23-24 (and cases cited therein).

The jury had sufficient evidence to find for the defense under at least three separate theories. Under the two-issue rule, there is no sound basis to reverse this lengthy trial based on alleged error in a jury instruction that had no bearing on liability and was based on an incorrect reading of Mississippi law. The judgment should be affirmed.

## ARGUMENT

### I. BECAUSE TELLUS WAIVED THESE NEW ARGUMENTS BY NOT PRESENTING THEM IN ITS DIRECT APPEAL, THEY SHOULD NOT BE CONSIDERED BY THIS COURT.

In its order requesting the parties to address the two-issue rule, this Court quoted from *Barth v. Khubani*, 748 So.2d 260, 261-62 (Fla. 1999), where the Florida Supreme Court defined the rule as follows:

> When a general verdict for the plaintiff is on review, the rule is applied by focusing on the causes of action, such that an ***appellate claim of error raised by the defendant*** as to one cause of action cannot be the basis for reversal where two or more theories of liability (or causes of action) were presented to the jury. On

> the other hand, when the jury returns a general verdict for the defendant, the "two issue rule" is applied by focusing on the defenses; thus, where two or more defense theories are presented to the jury and it returns a verdict for the defense, an ***appellate claim of error*** as to one defense theory will not result in reversal since the verdict may stand based on another theory.

In its initial brief, Texas Petroleum pointed out that Tellus had not raised "an appellate claim of error" concerning the sufficiency of the evidence to support the verdict on multiple theories, including the statute of limitations defense which had been submitted to the jury. Texas Petroleum expressly noted that Instruction No. 8 concerning the statute of limitations, R. 12642-44, R.E. 73-75, presented adequate support for the verdict. Texas Pet. Br. at 18-21. Texas Petroleum invoked the rule, recognized in Mississippi, that a general verdict will be affirmed on any ground sustainable in the evidence. *Id.* at 12, citing *Mississippi Cent. R. Co. v. Aultman*, 173 Miss. 622, 160 So. 737, 739 (1935), *appeal dismissed*, 296 U.S. 537 (1935); *Levy v. McMullen*, 169 Miss. 659, 152 So. 899, 899-900 (1934). Because the verdict was supported by grounds for which Tellus raised no error, Texas Petroleum asserted that the verdict should be upheld.

In its 30-page reply brief, Tellus devoted only a page and a half to this argument. Tellus expressly acknowledged Texas Petroleum's argument that "the jury could have accepted Texas Petroleum's statute of limitations defense," Tellus Reply Br. at 2, but it did not address that portion of Texas Petroleum's argument at all.

In its supplemental brief, Tellus not only argues the two-issue rule, but asserts for the first time that "the statute of limitations instruction was not supported by credible evidence and the jury should not have been instructed to consider it." Tellus Supp. Br. at 12. Tellus devotes a significant portion of its brief to asserting alleged error in the Circuit Court's granting the statute of limitations instruction even though that was never set forth as error in Tellus's appeal.

Although this Court's order of December 19, 2011, did not strike that portion of Tellus's supplemental brief, but instead allowed Texas Petroleum a chance to reply, it did not address or

resolve Texas Petroleum's waiver argument. Tellus's new arguments have been waived and should not be allowed to be presented at this point. While, admittedly, cases cited in Texas Petroleum's motion to strike note that the reason for not allowing new arguments to be presented in rebuttal briefs is the appellee's inability to reply to same, that does not change the fact that Tellus has waived this issue by not presenting it in its initial brief on appeal. This is not a new argument supporting an alleged error, but Tellus is alleging an entirely new error for the first time. It is not listed in its statement of issues and is not addressed in either its initial brief or its reply brief.

This Court has consistently taken the position that an appellant must specify the issues on appeal at the outset of its original brief and cannot later add to that list. Indeed, this Court has refused to consider arguments in an original brief that had not been initially identified. Discussing the practice under the former Supreme Court Rules, this Court said, "The omission of this issue from the Cross-Assignment of Errors precludes argument of it unless we consider it, at our option, as plain error." *Read v. Southern Pine Elec. Power Ass'n*, 515 So.2d 916, 921 (Miss. 1987). Today, all issues must be set forth in the statement of issues at the outset of the original brief under M.R.A.P. 28(a)(3), as the Court of Appeals has made clear: "[B]ecause Reed failed to specifically identify his assignments of error on issues one, two, and four as listed in paragraph seven above, he is barred from attempting to address them in the substantive argument section of his brief." *Reed v. State*, 987 So.2d 1054, 1056 (Miss. App. 2008).

Tellus tries to get around this problem by asserting that this Court's order requesting supplemental briefing on the two-issue rule changes everything—that the two-issue rule has not been applied in Mississippi and that if this Court is considering adopting the rule, then it should be allowed to assert new arguments. Tellus Response in Opposition to Motion to Strike at 2-3. But, as set forth in Texas Petroleum's supplemental brief, this rule is not new to Mississippi, and

Texas Petroleum specifically argued the cases supporting its application in its appeal brief. Further, although Texas Petroleum established in its brief that the statute of limitations defense provided additional grounds for upholding this verdict and that Tellus had alleged no error as to that defense, Tellus completely ignored this argument in its reply brief, where it could have done exactly what it did in its supplemental brief – argue that Texas Petroleum misread *Levy* and *Aultman*, but, alternatively, that affirmance would be improper even under Texas Petroleum's reading. Tellus raised the alternative argument only when this Court's order suggested that Texas Petroleum might be right.

Under the circumstances presented here, this Court should find that Tellus has waived its right to present new issues and assert new errors in its supplemental brief. Accordingly, those arguments set forth in Part II of its supplemental brief, particularly those related to the newly alleged error regarding the statute of limitations instruction, should not be considered by this Court. In addition, Texas Petroleum, in accordance with this Court's order, replies to these arguments below.

## II. THE CIRCUIT COURT DID NOT ERR IN INSTRUCTING THE JURY ON THE STATUTE OF LIMITATIONS.

One issue of much dispute throughout the years of litigating this case was whether or not Tellus's claims were barred by the statute of limitations. Because Tellus alleged that Texas Petroleum began converting its gas in 1995, Texas Petroleum argued that the suit brought against it in 2004 was barred by the three-year statute of limitations in Miss. Code Ann. § 15-1-49. In opposition to Texas Petroleum's summary judgment motion on the statute of limitations, counsel for Tellus argued that "[t]here's clearly a factual dispute here over when we should have learned of our claims." Tr. 384. Tellus submitted its own proposed jury instructions on the statute of

limitations issue, R. 12663-65, and began presenting its side of that issue to the jury as early as voir dire.[3]

Tellus now argues that the Court should not have instructed the jury on the statute of limitations at all. It does not argue that Instruction No. 8 erroneously states the law; rather, it argues that the jury should not have been instructed on the issue "because all of the evidence showed that Texas Petroleum's gas production from the A-1 well, if tortious, was a continuing tort as a matter of law."[4] Tellus Supp. Br. at 13. According to Tellus, the evidence presented left the jury with no choice—either "Texas Petroleum *continuously* produced shallow gas from the A-1 well from May 1995 to July 2004," *id.* at 12 (emphasis in original), or Texas Petroleum produced no gas from the shallow zones at all.

Perhaps that is what Tellus meant by its cryptic objection that "as a matter of law there is no limitations defense." Tr. 5476, C.R.E. 81. However, there was ample evidence for the jury to be able to decide whether or not any shallow gas was produced by Texas Petroleum, and, if so, whether "the date of the last injury caused by that defendant," R. 12642, R.E. 73, occurred prior to August 30, 2001, for the case against Texas Petroleum, and prior to August 25, 2003, for the case against William Crawford and Bruce Sallee. *Pierce v. Cook*, 992 So.2d 612, 618 (Miss. 2008) ("[a]s a continuing tort, the statute of limitations does not begin to run until the date of the

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[3] Tr. 888-91 ("It's no secret, the Court is going to give you instruction at the end of this case, I'm confident, that in general the statute of limitations is three years for this type of case. ... Now, however, we think the Court is going to instruct you at the end of the case that if the injury is a latent injury ... the three years does not start to run until the date the plaintiff either knew or should have discovered the injury. ... The point is, if we can prove that it's a latent injury .... We also believe that the Court, at the end of the trial, will give you yet another instruction that even if you were to find that we somehow should have noticed this injury before December of 2002 ... if you further find, though, that this was a continuing injury from 1991, a repeated injury from 1991 up to 2004, then that's a separate and independent reason why you have to deny the statute of limitations defense.")

[4] Texas Petroleum does not agree that Tellus's allegations, if true, constitute a continuing tort. *See* R. 5159-60, 10061-62. However, it did not object to Instruction No. 8 that included discussion of Tellus's continuing tort theory.

last injury"), citing *Smith v. Sneed*, 638 So.2d 1252, 1253 (Miss. 1994). As set forth in Texas Petroleum's initial brief, based on the evidence presented, the jury could have easily believed that no gas remained to be taken by 2001. Although Texas Petroleum certainly sought to prove that none of the gas it produced from the A-1 well came from the shallow zones, that does not mean that the jury could not find that some gas did come from shallow zones, but that such production occurred before 2001.

Tellus's argument confuses the issue of continuing tort with continuous production. It argues, "Texas Petroleum offered no proof that gas production from the A-1 well was interrupted prior to July 2004." Tellus Supp. Br. at 14. Indeed, Texas Petroleum admitted that it continually produced gas from the well after reopening it in 1997, but not that it continually produced shallow gas. Tellus had to prove a continuing tort, not mere continuing gas production. Tellus admits that Texas Petroleum offered multiple witnesses to show that its gas came from the deep zones. *Id.* Tellus submitted evidence to the contrary, but the jury was perfectly entitled to conclude that production of shallow gas, if it ever started, stopped at a date long prior to July of 2004.

There is nothing unusual about the submission of a statute of limitations issue to the jury. "Occasionally the question of whether the suit is barred by the statute of limitations is a question of fact for the jury ...." *Smith v. Sanders*, 485 So.2d 1051, 1053 (Miss. 1986). This Court has recently remanded a case presenting the continuing tort doctrine for resolution at trial. *Estate of Fedrick v. Quorum Health Resources, Inc.*, 45 So.3d 641, 643 (Miss. 2010). Here, the Circuit Court properly instructed the jury to resolve disputed facts on the continuing tort doctrine.

Based on the evidence presented, it is clear that disputes existed for the jury to resolve. For that reason, the Circuit Court properly overruled Tellus's motion for directed verdict on this issue. As set forth in *White v. Hancock Bank*, 477 So.2d 265, 269 (Miss. 1985), cited by Tellus,

in considering a directed verdict motion, the trial court is to give the non-moving party "the benefit of all favorable inferences that may reasonably be drawn from the evidence." If the evidence is such "that reasonable and fair-minded men and women in the exercise of impartial judgment might reach different conclusions, the motion should be denied." *Id.*

That is certainly the case here, and Tellus never disputed the sufficiency of the evidence to support the statute of limitations defense until page 12 of its supplemental brief. As discussed above, it should not be allowed to complain of the instruction now, but, even if this Court considers Tellus's argument, it is clear that the instruction was supported by the evidence presented in this case and was properly granted.

## III. THE TWO-ISSUE RULE REQUIRES AFFIRMANCE OF THE JURY'S GENERAL VERDICT IN FAVOR OF TEXAS PETROLEUM, WILLIAM H. CRAWFORD, AND BRUCE SALLEE.

It has always been the law in Mississippi that, in a case involving multiple theories, "a general verdict is sufficient if sustained under either count." *Levy*, 152 So. at 899. The two-issue rule, as applied in Florida and elsewhere, is no different: "[A]n appellate claim of error as to one defense theory will not result in reversal since the verdict may stand based on another theory." *Barth*, 748 So.2d at 262. Here, Tellus has admitted that the jury could validly have found that no conversion ever took place, and the same logic compels a conclusion that it could also validly have found that no conversion took place within the limitations period.[5]

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[5] Under the two-issue, or general verdict rule, if the jury's verdict can be sustained on either one of these grounds, then it should be affirmed. *Aultman*, 160 So. at 739; *Levy*, 152 So. at 739. *See also Johnson v. Pagano*, 440 A.2d 244, 246 (Conn. 1981) ("if any of the court's instructions are shown to be proper and adequate as to any one of the defenses raised, the general verdict will stand irrespective of any error in the charge as to others"); *Whitman v. Castlewood Int'l Corp.*, 383 So.2d 618, 619 (Fla. 1980) ("reversal is improper where no error is found as to one of two issues submitted to the jury on the basis that the appellant is unable to establish that he has been prejudiced"); *Lahm v. Burlington N. R. Co.*, 571 N.W.2d 126, 131-32 (Neb. App. 1997) ("unless an appellant can provide a record to indicate that the result of the trial was a result of the trial errors claimed on appeal, rather than from proper determination of the error-free issues, there is no reason to spend the judicial resources to provide a second trial"); *Crews v. Pudlinski*, 21 A.3d 568, 571 (Conn. App.) ("in a case in which the general verdict rule operates,

Remember that Tellus still does not object to Instruction No. 7, which assigned to them the burden of proving "that there was gas present in the Shallow Zones of the Bilbo A lease which was capable of being produced between May 1995 and July 2004, and that Texas Petroleum took gas from the Shallow Zones during this period of time." R. 12641, R.E. 72. Although Tellus objects to Instruction No. 9 on commingling, it admits that the instruction was harmless if there was no gas at all:

> [A]s Texas Petroleum posits, the jury *might* have found that there was no gas in the shallow sands and, therefore, not reached the point at which the commingling doctrine applies to shift the burden of proof. In that case, the verdict would be valid and the erroneous instruction would be harmless.

Tellus Reply Br. at 5 (emphasis in original). Just as the jury could validly have found that there was no shallow gas in 1995, it could also have found that the shallow gas ran out more than three years before Tellus filed suit. In either event, "the erroneous instruction would be harmless." *Id.*

Tellus frankly admits that the commingling instruction could have affected the verdict only if the jury believed that the well had produced shallow gas, but the jury could not determine how much.[6] "Because the Court cannot know which path the jury took, it must reverse." Tellus Reply Br. at 6. This is a classic statement of the "we can't tell rule," not the rule of *Levy* and

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if any ground for the verdict is proper, the verdict must stand; only if every ground is improper does the verdict fall"), *cert. denied*, 31 A.3d 384 (Conn. 2011).

[6] Tellus's commingling theory is not limited to a claim that gas production from the Bilbo A-1 well represented a commingling of both shallow and deep gas. Instead, Tellus also contends that gas production from the A-1 was also commingled with gas from the Bilbo A-9 and Bilbo A-13, entitling it to recover "the total amount of commingled sales gas measured at the Bilbo A Lease." Tellus Initial Br. at 21. Commingling, however, was such a minor part of Tellus's damage claim that, in both closing argument and rebuttal, its counsel made only one passing reference, stating that, "if gas is commingled, just because we can't tell you exactly how much of it is our gas, that's not our fault." Tr. 5566. Tellus's principal damage theory is that Texas Petroleum surreptitiously siphoned off shallow gas that was never measured anywhere. Tellus claims that its "estimates of unmetered fuel gas consumption were reasonable," Tellus Initial Br. at 21 n.24, and it does not deny that Instruction No. 9 properly allowed the jury to base a verdict on "just and reasonable inference." R. 12646, R.E. 77. Tellus does not explain how the commingling instruction could have influenced the jury's rejection of those estimates.

*Barth*.[7] It ignores the obligation of a Mississippi litigant challenging a judgment to demonstrate, not just error, but error which "affect[s] the substantial rights of the parties." M.R.C.P. 61. Accord, M.R.E. 103(a). That is why the Florida Court emphasized, "The focus on the winning party's actions or defenses, as the case may be, is logical given that the opposing party has the burden of establishing prejudice on appeal." *Barth*, 748 So.2d at 262. Because Tellus concedes that the jury, notwithstanding the alleged errors, might validly have found the absence of shallow gas either in 1995 or later,[8] it cannot show prejudice, and the judgment must be affirmed under *Levy* and *Barth*.[9]

Moreover, Tellus fails to demonstrate that the commingling instruction could have had any effect at all on the jury's deliberations under Instruction No. 8, the statute of limitations

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[7] Moreover, on this record, we can tell what the jury did. Instruction No. 4 provided, "If you find ... that Texas Petroleum converted gas from the Shallow Zones of the Bilbo A-1 well, then your verdict on this claim shall be for Plaintiffs." R. 12634, R.E. 65. Because the jury is presumed to have followed its instructions, *Curtis v. Bellwood Farms, Inc.*, 805 So.2d 541, 545 (Miss. App. 2000), the defense verdict proves that the jury found no conversion.

[8] Tellus in its supplemental brief attempts to walk away from its earlier admission by arguing that the commingling instruction, even under the two-issue rule, infected the jury's deliberations not only on conversion, but also on the statute of limitations issue. Tellus Supp. Br. at 10. Tellus cites to a Florida decision, *Grenitz v. Tomlian*, 858 So.2d 999, 1006-07 (Fla. 2003), to argue that the two-issue rule does not apply to elements of an overall defense of failure of proof, *e.g.*, liability and damages. Such an argument, however, is contrary to the Mississippi cases cited in Texas Petroleum's brief holding that any error in a damages instruction does not provide reversible error where the jury has found no liability. Texas Pet. Br. at 22, citing *Lewis v. Hiatt*, 683 So.2d 937, 943 (Miss. 1996); *Mitchell v. Eagle Motor Lines, Inc.*, 228 Miss. 214, 230, 87 So.2d 466, 471 (1956); *Fairfield v. Louisville & N.R. Co.*, 94 Miss. 887, 48 So. 513, 515 (1909)).

[9] Tellus admits that its own rejected instruction would have required the jury to order a "forfeiture," Tellus Reply Br. at 8, instead of assessing damages as accurately as the evidence permitted. It claims, however, that, no matter how bad its instruction may have been, any error in Instruction No. 9 entitles them to a new trial, relying on *Byrd v. McGill*, 478 So.2d 302, 305 (Miss. 1985). Tellus Reply Br. at 8 n.4. *Byrd*, however, explicitly limited its holding to the circumstance "where there is no other instruction before the court which treats the matter." 478 So.2d at 305. Here, Instruction No. 9 "treats the matter" of commingling. No subsequent case has extended the 5-4 decision in *Byrd* to the circumstances presented here. Certainly, *Byrd* does not relieve Tellus of the burden of demonstrating that any error in an instruction was so serious as to be prejudicial.

instruction. Its language, to which Tellus did not object,[10] requires the jury to determine the date that "the cause of such action accrued," which is the date upon which "the plaintiff has discovered, or by reasonable diligence should have discovered, the injury." R. 12462, R.E. 73. If the jury believed that Texas Petroleum had produced shallow gas, nothing in the commingling instruction remotely suggested that Tellus had not been injured absent proof of the quantity of the production. The jury could have validly determined the date on which the cause of action had accrued[11] and thus the date on which Tellus should have filed suit.[12]

Tellus's remaining allegations of error relate to the admission or exclusion of evidence[13] for which there will be no reversible error unless Tellus can show harm which impaired a substantial right. *Beverly Enters., Inc. v. Reed*, 961 So.2d 40, 44-45 (Miss. 2007). As already noted, one of the reasons for applying the two-issue rule is that a judgment will be reversed only for error that substantially affects the rights of a party. *See Shoup v. Wal-Mart Stores, Inc.*, 61 P.3d 928, 931-32 (Or. 2003); M.R.C.P. 61; M.R.E. 103(a). Courts applying this rule reject the argument that a verdict should be reversed based solely on the possibility that the jury was influenced by the alleged error. *Shoup*, 61 P.3d at 934-35.

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[10] Tellus's only objection to Instruction No. 8 was that "as a matter of law there is no limitations defense," Tr.5476, C.R.E. 81, an argument it did not present to this Court until page 12 of its supplemental brief. To this day, Tellus has interposed no objection to the text of Instruction No. 8.

[11] Depending upon the date of accrual determined by the jury, the statute of limitations could have been either a partial defense or a complete defense. Tellus therefore misses the mark in asserting that "Texas Petroleum's statute of limitations defense ... was *not a complete defense* to Tellus's claims." Tellus Supp. Br. at 11 (emphasis in original).

[12] The continuing tort doctrine, addressed in Instruction No. 8, does not change the outcome. Tellus would have continued to be injured as long as Texas Petroleum produced any shallow gas, whether or not the record establishes how much. The record fully supports a finding that no shallow gas in any quantity was produced after a date more than three years before filing suit against any of the particular defendants.

[13] Tellus refers in passing to the "misleading interrogatories," Tellus Supp. Br. at 10, but it does not attempt to explain how those interrogatories could have influenced the jury's resolution of either issue.

In support of the one paragraph in its supplemental brief arguing that alleged evidentiary errors affected all of Texas Petroleum's defenses, Tellus Supp. Br. at 12, Tellus cites to another Florida decision, *Browning v. Lewis*, 582 So.2d 101 (Fla. App. 1991). In that medical malpractice action alleging damages to a baby due to an obstetrician's negligence, evidence as to the mother's use of drugs and alcohol during the pregnancy before she knew she was pregnant was found to be both irrelevant, due to the lack of any causal connection between such use and the alleged injuries, as well as "highly prejudicial to plaintiff's entire case." *Id.* at 102.

In contrast, Tellus complains about the admission of cumulative testimony from Texas Petroleum's expert as to gas coming from the LTOP deep zone as opposed to the shallow zones that was consistent with his pretrial report, *see* Texas Pet. Br. at 35-40, and the exclusion of evidence that a witness had been accused, but not convicted, of a crime, in accordance with M.R.E. 609, *id.* at 40-41. Neither comes close to the prejudicial evidence presented in the Florida case, and Tellus simply cannot show that the outcome of this trial would have been different had the Court excluded Garza's testimony or allowed Tellus to accuse Lowe of outright theft.

This is especially so since the jury was presented with testimony from other witnesses that was cumulative of Garza's testimony, *see* Texas Pet. Br. at 15-16, 38-39, and Tellus was allowed to address Lowe's alleged bias by questioning him about his "debt of gratitude" to Texas Petroleum for not punishing him for his "copper salvaging." Tr. 1883, R.E. 183. Texas Pet. Br. at 40-41.

None of the errors alleged by Tellus would have affected a jury's finding either that there was no gas in the shallow zones, that Texas Petroleum personnel did not convert any gas that

was there, or that Tellus's claims were barred by the statute of limitations.[14] Accordingly, the judgment entered in favor of Texas Petroleum, Bruce Sallee, and William Crawford in accordance with the general verdict entered by the jury should be affirmed.

## CONCLUSION

The jury heard almost two months of evidence in this case. The jury carefully considered that evidence over a period of several days. Tellus still admits that the evidence, at least on some theories, sufficiently supports the verdict the jury rendered. Tellus has failed to carry its burden of showing that any error the Court might have made would have substantially affected the jury's verdict. In the unlikely event that this Court might find an error that affects one defense theory, *Levy* compels affirmance on the untainted theories. This judgment must be affirmed.

Respectfully submitted,

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[14] In the final section of its supplemental brief, Tellus takes issue with the two-issue rule by claiming that if the rule applies, Tellus itself would have had to request a special interrogatory as to the statute of limitations (which it apparently did not want to highlight to the jury despite its claim that the evidence was so overwhelmingly in its favor that a directed verdict should have been granted) and that, if said request were granted, "Tellus may well have been barred from appealing the statute of limitations error." Tellus Supp. Br. at 15. This statement is rather ironic in light of Tellus's failure to appeal on that issue in the first place and Texas Petroleum's specific objection to the general verdict form precisely because it had "no questions ... regarding defendants' affirmative defenses." Tr. 5472-73, C.R.E. 77-78.

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## CERTIFICATE OF SERVICE

I, Michael B. Wallace, do hereby certify that I have this date caused to be mailed, via U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing to the following:

Hon. Prentiss G. Harrell
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This the 24th day of January, 2012.

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