# Fourth Court of Appeals
## San Antonio, Texas

## MEMORANDUM OPINION

No. 04-16-00549-CV

**VIRTEX OPERATING CO., INC.** and VirTex Producing Company, L.P.,
Appellants

v.

Robert Leon **BAUERLE** and Cynthia Bauerle,
Appellees

From the 81st Judicial District Court, Frio County, Texas
Trial Court No. 12-10-00365-CVF
Honorable Donna S. Rayes, Judge Presiding

Opinion by: Marialyn Barnard, Justice

Sitting: Karen Angelini, Justice
Marialyn Barnard, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: November 8, 2017

AFFIRMED

This is an oil and gas case concerning the application of the accommodation doctrine. Appellees, Robert Leon Bauerle and Cynthia Bauerle (collectively, "the Bauerles"), filed suit against appellants, VirTex Operating Co., Inc. and VirTex Producing Company, L.P. (collectively, "VirTex"), seeking a declaration that VirTex's proposal to install overhead power lines across their ranch was prohibited under the accommodation doctrine. In addition to their declaratory judgment action, the Bauerles also alleged VirTex breached a surface use agreement. A jury returned a verdict in favor of the Bauerles as to each of their claims; the trial court then rendered judgment

on the jury's verdict and awarded the Bauerles attorney's fees. On appeal, VirTex raises several issues, arguing the evidence is legally and factually insufficient as to all three elements of the accommodation doctrine and the Bauerles were not entitled to attorney's fees. VirTex also argues the trial court abused its discretion with regard to the admissibility of certain evidence. We affirm the trial court's judgment.

## BACKGROUND

This appeal arises from a dispute between the Bauerles and VirTex concerning the installation of overhead power lines across the Bauerles' ranch property — known as the Todos Santos Ranch — in Dilley, Texas. The Todos Santos Ranch comprises approximately 8,500 acres in Frio and Zavala Counties. It is undisputed that the Bauerles own the surface estate of the 8,500-acre tract as well as a 2% royalty interest in the property. The Bauerles primarily use the ranch property to run a commercial hunting business and a cattle operation. The ranch is equipped with a hunting lodge, cookhouse, three bunkhouses, and a man-made lake. The Bauerles lease the ranch and its facilities to hunters on a yearly basis, and under these leases, hunters have the opportunity to hunt deer, turkey, and quail. In addition to the hunting leases, the Bauerles also maintain cattle on the ranch; however, the main source of income for the ranch stems from the hunting leases.

Under the hunting leases, hunters use helicopters several times throughout the year on the ranch for a number of game operations, including brush and predator control, game surveys, and deer captures. Of these operations, deer captures are arguably the most important. In an effort to manage the number of Whitetail deer on the ranch, hunters use helicopters to locate and capture deer quickly. Once pilots locate a deer, they are able to push the deer into an open area, where the deer can be captured with a net gun. The operation requires pilots to fly alongside the deer — approximately 4 to 5 feet above ground — weaving in and out of brush, while at the same time, dodging trees and other obstacles. The process has been described as one of "the most extreme

[forms of] flying that you can possibly do." According to several hunters, this method of deer capture is less stressful for the deer and more cost efficient for hunters. Additionally, this method has, to date, eliminated injuries to the deer. Ultimately, the captured deer are relocated to a fenced enclosure for breeding or to another nearby ranch in the event the Bauerles' ranch has a surplus of deer.

In addition to the deer capture operations, hunters also use helicopters for maintaining brush operations and predator control. Equipped with a tank and sprayers for brush control, helicopters fly over certain areas of the ranch and spray in order to enable taller brush to grow in a more favorable way for the deer. Hunters also use helicopters to hunt predators, such as coyotes, on the ranch.

As indicated above, it is undisputed the Bauerles own the entire surface estate and a 2% royalty interest in the ranch property. ExxonMobil owns the full mineral fee estate underlying the property and executed an oil and gas lease — known as the Mars Mclean Lease — to VirTex. The Mars Mclean Lease covers approximately 3,000 acres of the Bauerles' ranch. Although there was no oil and gas activity on the property when the Bauerles first acquired the property, a VirTex landman informed Mr. Bauerle that VirTex was interested in drilling a well to determine whether there was oil and gas on the property. Because the well was productive, VirTex drilled several more wells, paying monthly royalties to the Bauerles. By the fall of 2008, the Bauerles had entered into a surface use agreement with VirTex, allowing VirTex to install tank batteries. Currently, VirTex operates nine wells on approximately 2,000 acres of the leased acreage.

Each of the existing wells on the property is equipped with a pumpjack, which extracts crude oil from the ground so that the oil can be refined and placed on the market. VirTex currently operates each of the pump jacks with four portable diesel generators that it rents. According to VirTex, the generators were intended to be a temporary means of generating power to the pump

jacks until the installation of permanent overhead power lines. In 2012, VirTex approached the Bauerles and asked them to sign an easement for the installation of power lines. Currently, the property has a single power line that runs alongside a black paved road to the hunting lodge and other facilities on the ranch. VirTex's proposed power line configuration consists of a box with overhead power lines running to the individual wells; overall, the design would create a perimeter the Bauerles describe as a spiderweb. It is undisputed VirTex would pay for the costs of the proposed power lines.

Due to a concern that the overhead power lines would interfere with the helicopter operations, the Bauerles refused to sign the easement. The Bauerles also asked VirTex to halt any construction plans concerning the installation of the overhead power lines. VirTex agreed. The Bauerles then filed a declaratory judgment action, requesting the trial court to render judgment declaring that VirTex's installation of the proposed overhead power lines would substantially impair their preexisting use of the "lateral surface and super-adjacent airspace" of the property, which included use of the helicopters for game operations. The Bauerles also alleged VirTex breached the surface use agreement by failing to install tank batteries within a specified distance of F.M. #117 in accordance with the terms of the Agreement. In response, VirTex counterclaimed, asserting the Bauerles were unreasonably interfering with its right to extract the minerals by prohibiting the installation of the overhead power lines. According to VirTex, the installation of the overhead power lines is a reasonable and customary practice operators use to generate power to wells, and there is no other industry accepted method available.

The parties proceeded to trial, and the jury returned a verdict in favor of the Bauerles as to each of their claims. VirTex subsequently filed numerous post-trial motions, including a motion for judgment notwithstanding the verdict as to the Bauerles' breach of contract claim, which was based on the surface use agreement. The trial court granted the JNOV as to the breach of contract

claim, but denied all other requested relief.[1] The trial court subsequently rendered an amended final judgment, deleting the Bauerles' recovery on their breach of contract claim. VirTex then perfected this appeal.

## ANALYSIS

On appeal, VirTex raises several issues, arguing the evidence is legally and factually insufficient to support the jury's findings as to all three elements of the accommodation doctrine, the Bauerles were not entitled to attorney's fees, and the trial court erred in admitting and excluding certain evidence. With respect to its accommodation doctrine argument, VirTex specifically argues the Bauerles failed to prove: (1) the proposed power lines would completely preclude or substantially impair their existing hunting and cattle operations; (2) there was no reasonable alternative method available by which they could continue their existing hunting and cattle operations; and (3) there was a reasonable, customary, and industry-accepted method available to VirTex by which it could recover the minerals. With regard to attorney's fees, VirTex argues the trial court erred in awarding attorney's fees to the Bauerles because although framed as a request for declaratory relief, the Bauerles sought injunctive relief on their accommodation doctrine claim, and there is no statute permitting the recovery of attorney's fees on an accommodation doctrine claim. VirTex also argues the trial court abused its discretion in admitting testimony from the Bauerles' expert, Mike Kramer, and excluding multiple photographs showing helicopter operations were possible on ranch lands with overhead power lines.

[1] The Bauerles do not challenge the trial court's order granting VirTex's JNOV as to their breach of contract claim. Therefore, that issue is not before us.

***Accommodation Doctrine***

*Standard of Review*

In reviewing the legal sufficiency of the evidence, we view the evidence in the light most favorable to the verdict, credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not. *Reeder v. Wood Cty. Energy, LLC*, 395 S.W.3d 789, 795 (Tex. 2012); *SW Loan A, L.P. v. Duarte-Viera*, 487 S.W.3d 697, 701 (Tex. App.—San Antonio 2016, no pet.) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005)). Evidence is legally insufficient when: (a) there is a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; or (d) the evidence conclusively establishes the opposite of the vital fact. *HMC Hotel Props. II Ltd. P'ship v. Keystone-Tex. Prop. Holding Corp.*, 439 S.W.3d 910, 913 (Tex. 2013). More than a scintilla of evidence exists when the evidence supporting the finding, as a whole, "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Gharda USA, Inc. v. Control Sols., Inc.*, 464 S.W.3d 338, 347 (Tex. 2015); *Strad Energy Servs. USA, Ltd. v. Bernal*, No. 04-16-00116, 2016 WL 6242839, at * (Tex. App.—San Antonio Oct. 26, 2017, pet. denied) (mem. op.). If the evidence is so weak that it does no more than create a mere surmise or suspicion of its existence, then its legal effect is that it is no evidence. *Suarez v. City of Tex. City*, 465 S.W.3d 623, 634 (Tex. 2015).

In reviewing the factual sufficiency of the evidence, we must consider and weigh all of the evidence, not just the evidence that supports the verdict. *Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 615 (Tex. 2016). We will set aside the finding only if it is so contrary to the overwhelming weight of the evidence that the finding is clearly wrong and unjust. *Gardiner*, 505 S.W.3d at 615; *Ellis*, 971 S.W.2d at 407.

With regard to either a legal or factual sufficiency review, the factfinder is the sole judge of witness credibility and the weight to be given to testimony. *City of Keller*, 168 S.W.3d at 819 (legal sufficiency); *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003) (factual sufficiency). An appellate court may not substitute its judgment for that of the factfinder merely because it might reach a different result. *City of Keller*, 168 S.W.3d at 819; *Barker v. Eckman*, 213 S.W.3d 306, 314 (Tex. 2006).

*Applicable Law*

"Texas law has always recognized that a landowner may sever the mineral and surface estates and convey them separately." *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 60 (Tex. 2016). The severed mineral estate is known as the dominant estate because it receives the benefit of an implied right to use as much of the surface estate as reasonably necessary to produce and remove minerals; however this right must be exercised with "due regard" for the rights of the surface estate owner. *Id.* (citing *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621 (Tex. 1971)); *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 249–50 (Tex. 2013) (stating dominant mineral estate owner has not only right to go onto surface to extract minerals, but also all incidental rights reasonably necessary for extraction). This concept of "due regard" is known as the accommodation doctrine and is aimed at balancing the rights of the surface owner and the mineral owner with regard to the use of the surface while at the same time recognizing the dominant nature of the mineral estate. *Coyote Lake Ranch*, 498 S.W.3d at 62–63; *Tex. Genco, LP v. Valence Operating Co.*, 187 S.W.3d 121 (Tex. App.—Waco 2006, pet. denied).

Under the accommodation doctrine, "if the mineral owner or lessee has only one method for developing and producing the minerals, [then] that method may be used regardless of whether it precludes or substantially impairs the surface estate owner's existing use of the surface." *Merriman*, 407 S.W.3d at 248–49. On the other hand, "if the mineral owner has reasonable

alternative uses of the surface, one of which permits the surface estate owner to continue to use the surface in the manner intended … and one of which would preclude that use by the surface owner, [then] the mineral owner *must* use the alternative that allows continued use of the surface by the surface owner." *Id.* Accordingly, under these principles, the mineral owner's absolute right to use the surface is preserved if there is only one way to produce the minerals. *Tex. Genco, LP*, 187 S.W.3d at 121–23.

The Texas Supreme Court has further provided that:

> To obtain relief on a claim that the mineral lessee has failed to accommodate an existing use of the surface, the surface owner has the burden to prove that (1) the lessee's use completely precludes or substantially impairs the existing use, and (2) there is no reasonable alternative method available to the surface owner by which the existing use can be continued. If the surface owner carries that burden, he must further prove that given the particular circumstances, there are alternative reasonable, customary, and industry-accepted methods available to the lessee which will allow recovery of the minerals and also allow the surface owner to continue the existing use.

*Coyote Lake Ranch*, 498 S.W.3d at 62–63 (quoting *Merriman*, 407 S.W.3d at 249). Each of these elements of the surface owner's burden are fact-sensitive and must be established either conclusively or by appropriate findings in determining the reasonable necessity of the mineral owner's surface use. *Tex. Genco, LP*, 187 S.W.3d at 121–23.

*Application*

Based on the foregoing principles, the Bauerles had the burden of producing evidence conclusively establishing that VirTex's installation of overhead power lines would completely preclude or substantially impair their existing use of the surface, and there were no reasonable alternative methods available to them by which their existing use of the surface could be continued. *See Coyote Lake Ranch*, 498 S.W.3d at 62; *Merriman*, 407 S.W.3d at 249. Only after the Bauerles established these two elements were they required to further prove there were alternative reasonable, customary, and industry-accepted methods available to VirTex which would allow

VirTex to recover the minerals and them to continue their existing use. *See Coyote Lake Ranch*, 498 S.W.3d at 62; *Merriman*, 407 S.W.3d at 249. As indicated above, VirTex contends the evidence is legally and factually insufficient as to each of these elements.

1. *Did the Proposed Power Lines Completely Preclude or Substantially Impair the Bauerles' Existing Use of the Surface?*

VirTex first challenges the legal and factual sufficiency of the evidence to support the finding that the proposed overhead power lines would preclude or substantially impair the Bauerles' current use of the surface. VirTex argues that although the evidence shows the overhead power lines would admittedly make the Bauerles' use of helicopters more difficult and dangerous, the evidence did not establish the power lines would make helicopter use impossible. In support of this contention, VirTex points to the testimony by the Bauerles' helicopter witness, Freddie Graf, who conducts much of the ranch work on the property with a helicopter. Graf testified it would be possible — albiet, more dangerous — to fly a helicopter within the proposed grid. VirTex also points to testimony from its witness, Ben Ellis, who testified the proposed power lines did not substantially impair the Bauerles' use of the surface because many of the power lines would be in wooded areas, which are areas where deer capture and predator control do not occur.

The Bauerles, however, argue the evidence sufficiently shows the installation of the proposed power lines would substantially impair their existing use of the lateral surface and super-adjacent airspace of their property. According to the Bauerles, the evidence establishes that a large part of the ranch work requires the use of helicopters on the property, and the use of helicopters would become extremely dangerous once the overhead power lines were installed. The Bauerles point to Graf's testimony, as well as testimony from Will Nichols, who also leases use of the ranch and flies helicopters on the ranch. Both Graf and Nichols testified the proposed power lines would

make the area extremely difficult to fly and drastically hinder their ability to conduct game operations.

With regard to how the installation of the overhead power lines would impact the existing use of the property, the jury heard evidence that the proposed power lines would make helicopter flying "a very dangerous situation." Nichols, as well as Graf, testified the Bauerles' property currently had one power line across the property, and the installation of the proposed grid would make flying "so extremely dangerous" that neither of them would want to perform game operations on the property. Both men explained the nature of their flying requires them to fly low to the ground and they have to fly up and around trees and power lines at an extremely fast pace while chasing deer. Therefore, the number of power lines on the property significantly impacts the safety of their operations. Nichols specifically testified that because power lines "blend into the ground," a pilot must pay "absolute close attention to where those lines are," and the proposed power grid made him personally worried about flying over the ranch. Nichols explained the grid would impair his ability to fly safely to such an extent that "I probably won't be flying anymore." Additionally, Graf testified the power grid would "creat[e] a bunch — a whole lot more danger to myself and my passenger," pointing out the proposed grid increased the amount of obstacles he had to remain mindful of. Graf explained that the more power lines that were present, the more dangerous it became for a helicopter to fly over an area. Viewing this evidence in the light most favorable to the verdict, as well as considering and weighing all the evidence, we conclude such evidence is legally and factually sufficient to establish that VirTex's installation of the power lines would substantially impair the existing use of helicopters over the lateral surface and super-adjacent airspace of the property. *See Reeder*, 395 S.W.3d at 795; *Crosstex N. Tex. Pipeline, L.P.*, 505 S.W.3d at 615.

VirTex, however, argues there is contrary evidence, showing that helicopter usage could still be possible even with the proposed overhead power lines, and therefore, the Bauerles' existing use of the surface would not be substantially impaired or precluded. For support, VirTex points to its helicopter witness, Ben Ellis, who testified he has flown helicopters on ranches with more power lines than that proposed and, as noted above, the proposed power lines affected only wooded areas where deer capture and predator control did not occur. VirTex further points out both Graf and Nichols testified helicopter flying could still be possible.

In light of this contrary evidence, the jury also heard Graf and Nichols testify that the proposed grid would hinder their ability to fly *safely*. Graf specifically qualified his statement that helicopter operations could still be possible by testifying anything was possible but the proposed grid would be "hard to keep up with" and "make it much more difficult." Graf further explained, "it has fingers coming off of it, you know, one going here, one going here … it's hard to keep up with that many power lines in the back of your head." Because the factfinder is the sole judge of witness credibility and weight to be given to testimony, the jury was free to believe Nichols and Graf's testimony that the proposed overhead power lines would significantly hinder their ability to fly over the ranch. *See City of Keller*, 168 S.W.3d at 819; *Golden Eagle Archery, Inc.*, 116 S.W.3d at 761; *Barker*, 213 S.W.3d at 314.

VirTex further contends the testimony from Nichols and Graf was conclusory because it was based on mere speculation, and therefore, their testimony did not constitute evidence. According to VirTex, because the proposed power lines were not yet installed, Nichols and Graf's testimony regarding whether the power lines would substantially impair the existing use of the surface was merely speculative. We disagree. Evidence establishing that a lessee's proposed use *would* completely preclude or substantially impair the surface owner's existing use is sufficient evidence to satisfy the first prong of the accommodation doctrine. *See Valence Operating Co. v.*

*Tex. Genco, LP*, 255 S.W.3d 210, 218 (Tex. App.—Waco 2008, no pet.) (holding testimony that *proposed* drilling *would* change geometry of landfill was sufficient evidence to show substantial impairment) (emphasis added); *Tex. Genco, LP*, 187 S.W.3d at 121–24 (holding ample evidence shows landowner's existing use of cell 20 *would be* completely precluded or substantially impaired *if* lessee drilled well because landowner would have to redesign cell configuration) (emphasis added). We have found no authority, and VirTex has failed to point to any, that indicates the substantial impairment prong of the accommodation doctrine can only be established by evidence showing the surface owner has already been impaired by the lessee's proposed use of the surface. Rather, the surface owner need only prove that his existing use would be substantially impaired or completely precluded by the mineral owner's proposed use of the surface. *See Valence Operating*, 255 S.W.3d at 218; *Tex. Genco, LP*, 187 S.W.3d at 121–24. Here, both Nichols and Graf testified in detail how the proposed power line configuration would substantially impair — in their own words, "hinder" — their helicopter usage.

Finally, VirTex points to *Coyote Lake Ranch, LLC v. City of Lubbock* for the proposition that the Bauerles must show how *all* the proposed power lines — as opposed to merely some or more power lines — would substantially impair their helicopter operations. 498 S.W.3d at 65. In *Coyote Lake Ranch*, a ranch conveyed its groundwater rights to the City of Lubbock ("the City"), expressly providing the City with the full rights of ingress and egress over the property so that the City could drill water wells. *Id.* at 56–57. The deed also specifically provided that the City could install power lines across the property in order to generate power to the wells. *Id.* at 57. In 2012, the City proposed plans to increase water extraction efforts on the ranch and began taking action to prepare additional drill sites. *Id.* The ranch filed an application for a temporary injunction enjoining the City from pursuing its efforts. *Id.* The ranch argued the proposed drill sites would remove vegetation for cattle on the ranch and the proposed power lines would allow hawks to roost

and prey on the Lesser Prairie Chicken, threatening its survival. *Id.* at 57–58. The trial court granted the injunction, and the City appealed. *Id.* at 58. On appeal, the court of appeals reversed the trial court's order granting the injunction, and the ranch filed its petition for review, arguing the accommodation doctrine applied to groundwater and the City had to accommodate the ranch. *Id.*

The Texas Supreme Court held the accommodation doctrine applied to a severed groundwater estate just as it does to a severed mineral estate. *Id.* at 64. The Texas Supreme Court then considered whether the court of appeals was correct in reversing the trial court's order granting a temporary injunction that enjoined the City from installing power lines across the ranch. *Id.* at 65. In its analysis, the court pointed out that the deed expressly authorized the City to install overhead power lines across the property, and, as VirTex points out, the ranch failed to establish that *all* the proposed power lines threatened the livelihood of the Lesser Prairie Chicken. *Id.* The court then held that the temporary injunction was too broad because it enjoined the City from engaging in activities that were expressly authorized under the deed. *Id.* In reaching this conclusion, the court was not considering the application of the accommodation doctrine. *Id.* Rather, the court was deciding whether the temporary injunction was the appropriate means by which to stop the City from improperly using the surface pending a final resolution of the dispute. *Id.* Thus, it considered whether all the proposed power lines threatened the livelihood of the Lesser Prairie Chicken only in the context of the propriety of the temporary injunction. *Id.* With regard to the application of the accommodation doctrine, the court remanded the case to the trial court to apply the elements of the accommodation doctrine. *Id.*

After reviewing this case, we conclude VirTex's contention that *Coyote Lake* stands for the proposition that the Bauerles must prove all the power lines substantially impair its existing use of the surface is misplaced as *Coyote Lake* is not an application of the elements of the

accommodation doctrine. Moreover, unlike *Coyote Lake*, this case does not involve a deed or lease that gives VirTex the express right to erect overhead power lines across the Bauerles' property. Furthermore, there is no temporary injunction order enjoining VirTex from installing overhead power lines; rather, VirTex agreed to halt installation of the power lines. Thus, unlike the Texas Supreme Court, we need not engage in an analysis regarding whether a temporary injunction is the appropriate means by which to stop VirTex from improperly using the surface, and therefore, whether *all* the power lines are problematic.

Accordingly, we hold the Bauerles produced legally and factually sufficient evidence for the jury to find that their existing use of the surface and adjacent airspace would be substantially impaired by the installation of the proposed overhead power lines.

*2. Is There Any Reasonable Alternative Method Available to the Bauerles by Which their Existing Use Could Be Continued?*

VirTex next contends the Bauerles failed to establish that no reasonable alternative methods existed by which they could continue leasing property to hunters interested in using helicopters. In support of its position, VirTex argues the evidence shows hunters could continue using helicopters for game operations in the 5,500 acres of unleased property and could use four-wheelers to capture and transport deer in the leased acreage with the proposed power lines. Thus, according to VirTex, the evidence establishes reasonable alternative methods existed by which the Bauerles could continue its existing use of the surface.

The Bauerles contend, however, the evidence established that no reasonable alternative methods existed by which they could continue the existing use of the surface. According to the Bauerles, due to the size of the property and unpredictability of the wild animals, the only reasonable mechanism available to hunters for their game operations was the use of helicopters. The Bauerles contend VirTex's proposed alternative methods were unreasonable because they fail

to recognize that hunters lease the property because they have the option to use helicopters to navigate a large amount of terrain in a short period of time as well as quickly capture deer.

Here, the jury heard testimony from hunters, who testified the use of helicopters for game operations made the Bauerles' large property possible to manage in an efficient manner. When given the option of using four-wheelers, Graf and Nichols testified the amount of terrain they had to cover with a four-wheeler was too large. Furthermore, with regard to the idea of keeping helicopter operations restricted to the other parts of the ranch, Graf and Nichols testified that due to the unpredictable nature of deer, there was no guarantee helicopters could successfully capture deer without flying into VirTex's leased area. Both Graf and Nichols further testified they would not lease the property from the Bauerles unless they had the option to use helicopters.

VirTex, however, contends such evidence merely shows the proposed alternative methods are "more inconvenient or less economically beneficial than the existing method," and therefore, it is not evidence that satisfies the Bauerles' burden of proof. For support, VirTex relies on *Merriman v. XTO Energy, Inc.* in which the Texas Supreme Court held the surface owner failed to meet his burden of proof with respect to the second element because he failed to explain why the proposed alternative methods — in that case, the use of corrals and pens in other parts of the ranch — were unreasonable. 407 S.W.3d at 249–50. In *Merriman*, the Texas Supreme Court stated that a surface owner fails to meet his burden by producing evidence that the alternative method is, as VirTex points out, "more inconvenient or less economically beneficial than the existing method." *Id.* at 249. "Rather, the surface owner has the burden to prove that the inconvenience or financial burden of continuing the existing use by the alternative method is so great as to make the alternative method unreasonable." *Id.*

We disagree with VirTex that the Bauerles failed to meet their burden of proof with respect to the second element of the accommodation doctrine. Here, unlike *Merriman*, the testimony

produced by the Bauerles establishes why the inconvenience and expense of the proposed alternative methods was so great that it rendered those methods unreasonable. The testimony showed that the proposed alternative methods of managing the property made the land less likely to be leased by hunters. Mr. Bauerle testified the primary use of the ranch was to lease it for hunting, and the evidence showed current hunters would no longer lease the property if VirTex installed overhead power lines. Nichols specifically testified he would not lease from the Bauerles if power lines were installed because he could not perform helicopter operations safely, and the ranch was too large to manage otherwise. The jury also heard evidence from Nichols and Graf, stating the nature of deer capture was so fast and unpredictable that the use of helicopters was instrumental in managing the property, and therefore, the option to use helicopters was the primary reason they leased the land from the Bauerles. The evidence also showed that using four-wheelers to capture deer resulted in more injuries to the deer and as a result, was not an option hunters were willing to use. Such evidence establishes that the alternative methods were not merely inconvenient or less economically beneficial, but that the inconvenience and expense was so great that it rendered the alternative methods as unreasonable. *See id.*

Accordingly, when viewing this evidence in the light most favorable to the verdict and considering and weighing all the evidence, we conclude that the Bauerles met their burden of proof with respect to the second element of the accommodation doctrine. *See Reeder*, 395 S.W.3d at 795; *Crosstex N. Tex. Pipeline, L.P.*, 505 S.W.3d at 615. In other words, we hold there was sufficient evidence establishing no reasonable alternative methods existed by which the Bauerles could continue leasing the ranch to hunters who managed the property using helicopters.

*3. Is an Alternative Reasonable, Customary, and Industry-Accepted Method Available to VirTex that Will Allow Recovery of the Minerals?*

Having held the Bauerles produced sufficient evidence establishing the first and second prongs of the accommodation doctrine, we now turn to whether the Bauerles proved an alternative reasonable, customary, and industry-accepted method was available to VirTex. *See Coyote Lake Ranch*, 498 S.W.3d at 62; *Merriman*, 407 S.W.3d at 249. VirTex argues the Bauerles did not produce evidence to support the jury's finding that reasonable alternatives existed by which VirTex could recover the minerals in a cost-efficient manner. According to VirTex, the proposed alternative suggested by the Bauerles to power the pump jacks with natural gas failed to include the ancillary costs of "sweetening" the gas — a process that was necessary because the acid in natural gas could destroy the generators for each pump jack. Moreover, according to VirTex, the Bauerles' expert, Mike Kramer, presumed VirTex could obtain an easement over neighboring property for a natural gas line and access to an amine plant. VirTex further points out Kramer calculated the cost increase of using natural gas as to only the nine existing wells on the property as opposed to the forty-five proposed wells VirTex planned to drill. As part of its contention, VirTex argues the trial court abused its discretion in allowing Kramer to testify because Kramer was not qualified as an expert, nor were his opinions reliable; therefore, his testimony is not evidence.

The Bauerles assert they produced ample evidence to support the jury's finding that VirTex had reasonable alternative methods available to it that would allow it to extract the minerals from the property and would not interfere with the Bauerles' current use of the surface. These alternatives included burying power lines as opposed to installing overhead power lines, fueling pump jacks by diesel or natural gas as opposed to electricity, or continuing to use rented generators

to operate the pump jacks. The Bauerles further pointed out natural gas lines were already installed across their ranch, and VirTex could utilize these lines to power the pump jacks.

*A. Exclusion of Mike Kramer's Testimony*

We begin our analysis by determining whether the trial court abused its discretion in admitting the testimony of the Bauerles' expert, Mike Kramer. The trial court has broad discretion in determining the admissibility of expert testimony, and we review the trial court's ruling for an abuse of discretion. *State v. Petropoulos*, 346 S.W.3d 525, 529 (Tex. 2011); *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 578 (Tex. 2006). The trial court's role is to determine whether the analysis the expert used to reach his conclusions is reliable, not to determine whether the expert's opinion is correct. *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 629 (Tex. 2002); *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726 (Tex. 1998).

Under Rule 702 of the Texas Rules of Evidence, the party seeking to admit expert testimony must establish (1) the expert is qualified to render an opinion on the subject matter, and (2) the testimony is relevant to an issue in the case. TEX. R. EVID. 702; *TXI Transp. Co. v. Hughes*, 306 S.W.3d 230, 234 (Tex. 2010). Expert testimony must also rely on sufficient data and proper methodology. *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 905–06 (Tex. 2004); *Kerr–McGee Corp. v. Helton*, 133 S.W.3d 245, 257 (Tex. 2004). "An expert's bare opinion will not suffice." *Ramirez*, 159 S.W.3d at 906. If the analytical gap between the offered opinion and the underlying data is too great, then the expert testimony is unreliable. *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 39 (Tex. 2007).

Here, VirTex moved to exclude Kramer's opinions as to the third element of the accommodation doctrine,[2] arguing Kramer was not qualified as an expert because he did not have

[2] VirTex also moved to exclude Kramer's testimony as it related to the Bauerles' negligence claim; however, the Bauerles ultimately amended its pleadings and dismissed that claim.

any college experience, nor was he an engineer or geologist. In its motion, VirTex also argued Kramer's testimony was unreliable because his testimony was not sufficiently tied to the facts of the case.

As proponents of the expert testimony, the Bauerles established that Kramer was an oil and gas supervisor in the area for over forty years, and his opinion was being proffered to establish the methods used in the oil and gas industry for generating power to wells. The Bauerles were permitted to show Kramer was qualified based on his experience and skillset regardless of whether he had a college degree or was an engineer. *See Gilley v. State Farm Lloyds*, 461 S.W.3d 563, 569 (Tex. App.—San Antonio 2014, pet. denied). Rule 702 specifically states a witness may qualify as an expert by any one of the following criteria: knowledge, skill, experience, training *or* education. TEX. R. EVID. 702 (emphasis added). The evidence shows Kramer worked with engineers at a variety of oil and gas companies and obtained an extensive knowledge of engines, pumps, compressors, and other related systems that used natural gas to power wells. In forming his opinion, Kramer testified that based on his experience and training, natural gas, so long as it was sweetened, was a reasonable alternative and industry-accepted method VirTex could use to power the wells on the Bauerles' property.

With regard to the estimated costs of powering the wells with natural gas, Kramer based his opinion on bids he obtained from several vendors. In obtaining the bids, Kramer took into account the fact that the natural gas would have to be piped from the existing wells on the Bauerles' ranch to a neighboring ranch that had an amine plant, where the gas could be sweetened. After the gas was sweetened, it would be piped back to the Bauerles' ranch to power the wells. Thus, the record shows that Kramer relied on sufficient data and a proper methodology in forming his opinion as to costs. *See Volkswagen of Am., Inc.*, 159 S.W.3d at 905–06. Although VirTex argues Kramer's testimony was not sufficiently tied to the facts of the case, the evidence shows Kramer

based his calculation of costs by taking into consideration the relevant circumstances surrounding the Bauerles' property and how the natural gas would have to be sweetened. Accordingly, because the evidence shows Kramer was qualified by experience and based his opinion on the facts of the case, we hold the trial court did not abuse its discretion in admitting Kramer's testimony. *See* TEX. R. EVID. 702; *TXI Transp. Co.*, 306 S.W.3d at 234.

*B. Sufficiency of Evidence*

With regard to sufficiency of the evidence, the record reflects the Bauerles produced evidence that other reasonable, customary, and industry-accepted methods existed by which VirTex could power the wells. The Bauerles produced evidence that the wells could be powered by natural gas, a method VirTex had used in the other operations across South Texas. Specifically, the jury heard testimony from Kramer, who opined that although the cheapest option for powering the pump jacks would be with overhead power lines, powering the wells by natural gas was the next best alternative at $200–$300 more per month per well. Kramer also opined this method was industry-accepted, explaining he had worked on past operations in which the pump jacks were powered by natural gas. As indicated above, Kramer based his opinion on his forty years of experience working in the oil and gas industry and various bids he obtained, taking into account the process of sweetening the gas at the neighboring amine plant. In addition to Kramer's testimony, the jury also heard testimony from David Urban, the owner of Urban Electrical Service, Inc., a company that installs power lines. Urban testified that if VirTex chose to use electricity to power the pump jacks, underground power lines — albeit more costly — could be installed in rural settings such as the Bauerles' ranch.

The jury also heard contravening evidence from two designated experts for VirTex. Dale Phipps, a degreed natural gas engineer and owner and officer of VirTex, testified overhead power lines would be the "most suitable" for VirTex's operations. In light of Kramer's proposal to use

natural gas, Phipps pointed out that VirTex would need to obtain an easement from the neighboring property in order to access the closest amine plant, where the natural gas could be sweetened. Phipps also testified it was unclear whether an easement could be obtained. However, Phipps admitted VirTex used natural gas to power pump jacks at other operations in South Texas, but added the gas did not have to be sweetened. Additionally, Phipps testified VirTex had used temporary generators to permanently power wells in Dimmit and Duval Counties; Phipps added, however, that the Duval County well became too expensive to run and VirTex planned to plug it.

After viewing this evidence in the light most favorable to the verdict and crediting favorable evidence and disregarding contrary evidence, we conclude the evidence is legally sufficient to support the jury's finding that reasonable and industry-accepted alternatives existed by which VirTex could power the pump jacks. *See Reeder*, 395 S.W.3d at 795; *Crosstex N. Tex. Pipeline, L.P.*, 505 S.W.3d at 615. Here, there was more than a mere scintilla of evidence to show that burying the power lines or using natural gas were options VirTex could use. *See Reeder*, 395 S.W.3d at 795; *Crosstex N. Tex. Pipeline, L.P.*, 505 S.W.3d at 615. And although VirTex disputes the evidence produced by the Bauerles, arguing it presumed an easement could be obtained over neighboring property and it did not take into account the cost increase with regard to forty-five wells, it was for the jury to consider and weigh all of the evidence when making its finding. *See City of Keller*, 168 S.W.3d at 819; *Golden Eagle Archery, Inc.*, 116 S.W.3d at 761. Here, the jury heard sufficient evidence to establish reasonable alternative and industry-accepted methods of powering the wells existed. With respect to these methods, the jury heard evidence that powering the wells with natural gas was the "next best alternative," and although it may not have been the least costly method, under the accommodation doctrine, the Bauerles need only show it was a reasonable and industry-accepted alternative. *See Coyote Lake Ranch*, 498 S.W.3d at 62–63.

Accordingly, we hold the evidence was legally and factually sufficient to support the jury's finding with respect to the third element of the accommodation doctrine.[3]

***Attorney's Fees***

In its next issue, VirTex contends the trial court erred in awarding the Bauerles' attorney's fees under the Uniform Declaratory Judgments Act ("UDJA"). VirTex argues the Bauerles framed their accommodation doctrine "claim"[4] as a declaratory judgment action for the sole purpose of requesting attorney's fees because there is no statute permitting the recovery of attorney's fees on an accommodation doctrine "claim." However, according to VirTex, the crux of the Bauerles' request for relief was injunctive in nature as opposed to declaratory. For support, VirTex points out all of the cases, which concern the accommodation doctrine, are cases in which plaintiffs request injunctive relief. *See, e.g., Coyote Lake Ranch, LLC*, 498 S.W.3d at 57; *Merriman*, 407 S.W.3d at 248–49; *Tarrant Cty. Water Control & Imp. Dist. No. One v. Haupt, Inc.*, 854 S.W.2d 909, 910 (Tex. 1993) (indicating plaintiffs' action for inverse condemnation damages originated out of injunction proceeding); *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex.1971) (stating Jones sued Getty Oil for injunction, seeking to restrain Getty Oil from using vertical space for pumping units that prevented Jones's use of automatic irrigation sprinkler system).

The Bauerles counter that the trial court did not err in awarding attorney's fees under the UDJA. According to the Bauerles, VirTex mischaracterizes their petition as seeking injunctive relief. The Bauerles argue injunctive relief was not sought because VirTex voluntarily ceased installation of the power lines when confronted by the Bauerles. As a result, they sought a

[3] In its brief, VirTex also contends the Bauerles unreasonably interfered with its operations and failed to defend their actions under the accommodation doctrine. Having held the Bauerles produced legally and factually sufficient evidence to support the jury's finding with respect to the elements of the accommodation doctrine, we need not address this issue.

[4] VirTex refers to the Bauerles' request to apply the accommodation doctrine as a "claim." However, the accommodation doctrine is not a claim for relief; rather, it is a legal principle used to determine how "conflicting estates should act with due regard for each other's rights." *See Coyote Lake Ranch*, 498 S.W.3d at 60–61.

declaratory judgment action because there was an active dispute with regard to their rights and obligations. We agree.

A court may award costs and reasonable and necessary attorney's fees in a proceeding brought under the UDJA. TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (West 2008); *Tanglewood Homes Ass'n, Inc. v. Feldman*, 436 S.W.3d 48, 69 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). However, an award of attorney's fees is discretionary and will be reversed upon a showing of an abuse of discretion. *Tanglewood Homes Ass'n*, 436 S.W.3d at 69. A trial court abuses its direction if it acts without reference to any guiding rule or principle. *Id.*

As pointed out by VirTex, "a party cannot use the [UDJA] as a vehicle to obtain otherwise impermissible attorney's fees." *Id.* (citing *MBM Fin. Corp. v. Woodlands Operating Co.*, 292 S.W.3d 660, 669 (Tex. 2009)); *City of Houston v. Texan Land & Cattle Co.*, 138 S.W.3d 382, 392 (Tex. App.—Houston [14th Dist.] 2004, no pet.). In other words, "fees are not permissible under § 37.009 where [the declaration is sought] solely for the purpose of obtaining attorney's fees." *Tanglewood Homes Ass'n*, 436 S.W.3d at 69 (quoting *Kenneth Leventhal & Co. v. Reeves*, 978 S.W.2d 253 (Tex. App.—Houston [14th Dist.] 1998, no pet.)). "Furthermore, a declaratory plea may not be coupled to a damage action simply in order to pave the way to recover attorney's fees." *Dallas Area Rapid Transit v. Agent Sys., Inc.*, No. 02-08-156-CV, 2008 WL 4938097, at *2 (Tex. App.—Fort Worth Nov. 20, 2008, pet. denied) (mem. op.); *see also Tanglewood Homes Ass'n*, 436 S.W.3d at 70 ("A party also may not use a declaratory judgment action to seek the same relief afforded under another of its causes of action in order to obtain attorney's fees."). Thus, if the declarations obtained in the judgment "merely duplicate issues already before the trial court," then the party may not recover attorney's fees. *Tanglewood Homes Ass'n*, 436 S.W.3d at 70; *Mungia v. Via Metro. Transit*, 441 S.W.3d 542, 547 (Tex. App.—San Antonio 2014, pet. denied).

Here, there is nothing in the record to show the Bauerles sought a declaration solely for the

purpose of recovering their attorney's fees. VirTex essentially contends the Bauerles should have sought injunctive relief as opposed to declaratory relief because that is the type of relief past plaintiffs have sought when considering the application of the accommodation doctrine. However, on more than one occasion, this court has pointed out that the existence of another adequate remedy does not preclude a declaratory judgment action. *See Mungia*, 441 S.W.3d at 547; *Zuehl Airport Flying Cmty. Owners Ass'n, Inc. v. Meszler*, No. 04-09-00028-CV, 2010 WL 454931, at *6 (Tex. App.—San Antonio May 4, 2010, pet. denied) (mem. op.) (citing *MBM Fin. Corp. v. Woodlands Operating Co., L.P.*, 292 S.W.3d 660, 669 (Tex. 2009)). Moreover, VirTex does not point to any authority, nor have we found any, holding that injunctive relief is the only remedy permitted when seeking application of the accommodation doctrine. Thus, we reject VirTex's contention that the potential for injunctive relief precluded the Bauerle' from asserting a claim for declaratory relief with regard to the accommodation doctrine.

Moreover, the Bauerles' request for declaratory relief does not duplicate any other claims asserted in its pleadings as the declaration they sought dealt solely with the determination of rights with respect to the surface and mineral owners under the accommodation doctrine. Although the Bauerles also alleged VirTex breached a surface use agreement, that claim focused solely on whether VirTex installed tank batteries on the Bauerles' property in accordance with a surface use agreement. Nothing in that dispute concerned the installation of overhead power lines or application of the accommodation doctrine. Accordingly, we conclude the Bauerles' request for declaratory relief was not used as a vehicle to obtain otherwise impermissible attorney's fees, nor did their request concern issues or relief duplicated in their breach of contract claim. We therefore hold the trial court did not abuse its discretion in awarding attorney's fees to the Bauerles under the UDJA.

***Exclusion of Photographic Evidence***

In its final appellate issue, VirTex contends the trial court abused its discretion by refusing to admit multiple photographs depicting the Bauerles' helicopter pilot witness — Will Graff — and his team capturing a deer on a ranch with overhead power lines. According to VirTex, these photographs were relevant because one of the central questions in this case concerned whether the installation of overhead power lines would preclude or substantially impair the Bauerles' existing use of the property. However, the trial court refused to admit the photographs on the basis that the probative value of the photographs was substantially outweighed by their prejudicial value.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Gharda USA, Inc.*, 464 S.W.3d at 348; *Rodriguez v. JPMorgan Chase Bank, N.A.*, No. 04-14-00342-CV, 2015 WL 3772110, at *8 (Tex. App.—San Antonio June 17, 2015, pet. denied) (mem. op.). A trial court abuses its discretion if it acts without reference to any guiding rules or principles. *U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118, 132 (Tex. 2012); *Rodriguez*, 2015 WL 3772110, at *8 (citing *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 687 (Tex. 2002)). We must uphold a trial court's decision to exclude evidence if there is any legitimate basis for it. *Enbridge Pipelines (East Tex.) L.P. v. Avinger Timber, LLC*, 386 S.W.3d 256, 264 (Tex. 2012).

Under Rule 403 of the Texas Rules of Evidence, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." TEX. R. EVID. 403. If the appellant can show the trial court's evidentiary ruling was erroneous, then in order to obtain a reversal, it must also show the error "probably (though not necessarily) resulted in improper judgment." *Nissan Motor Co. Ltd. v. Armstrong*, 145 S.W.3d 131, 144 (Tex. 2004); *see* TEX. R. APP. P. 44.1. In determining if excluded evidence probably resulted in the rendition of an improper judgment, we look at the entire record, and,

"typically, a successful challenge to a trial court's evidentiary rulings requires the complaining party to demonstrate that the judgment turns on the particular evidence excluded." *Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001).

Here, although the photographs depicted Graf and his team conducting helicopter operations on a property with overhead power lines, the photographs did not depict whether the layout of the overhead power lines was similar to VirTex's proposed power grid over the Bauerles' property. One of the disputes in this case centered on whether helicopter operations would be precluded or substantially impaired by the installation of a specific grid-like structure. Moreover, even assuming it was error to exclude the photographs, such error would have not resulted in the rendition of an improper judgment because the jury heard Graf testify he had flown over other ranch properties with overhead power lines. As indicated above, Graff testified helicopter operations over ranches with overhead power lines was possible, but due to the spiderweb design of VirTex's proposed grid, helicopter operations over the Bauerles' ranch would be unsafe. Accordingly, we conclude the trial court did not err in excluding the photographic evidence, and even assuming there was error, we hold the exclusion of the photographs was harmless and did not cause the rendition of an improper judgment.

## CONCLUSION

Based on the foregoing, we overrule VirTex's issues and affirm the trial court's judgment.

Marialyn Barnard, Justice