

**IN THE SUPREME COURT
OF THE STATE OF MONTANA**

Supreme Court Cause No. DA 23-0384

**SALLY JO BECK, VIVID PROPERTIES, LLC,
CURT and CARRIE BATES, GARY and ANN LIBECAP,
LIBECAP REVOCABLE TRUST, DON and ANITA
COURTNEY, COURTNEY FAMILY TRUST, MARK
CARPENTER, KEVIN and MARGIE HUGUET, DONALD
and NANCY HALL, PHILLIP and JANE HALL, and SHALOM HOUSE,
LLC,**

Plaintiffs and Appellees,

vs.

**JOHN DIMAR, DIMAR FAMILY
LLC, a Kentucky Limited Liability Company, and
DIMAR FAMILY PARTNERSHIP, LTD,**

Defendants and Appellants.

APPELLANTS' OPENING BRIEF

An appeal from the decision of the Honorable John W. Larson, Judge of the Fourth Judicial District (Dept. 3), in and for the County of Missoula, under the above caption and Cause No. DV-22-234

APPEARANCES OF COUNSEL

For the Defendants/Appellants:

Colleen M. Dowdall, Esq.
DOWDALL LAW
4900 Lower Miller Creek Rd.
Missoula, MT 59803
Phone: (406) 240-5949
Email: colleen@dowdall-law.com

Donald R. Murray
HASH, O'BRIEN, BIBY & MURRAY
136 First Avenue West
P.O. Box 1178
Kalispell, MT 59903-1178
Phone: (406) 755-6919
Email: dmurray@hashlaw.com

For the Plaintiffs/Appellees:

Nicole L. Siefert

SIEFERT & WAGNER PLLC

1821 South Avenue West, Suite 501

Missoula, MT 59801

Phone: (406) 226-2552

Email: *nicole@swl.legal*

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ATTACHMENTS TO THE BRIEF

Attachment 1: District Court's order denying plaintiffs' request for a temporary restraining order, entitled *Order Denying Plaintiffs' Request for TRO*, Doc. 6.

Attachment 2: District Court's findings and conclusions, entitled *Findings of Fact, Conclusions of Law and Order Granting Preliminary Injunction on Access to and Management of Bridge Located on Easement Over Clearwater River and Access to Highway 83, Missoula County, Montana*, Doc. 26.

Attachment 3: District Court's summary judgment ruling, entitled *Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment*, Doc. 52.

Attachment 4: Final decision of Fourth Judicial District Court Judge Karen Townsend in the prior case, entitled *Order*, and captioned *Clearwater Bridge Group LLC, and John R. Dimar as Trustee of the John R. Dimar Family Trust v. River Watch Homeowner's Association*, Fourth Judicial District Court Cause No. DV-12-1547.¹

Attachment 5: 1994 Plum Creek Easement; recorded at Book 403, Page 2484.²

Attachment 6: 1998 Plum Creek Easement; recorded at Book 535, Page 0947.

Attachment 7: Certificate of Survey [River Watch]

¹ This is the "prior case" relied on by the District Court to invoke the doctrine of collateral estoppel. However, in that prior case, Judge Townsend considered the 1994 Plum Creek easement *only* through the

² All references to recorded documents are records maintained in the office of the Clerk & Recorder for Missoula County.

ISSUES PRESENTED FOR REVIEW

This appeal presents the following issues:

1. Did the District Court err in ruling that paragraph 6 of the 1994 Plum Creek easement (addressing “improvements”) was applicable to these parties and operated to absolve the plaintiffs of any obligation to share in the cost of building the bridge (a cost borne entirely by Dimars)?
2. Did the District Court err in its interpretation of the 1994 Plum Creek easement by ruling that the bridge was an “improvement” covered by the document’s paragraph 6?
3. Did the District Court err by not addressing the implications of the gap in the easement appurtenant to the parties’ properties where that easement purports to cross the Clearwater River?
4. Did the District Court err in applying the doctrine of collateral estoppel to avoid addressing the implications of the gap in the easement appurtenant to the parties’ properties where that easement purports to cross the Clearwater River?
5. Will the plaintiffs be unjustly enriched if they are allowed to use the bridge without having to contribute to the cost of its construction?
6. Did the District Court err in granting a preliminary injunction giving plaintiffs essentially unlimited use of a bridge paid for by their neighbor while absolving plaintiffs of any obligation to contribute to the cost of the bridge’s construction?
7. What is an appropriate remedy?

STATEMENT OF THE CASE

Unable to reach agreement with Dimars for shared use of the bridge, the plaintiffs brought this lawsuit against John and Cheryl Dimar (their

neighbors by whom the bridge was built) seeking to compel Dimars to allow them unlimited use of the bridge. *Verified Complaint*, Doc. 1. The plaintiffs sought a temporary restraining order to gain unrestricted access to the bridge. *Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction*, Doc. 5. The District Court denied the plaintiffs' application for a TRO pending service on Dimars and a hearing. *Order Regarding Temporary Restraining Order and Order to Show Cause*, Doc. 7. The Dimars answered and asserted a counterclaim. The District Court then held a hearing on the plaintiffs' request for a TRO. At that July 22, 2022 hearing, the Court heard testimony from several of the plaintiffs, as well as John Dimar and Dimars' engineer, Mike Day. *Transcript*, pp. 17-304. Based on the testimony offered at the TRO hearing, the District Court made extensive findings of fact and granted a preliminary injunction allowing plaintiffs unrestricted use of the bridge subject to Dimars' right to oversee the use as follows:

3. Defendant may reasonably limit access only for purposes of report, maintenance, or safety issues. This option does not address liability issues.
5. Management including maintenance and safety issues absent further agreement remains with Defendant to protect and preserve his \$700,000 investment and to limit his liability.

Findings of Fact, Conclusions of Law and Order Granting Preliminary Injunction on Access to and Management of Bridge Located on Easement Over Clearwater River and Access to Highway 83, Missoula County, Montana, pp. 16-17, Conclusions Nos. 3 and 5, Doc. 26 (herein *Findings of Fact*).

The Court also found:

59. Use of the bridge without contribution or a joint management system/agreement from all Plaintiff landowners could result in as [*sic*] possible damage to the structure, liability for injuries caused by unauthorized use or use not contemplated by the Dimars when the bridge at issue was constructed. At the same time the Easement Agreement is clear that reimbursement is not required.

Id., pp. 16-17.

The parties then filed cross motions for summary judgment. The motions were briefed and the District Court heard oral arguments on the motions on April 26, 2023. *Transcript*, p. 310. The District Court granted plaintiffs' motion and denied Dimars' motion. *Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment*, Doc. 52. Dimars appealed.

STATEMENT OF FACTS

The parties are all neighbors. They own properties clustered around the foot of Salmon Lake and its outlet, the Clearwater River. All of the

parties' properties are on the west side of the river and Salmon Lake, within sight of Montana Highway 83 that runs along the east side of the lake, but inaccessible from Highway 83 without a bridge spanning the river.

The parties' lots are in three subdivisions created from larger tracts of what were formerly Plum Creek timberlands, Clearwater Cove, Eagle's Nest at Salmon Lake and Big Waters Ranch. Some have seasonal cabins and others year-round homes. Of the parties in this litigation, Dimars were the first to arrive. John and Cheryl Dimar bought Lot 2 of Clearwater Cove in 1996, The Dimar Family Partnership, LTD, bought Lot 3 of Clearwater Cove in 1999, and a decade later, in 2009, The Dimar Family LLC, bought Lot 1 of Big Waters Ranch.

Years ago, when there was little development in the area, a rudimentary bridge spanned the Clearwater River at approximately the same location where the bridge that is the subject of this lawsuit stands now. Plum Creek built the "old" bridge sometime in the 1960's primarily to haul logs from its timberlands on the west side of the river. That bridge fell into disrepair and was removed in 1981, before any of these parties owned property in the area. None of these parties ever used that bridge and none of them ever accessed their properties from Highway 83 over the river until Dimars built the new bridge. Access to the parties' properties is on the west

side of the river on Blanchard Creek Road that intersects Highway 200 west of Clearwater Junction. That has been the sole access for all the plaintiffs (as well as Dimars) since any of them purchased their properties. It is a seven mile drive on rough gravel roads and all of the parties would much prefer the shorter more convenient route to the east over the river and up the short (but steep) slope to Highway 83, just ten minutes from Seeley Lake. All parties are in agreement that the bridge gives them a much more desirable access and all wanted to see a bridge built to provide that access. However, building a bridge over a Montana river in today's regulated environment is a far cry from the simple undertaking it was when Plum Creek did it a half century ago. And Plum Creek had the added advantage of owning the land on both sides of the river.

Serious bridge discussions were initiated in 2009 with John Dimar approaching some of his neighbors – primarily Mark Carpenter and Libecaps – about the prospect of constructing a new bridge across the Clearwater. All of the parties wanted a bridge and the easy access it would provide *via* Highway 83. Dimars took on the project and construction of a new bridge was completed in 2016. The cost of the project, which included a lawsuit to confirm the parties' easement through the River Watch subdivision on the east side of the river, was close to \$1 million. It was paid for entirely by

Dimars. *Verified Complaint*, pp. 5-6, ¶¶ 22-24, Doc. 1; *Brief in Support of Plaintiff's Motion for Temporary Restraining Order*, p. 4, ¶¶ 10-12, Doc. 6.

Once the bridge was completed, Dimars gave keys to the neighbors and to emergency responders in Seeley Lake and vicinity for limited emergency access while the parties tried to form a bridge users association and come to an agreement on how to share the cost of the project. This arrangement was unsatisfactory to the plaintiffs, and frustrated with what they felt was a lack of progress in resolving the long term use, maintenance and ownership of the bridge, they brought this action.

Among the first steps in the process of building the bridge was to secure an approach permit from the Montana Department of Transportation to allow an access road to intersect with Highway 83. Dimars enlisted the aid of Mike Day of WGM Group in Missoula, an engineer with a background in bridge building, to oversee the project and help Dimars with its technical and regulatory requirements. From the outset the project was met with resistance from the residents of the River Watch subdivision sandwiched between Highway 83 and the east side of the river. Establishing easement rights through River Watch was an essential first step in the process, but was vigorously opposed by the River Watch residents. To establish that access, Dimars formed Clearwater Bridge Group, LLC, and brought an action in

Missoula County District Court. That case is *Clearwater Bridge Group, LLC and John R. Dimar as Trustee of the John R. Dimar Family Trust v. River Watch Homeowner's Association*, Fourth Judicial District Court Cause No. DV-12-1547. *Clearwater Bridge Group* is important to this case and Judge Townsend's ruling is attached to this brief as Attachment 4. That ruling affirmed the easement rights of the parties to this action, all of whom claim those easement rights from Highway 83 to their lots in Clearwater Cove (and adjacent subdivisions) under a 1994 easement agreement between Plum Creek and Eagle Nest Investments, the developer of Clearwater Cove. That 1994 Plum Creek easement is central to the issues in this case. It is attached to this brief as Attachment 5 and discussed at length below. All of these parties claim their easement rights as successors in title to Eagle Nest Investments, the grantee in the 1994 Plum Creek easement.

Additional pertinent background can be found in Judge Townsend's *Order* in the *Clearwater Bridge Group* case. She related this history, relevant here, in her decision affirming the plaintiffs' easement rights under the 1994 Plum Creek easement:

This case arises out of a dispute regarding an easement across the common area of the River Watch subdivision on the Clearwater River near the mouth of Salmon Lake. The River Watch subdivision is on the east side of the river, and it is bounded by Highway 83 and the river. The John Dimar Family Trust owns 2 lots on the west side of the river which, along with several other properties, possess an express easement

through River Watch's common area to provide access to the site of a former bridge connecting Highway 83 to the west side properties. Plum Creek, which long ago used the bridge for logging purposes, removed the bridge for safety reasons in 1981 – however, Plaintiffs now seek to build a new bridge in its place to which Defendant objects. Thus far, Plaintiffs have accessed their properties via a less convenient route on the west side of the river – Blanchard Creek Road.

Historically, as Plum Creek sold parcels of land around the outlet of Salmon Lake, it reserved and granted easements along a right of way which ran from Highway 83 towards the bridge site on the east side of the river. It also reserved and granted easements on the west side of the river to provide access to properties it was developing as residential subdivisions in the area, such as Plaintiffs' properties.

Clearwater Bridge Group, supra, Doc. 34, Ex. 1, pp. 2-3, Attachment 4.

With Judge Townsend's decision in hand, Dimars secured an approach permit from MDOT and the process of building the bridge began in earnest. That process – begun in 2009 and finished in 2016 – is described in detail in the testimony of Dimars' engineer, Mike Day, in the transcript of the July 22, 2022 TRO hearing. *Transcript*, p. 221, ln. 25, *et seq.* As the District Court noted, the project was “. . . complex with numerous challenges, both physical and environmental, as well as the adjacent land owner/political issues described herein.” *Findings of Fact*, No. 19, p. 5, Doc. 26. While the complexity, duration and cost of the project were all more than anyone anticipated, everything Dimars did was necessary and all amounts Dimars spent were reasonable. The District Court so found upon hearing the testimony of Dimars' engineer. *Findings of Fact*, Nos. 29-32,

pp. 7-8, Doc. 26. Among the District Court's findings in that regard was this one:

29. Construction of this new bridge was completed in 2016 at the sole cost of Defendants. Testimony at the hearing estimated over \$700,000 in construction costs and \$100,000 in attorney's fees. These costs are reasonable.

Id., Finding No. 29.

Until Dimars built the bridge, none of these parties had ever used the 1994 Plum Creek easement from Highway 83 to access their properties. None of these parties have ever seen the old bridge much less crossed the river on it.¹

When the plaintiffs brought this action seeking to compel Dimars to allow them unrestricted access, they asserted unequivocally that ***they should contribute monetarily to the cost of the bridge's construction***; costs borne entirely by Dimars. In their complaint the plaintiffs represented:

28. Plaintiffs are only required to share the cost of the basic construction of the bridge that returned it to its original construction, excluding any additional extravagant embellishments.

Verified Complaint, p. 7, ¶ 28, Doc. 1.

¹ This is among the reasons Dimars take issue with plaintiffs' allegations of irreparable harm from not having unlimited use of the bridge. Despite there being no agreement in place to share the cost of the bridge and address its ongoing maintenance and Dimars' potential liability, Dimars gave their neighbors keys but asked that until consensus was reached on those matters, they limit their use to emergencies only. It is hard to validate plaintiffs' claims of irreparable harm from not having unlimited use of the bridge that did not previously exist on an easement they had never used and could not use until the bridge was built.

As the plaintiffs acknowledged, their obligation to contribute to the cost of the bridge is a *requirement*. In arguments to the District Court plaintiffs reiterated their position, stating:

Plaintiffs should only be required to share the cost of the basic construction of the bridge that returned it to its original construction, excluding any additional extravagant embellishments.

Brief in Support of Plaintiff's Motion for Temporary Restraining Order, p. 5, ¶ 16, Doc. 6. And in responding to Dimars' counterclaim, the plaintiffs again acknowledged their obligation to contribute to the cost of construction, stating:

The Counter Defendants agree that some contribution is proper, in an amount to be determined by the Court.

Answer to Counterclaim, p. 6, ¶ 34, Doc. 11.

At the July 22, 2022 TRO hearing, plaintiffs' counsel stated:

Now, these are all neighbors. And they all really want to use the bridge. And they will testify here today that they are willing to pay an amount to use it. They do not want to use the bridge that Dr. Dimar built for free. They are willing to pay for it.

Transcript, p. 12, ln. 13. And at that TRO hearing, Gary Libecap, one of the plaintiffs, testified to his position and that of his co-plaintiffs on contributing to the cost of the bridge:

Question (Ms. Siefert). And would you be willing to pay up to \$30,000 to use the bridge?

Answer (Gary Libecap). Yes.

Question. Okay. And would all of the other plaintiffs be willing to pay \$30,000 to use the bridge?

Answer. That's my understanding, yes.

Transcript, p. 33, ln. 13.

In their proposed findings of fact submitted to the District Court after the TRO hearing, plaintiffs' counsel summarized her clients' testimony, stating:

43. Plaintiffs testified that they are willing to form a bridge association where they would share in the cost to pay insurance and maintenance for the bridge.

[Plaintiffs' Proposed] *Findings of Fact, Conclusions of Law, and Order*, p.

10, ¶ 43. The District Court found:

25. Plaintiffs Gary Libecap, Mark Carpenter, Curt Bates, and Sally Jo Beck testified as to the entire Plaintiffs' group's intent to pay \$30,000 per lot in order to offset some of the costs of the bridge once a formal written agreement had been reached between them and Dimar. No agreement has yet been reported to the Court.

Findings of Fact, Doc. 26, p. 7, ¶ 25.

At some point the plaintiffs changed their position and they now claim that language in the 1994 Plum Creek easement, specifically paragraph 6 relative to "improvements," absolves them of any obligation to share in the cost of the bridge. They assert the right to unlimited access to the bridge yet claim they have no obligation to pay anything toward the cost of building it. In summary judgment briefing the plaintiffs asserted:

The Court should issue a declaratory judgment declaring that Plaintiffs have a right to use the bridge crossing the Clearwater River and are not responsible for reimbursing Dimar for the costs of construction.

Plaintiffs' Reply Brief in Support of Motion for Summary Judgment, p. 15, Doc. 50.

Plaintiffs also acknowledge Dimars' desire to create a bridge users association so all can use the bridge, contribute to its cost and participate in its future operation and maintenance. The plaintiffs stated:

Defendants have stated that they would create a Bridge Easement Association Agreement with Plaintiffs to allow them access to use the bridge and easement, but they have not yet done so.

Id., p. 7, Doc. 6.

Dimars actually went to great lengths to create such an association, but doing so with a group that initially claimed Dimars spent far more than necessary and now claims the right to unlimited use with no obligation to contribute is challenging.

The District Court ruled as advocated by the plaintiffs, granting them unlimited rights to use the bridge and finding that paragraph 6 of the 1994 Plum Creek easement relieved them of any obligation to contribute to the cost of building it.

STANDARD OF REVIEW

1. Summary Judgment – de novo.

Since the case was decided on cross motions for summary judgment, the standard this Court will apply in its review of the District Court's rulings is *de novo*. The cases are legion that discuss this standard; one is *Quarter Circle JP Ranch, LLC v. Jerde*, 2018 MT 68, 391 Mont. 104, 414 P.3d 1277, ¶ 7, in which the Court stated the standard thusly:

We review *de novo* a district court's grant or denial of summary judgment, applying the same criteria of M. R. Civ. P. 56 as a district court. *Pilgeram v. Green Point Mortg. Funding, Inc.*, 2013 MT 354, ¶ 9, 373 Mont. 1, 313 P.3d 839. Summary judgment is appropriate when the moving party demonstrates both the absence of any genuine issues of material fact and entitlement to judgment as a matter of law. M. R. Civ. P. 56(c)(3); *Bird v. Cascade Cnty.*, 2016 MT 345, ¶ 9, 386 Mont. 69, 386 P.3d 602. We review a district court's conclusions of law to determine whether they are correct. *Pilgeram*, ¶ 9.

2. Collateral Estoppel – de novo.

Review of the District Court's collateral estoppel ruling is also *de novo*. As this Court noted in *Denturist Ass'n of Mont. v. State*, 2016 MT 119, 383 Mont. 391, 372 P.3d 466, ¶8:

A district court's application of *res judicata* or collateral estoppel is reviewed *de novo*. *Textana, Inc. v. Klabzuba Oil & Gas*, 2009 MT 401, ¶ 62, 353 Mont. 442, 222 P.3d 580; *Brilz v. Metro. Gen. Ins. Co.*, 2012 MT 184, ¶ 13, 366 Mont. 78, 285 P.3d 494.

These are the standards applicable here; this Court will review *de novo* – for correctness – the District Court's interpretations of the law (and

the 1994 Plum Creek easement), its summary judgment rulings and its application of collateral estoppel.

SUMMARY OF ARGUMENT

1. Paragraph 6 of the 1994 Plum Creek easement is not applicable.

Paragraph 6 of the 1994 Plum Creek easement is not applicable to these parties. That provision, the one the District Court applied to relieve the plaintiffs of any obligation to share in the cost of the bridge, is both a grant of an easement and an agreement for the shared use of a road (and bridge) – a road users agreement – between a timber company and a real estate developer. These parties are neither. They are all owners of lots in three small subdivisions carved out of former Plum Creek timberlands by developers. As to the document’s easement component, these parties are the successors to the grantee, Eagle Nest. As to the document’s road users’ agreement component, they are the successors in interest to neither party. Applying this three-decade-old agreement between a timber company and a developer for the shared the use of a road to be built by the developer to vastly alter the relationships among these neighbors, enriching the plaintiffs to the substantial detriment to Dimars, was error.

2. The District Court’s interpretation of paragraph 6 is flawed.

Even if the road users’ provisions in the 1994 Plum Creek easement

applied here, the District Court's interpretation of paragraph 6 addressing "improvements" is flawed. It is clear from consideration of the document as a whole – both its easement component and its road users component – that a bridge over the Clearwater was not intended by the parties to be treated as an "improvement" under paragraph 6. Any bridge that might be built would be part of a new road access to be built by the grantee/developer, Eagle Nest, for its Clearwater Cove project. It was entirely up to Eagle Nest if it elected to build the access and it was entirely up to Eagle Nest to pay for it if it did. If Eagle Nest did elect to build the road (and bridge) and Plum Creek shared its use (as was Plum Creek's right under the agreement) then the road users' provisions addressing "maintenance" (paragraph 4), "damage" (paragraph 5) and "improvements" (paragraph 6) would become operative. A bridge over the Clearwater was not intended to fall under the "improvements" provisions of paragraph 6 – any bridge building was Eagle Nest's responsibility. The District Court's interpretation of paragraph 6 to essentially give plaintiffs the gift of a free bridge was clearly error and way out of line with the obvious intent of the original parties to the agreement.

3. The plaintiffs are being unjustly enriched.

Giving plaintiffs unlimited use of the bridge and absolving them of any obligation to contribute toward its cost has manifestly and unjustly

enriched the plaintiffs at Dimars' expense. *See; Storms v. Bergsieker*, 254 Mont 130, 835 P.2d 738 (1992).

4. There is a gap in the easement at the river.

These parties all claim their access from Highway 83 pursuant to the 1994 Plum Creek easement. However, in 1994 when Plum Creek granted that easement to Eagle Nest, Plum Creek did not own the bed of the Clearwater River. One cannot grant an easement over land one does not own. As a consequence, there is a gap in the parties' easement where it purports to cross the river. While the District Court invoked collateral estoppel to avoid addressing the gap, it did acknowledge its presence, finding [emphasis added]:

“ . . . Plum Creek did not own the land under the Clearwater River, so it did not have the power to grant Eagle Nest Investments an easement across the river. Consequently, ***there is a gap in Easement No. 1 at the river.***”

Findings of Fact, p. 8, ¶ 35, Doc. 26.

5. The District Court erred by invoking collateral estoppel.

The District Court avoided any analysis of the implications of the gap, ruling that the issue had been resolved by the *Clearwater Bridge Group* case and thus collateral estoppel precluded its consideration. However, in that prior case Judge Townsend adjudicated the easement ***only*** through the River Watch property to the east bank of the river. Judge Townsend's *Order* in

Clearwater Bridge Group ends where the gap begins. It was error to apply the doctrine; the issue was not addressed in the prior ruling.

6. The appropriate remedy is remand (and perhaps a special master).

The plaintiffs do not have the right to unlimited use of the bridge without sharing proportionately in the cost of its construction. The Court should remand the matter to the District Court for rulings consistent with this Court's decisions on the issues raised by Appellants and with instructions to consider the appointment of a special master pursuant to Rule 53, M.R.Civ.P., to assist the parties in establishing a bridge users association and determining the amount of plaintiffs' contribution to the cost of building the bridge.

ARGUMENT

I. THE DISTRICT COURT ERRED BY GRANTING SUMMARY JUDGMENT TO THE PLAINTIFFS ON THEIR CLAIM THEY HAVE NO OBLIGATION TO CONTRIBUTE TO THE COST OF THE BRIDGE

A. PARAGRAPH 6 OF THE 1994 PLUM CREEK EASEMENT DOES NOT APPLY TO THESE PARTIES

The District Court erred by applying the road users' provisions – specifically paragraph 6 addressing “improvements” – to these parties and their bridge project. The road users' provisions of the 1994 Plum Creek

easement were between a timber company and a real estate developer.

These parties are all owners of residential lots created by developers on former Plum Creek land.

1. The plaintiffs acknowledged they should share in the cost of building the bridge.

When the plaintiffs brought this action seeking to compel Dimars to give them unrestricted access, they represented that ***they should contribute monetarily to the cost of the bridge's construction*** – costs that were borne entirely by Dimars. In their complaint the plaintiffs represented:

28. Plaintiffs are only required to share the cost of the basic construction of the bridge that returned it to its original construction, excluding any additional extravagant embellishments.

Verified Complaint, p. 7, ¶ 28, Doc. 1.

As the plaintiffs acknowledged, their obligation to contribute to the cost of the bridge is a ***requirement***. In arguments to the District Court plaintiffs reiterated their position, stating:

Plaintiffs should only be required to share the cost of the basic construction of the bridge . . .

Brief in Support of Plaintiff's Motion for Temporary Restraining Order, p. 5,

¶ 16, Doc. 6. And in responding to Dimars' counterclaim, the plaintiffs again acknowledged their obligation to contribute to the cost of construction, an obligation they asserted should be determined by the District Court:

The Counter Defendants agree that some contribution is proper, in an amount to be determined by the Court.

Answer to Counterclaim, p. 6, ¶ 34, Doc. 11.

At the July 22, 2022 TRO hearing, plaintiffs' counsel stated:

Now, these are all neighbors. And they all really want to use the bridge. And they will testify here today that they are willing to pay an amount to use it. They do not want to use the bridge that Dr. Dimar built for free. They are willing to pay for it.

Transcript, p. 12, ln. 13. And at that TRO hearing, Gary Libecap, one of the plaintiffs, testified regarding contributing to the cost of the bridge, stating:

Question (Ms. Siefert). And would you be willing to pay up to \$30,000 to use the bridge?

Answer (Gary Libecap). Yes.

Question. Okay. And would all of the other plaintiffs be willing to pay \$30,000 to use the bridge?

Answer. That's my understanding, yes.

Transcript, p. 33, ln. 13.

In their proposed findings of fact submitted to the District Court following the TRO hearing, plaintiffs' counsel also expressed plaintiffs' support for a bridge users association, stating:

43. Plaintiffs testified that they are willing to form a bridge association where they would share in the cost to pay insurance and maintenance for the bridge.

[Plaintiffs' Proposed] *Findings of Fact, Conclusions of Law, and Order*, p.

10, ¶ 43. Following the TRO hearing, the District Court found:

25. Plaintiffs Gary Libecap, Mark Carpenter, Curt Bates, and Sally Jo Beck testified as to the entire Plaintiffs' group's intent to pay \$30,000 per lot in order to offset some of the costs of the bridge once a formal written agreement had been reached between them and Dimar. No agreement has yet been reported to the Court.

Findings of Fact, p. 7, ¶ 25, Doc. 26.

But the plaintiffs have done an about face. Pointing to the 1994 Plum Creek easement, specifically its paragraph 6 relative to "improvements," they now argue they are absolved of any obligation to contribute. The position they now advocate is that they have the right to unlimited use of the bridge yet based on a three-decade-old agreement between a timber company and a real estate developer they have no obligation to pay anything toward its cost. In summary judgment briefing the plaintiffs asserted:

The Court should issue a declaratory judgment declaring that Plaintiffs have a right to use the bridge crossing the Clearwater River and are not responsible for reimbursing Dimar for the costs of construction.

Plaintiffs' Reply Brief in Support of Motion for Summary Judgment, p. 15, Doc. 50.

Paragraph 6 of the 1994 Plum Creek easement provides [emphasis added]:

6. Construction and Improvement. Unless the parties hereto agree in writing to share the cost of **improvements to said roads** in advance of such improvements being made, said improvements shall be solely for the account of the improver.

1994 Plum Creek Easement, p. 2, ¶ 6, Attachment 5.

This is the totality of the Court’s analysis of why it found paragraph 6 applicable here [emphasis added]:

Next, Section 6 of the Easement Agreement describes which parties are responsible for construction and ***improvements to the easement***. Doc. 28, Ex. A, § 6. Section 6 provides that the party making or constructing an improvement is solely responsible for such costs unless the parties agree in writing to share in the same. There is no genuine dispute that there is no writing in which Mr. Dimar and Plaintiffs agreed to share the costs. Further, this Court has already concluded Mr. Dimar is not entitled to contribution for construction costs of the bridge under the clear language of the Easement Agreement, which states “...the Easement Agreement is clear that reimbursement is not required.” Doc. 26, ¶¶ 59-62.

Order Granting Plaintiff’s Motion for Summary Judgment, p. 7, Doc. 52.

Notably, the language the District Court attributed to the 1994 Plum Creek easement (the last line in the above quotation) is ***not*** in the easement as stated. The citation to “Doc. 26, ¶¶ 59-62” that follows the quoted language is the correct reference to where the quote appears in the Court’s *Findings and Conclusions*. Also noteworthy is that in paragraph 6 the parties addressed “improvements ***to said roads***.” The District Court stated “improvements ***to the easement***.” There is a big difference.

As discussed in the paragraphs that follow, the District Court both misapplied and misinterpreted paragraph 6.

2. Paragraph 6 of the Plum Creek easement is not applicable to this dispute between lot owners who are successors to the interest of the grantee, Eagle Nest.

Applying paragraph 6 of the 1994 Plum Creek easement to these parties is unsound legally and logically. While the document (Attachment 5) is entitled “Easement,” and does grant an easement to the grantee, Eagle Nest, it is also an agreement for the shared use of a road (and bridge) – a road users agreement. When Plum Creek grants an easement on an existing road, since it has extensive land holdings, it typically reserves the right to use the road. *See, e.g.* the 1998, Plum Creek Easement, Attachment 6. The 1994 easement contemplated that Eagle Nest would build a new road to provide access from Highway 83 to its Clearwater Cove subdivision. Plum Creek reserved the right to use that road (that would necessarily include a bridge since the access crossed the Clearwater River) in the event Eagle Nest built it. And if Eagle Nest built the road (and bridge) and if Plum Creek used it, the parties made provision for their respective obligations relative to that shared use. These provisions can be seen in the road users agreement component of the document, in particular paragraphs 4, 5 and 6 addressing “maintenance,” “road damage” and “improvements.” These identical paragraphs on shared road use can be seen in both the 1994 and 1998 Plum Creek easements (Attachments 5 and 6). Paragraph 6 is part of the road users’ agreement and addresses payment for improvements to the new road – “said roads” – (and bridge) it was anticipated Eagle Nest would build. The

new road (necessarily including a bridge) for access to Eagle Nest's Clearwater Cove was not an "improvement" under paragraph 6. It was new construction for which Eagle Nest was solely responsible. With both timberlands and other developable lands in the area, Plum Creek reserved the right to use the road (and bridge). The agreement is between Eagle Nest Investments (the road/bridge builder) and Plum Creek (the road/bridge user), and it governs a specific relationship between *those* parties; these parties are not their successors in interest. These parties are the successors in interest to Eagle Nest, the developer of their Clearwater Cove lots.

The *grant of easement* was intended by the parties to run with the title to the dominant tenement and benefit successors in title to the dominant tenement (the Clearwater Cove lot buyers, Dimars, Courtneys, Libecaps, *et al.*). But the road users agreement is a different animal and was specific to Plum Creek (the large timber company) in the event it elected to use Eagle Nest's road (and bridge) as part of its timber management operation or for other developments. Had Weyerhaeuser succeeded to Plum Creek's interest the road users agreement would have been binding on Weyerhaeuser. But here there is no successor to Plum Creek. All these parties are owners of residential lots carved out of Plum Creek land; they are successors to the subdividers to whom Plum Creek granted easements. Their rights were

acquired by buying lots that were part of Eagle Nest's dominant tenement. The road users' agreement does not address, and was not intended to address, their rights *vis-a-vis* each other. Applying the thirty-year-old provisions of the Plum Creek/Eagle Nest road users' agreement to order the legal relations between these similarly situated neighbors is illogical, and an application of the agreement clearly not intended by the original parties to it. Applying that paragraph 6 here to absolve some lot owners of any obligation to contribute to the cost of the bridge built by another lot owner is unsound legally and has ushered in a result that unjustly enriches each of the plaintiffs at the expense of Dimars, their neighbors. The dispute here is between successors in title to Eagle Nest – all similarly situated as owners of subdivision lots developed by Plum Creek's grantee. None are successors to the timber company that made provision for its own use of the road.

B. EVEN IF IT DID APPLY, PARAGRAPH 6 OF THE 1994 PLUM CREEK EASEMENT DOES NOT OPERATE AS APPLIED; IT WAS MISINTERPRETED BY THE DISTRICT COURT

The District Court not only misapplied the 1994 Plum Creek easement to these parties, it misinterpreted it as well. The bridge is not an “improvement” governed by paragraph 6. On that point the intent of the original parties to the agreement is clear.

1. Basic rules for interpretation of the Plum Creek easement; view the document as a whole and consider the attendant circumstances.

The rules of contract interpretation applicable here are cataloged in *Wiegele v. W. Dry Creek Ranch, LLC*, 2019 MT 254, 397 Mont. 414, 450 P.3d 879, as follows:

“Particular clauses of a contract are subordinate to its general intent[,]” § 28-3-307, MCA, and “[t]he whole of a contract is to be taken together as to give effect to every part if reasonably practicable, each clause helping to interpret the other.” Section 28-3-202, MCA.

Contracts are not created in a vacuum, and courts may consider the circumstances under which the agreement was made or the matter to which it relates. *Broadwater Dev. L.L.C.*, ¶ 20. See § 28-3-402, MCA (“A contract’s intention may be explained by reference to the circumstances under which it was made and the matter to which it relates.”). See also §§ 28-2-905(2) and 70-20-202(2), MCA. When interpreting a writing granting an interest in real property, such as an easement, the court may hear evidence of the surrounding circumstances, including the situation of the property and the context of the parties’ agreement, so the court is placed in the position of those whose language the court is to interpret. *Broadwater Dev. L.L.C.*, ¶ 22 (citing § 1-4-102, MCA (“For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument and the parties to it, may also be shown so that the judge is placed in the position of those whose language the judge is to interpret.”)).

Wiegele, supra, ¶¶ 18, 19. The Court in *Wiegele* went on to note:

Both parties agree that contract interpretation must give effect to the mutual intent of the parties as it existed at the time of contracting, and a contract’s intent may be explained by the surrounding circumstances under which it was made. *Broadwater Dev. L.L.C.*, ¶ 19 (citing § 28-3-301, MCA); see § 28-3-402, MCA; *Mary J. Baker Revocable Trust*, ¶ 21.

Id., ¶ 29.

As the Court noted recently in *Lewis & Clark County v. Wirth*, 2022

MT 105, 409 Mont. 1, 510 P.3d 1206, ¶ 17 [emphasis added]:

It is a fundamental rule that courts may look “not only to the language employed, but to the subject-matter and the surrounding circumstances, and may avail themselves of the ***same light which the parties possessed when the contract was made.***” (Citations omitted.)

2. Even if paragraph 6 of the Plum Creek easement was applicable to this dispute, the bridge is not an “improvement” within the contemplation of the provision.

The District Court looked at paragraph 6 in isolation and did not consider the document as a whole or the circumstances attending its making. Looking at the agreement in the context of the existing circumstances, and considering the document in its entirety shows the following:

Plum Creek sold Eagle Nest the land on which Eagle Nest was developing its Clearwater Cove subdivision. Plum Creek also granted Eagle Nest an easement from Highway 83 over the Clearwater River to the Eagle Nest property (Clearwater Cove). The deed and the easement were recorded on the same day and the plat for Clearwater Cove was recorded the following day. Most of the parties to this action are Clearwater Cove lot owners. Some of them own lots in adjacent subdivisions also developed on what was Plum Creek land; Big Waters Ranch to the south (Dimars) and Eagle’s Point at Salmon Lake to the north (Carpenter, Huguets, Don and

Nancy Hall and Vivid Properties). All of the plaintiffs as well as Dimars claim their easement rights from Highway 83 under the 1994 Plum Creek easement.

What the original parties to that agreement contemplated was that Eagle Nest would develop the Clearwater Cove property as a platted subdivision with the option to give it a much better access by building a road (with a bridge) from Highway 83 over the river to the development. The highway was tantalizingly close, but agonizingly separated from the project by the Clearwater River. However, the building of that road (and bridge) in the easement was up to Eagle Nest – to build it *and to pay for it*. This is clear from the terms of the 1994 easement and confirmed by the later 1998 easement – building the new access to Clearwater Cove and its necessary bridge was solely up to Eagle Nest.

The 1998 easement recites as its purpose only the “*reconstruction*, use and maintenance of *existing roads*.” The 1994 easement contemplates the construction of the new road over the river to Clearwater Cove, reciting as its purpose “for a road *to be constructed*, reconstructed, *improved* . . . and maintained.” Thus, it is clear that these parties – Plum Creek in particular, the chief architect of the documents – were deliberate about distinguishing between easements on existing roads and easements that

contemplated new road construction. The 1994 easement contemplated new construction, *by the grantee*.

The purpose of the 1994 easement was to allow Eagle Nest to build a new road (and bridge) that would give its Clearwater Cove subdivision easy access from Highway 83. That new road – one segment on the east side of the river, a bridge over the river, and another segment on the west side of the river – are the only roads subject to the agreement. Paragraph 6 addresses “improvements to *said roads*.” That means the improvements provision of paragraph 6 addresses improvements made to the road (and bridge) Eagle Nest was to build. To the *building* of the new road and bridge, paragraph 6 did *not* apply. Paragraph 6 applied only to improvements made to the road once Eagle Nest built it. (“ . . . improvements to *said roads*.”) The District Court used the phrase “improvements *to the easement*.” *Order Granting Plaintiff’s Motion for Summary Judgment*, p. 7, Doc. 52. That is not what the parties intended. “Improvement” *of the easement* was up to Eagle Nest. Paragraph 6 was intended to address improvements to the “said roads” after Eagle Nest built them. *Building* a new road (and bridge), which was up to Eagle Nest, and *improving* an existing road were addressed independently; they are not the same. With paragraph 6 the parties addressed “improvements to *said roads*.” *1994 Plum Creek Easement*, Attachment 5,

p. 3, ¶ 6.

Improving a “said road” is clearly different than building a new road. A “said road” cannot be improved until it is in existence. Stated another way, one cannot “improve” something that does not exist; one must first build it and then it can be made better (“improved”). Paragraph 6 applies to improvements to existing roads; it does not apply to new construction.² The plaintiffs’ and the District Court’s interpretation of paragraph 6 as applicable to the bridge here was clearly erroneous. The parties to the 1994 easement did not intend the bridge over the Clearwater to be treated as an “improvement” subject to paragraph 6.

That the parties anticipated Eagle Nest would be constructing such an access, and that it would include a bridge, is clear from the 1998 easement. That agreement specifically addresses the construction of a bridge over the Clearwater River by the grantee pursuant to the 1994 easement, providing [emphasis added]:

13. Termination. ***If Grantee constructs a bridge over the Clearwater River, pursuant to that certain Easement recorded January 20, 1994 in Book 43 [sic] of Micro Records at Page 2484, providing Grantee alternative access from the grant contained herein . . .***

1998 Plum Creek Easement, Attachment 6, p. 5, ¶ 13.

² It can be fairly inferred that what Plum Creek is saying with these standard road users provisions on maintenance, damage and improvements is that, “we will repair any damage we cause, and we will share in the maintenance, but if you want to make an improvement and you expect Plum Creek to pay, you better get it in writing or you’re on your own.”

This language dispels any doubt about the parties' intentions with respect to the construction of a bridge. They anticipated that Eagle Nest would build a road, to include a bridge, from Highway 83 to Eagle Nest's Clearwater Cove development and that any such new construction was up to Eagle Nest. Plum Creek reserved the right to use the road (and bridge) if Eagle Nest built it, but it was up to Eagle Nest to build it (and pay for it). Plum Creek and Eagle Nest did not intend paragraph 6 to apply to this new construction. In so applying it, the District Court erred.

II. THE DISTRICT COURT ERRED BY GRANTING SUMMARY JUDGMENT TO PLAINTIFFS ON THEIR EASEMENT CLAIM

A. THE PLAINTIFFS DO NOT HAVE THE EASEMENT THEY CLAIM TO HAVE; THERE IS A GAP AT THE CLEARWATER RIVER.

While Dimars do advance the argument that plaintiffs do not have an easement over the Clearwater River, they have no desire to interfere with the plaintiffs' ability to access their properties from Highway 83. In fact, the Dimars built the bridge so the plaintiffs could enjoy the enhanced access it would provide. But from a strict legal perspective, it is important to establish that the plaintiffs' claimed easement has one crucial defect and that is the "gap" in the easement where it purports to extend over the river.

Since the plaintiffs now assert the dual arguments that their easement

gives them unlimited use of the bridge and paragraph 6 of the 1994 Plum Creek easement relieves them of any obligation to contribute to its cost, this issue must be addressed. The District Court acknowledged the “gap,” but invoked collateral estoppel to avoid analyzing the gap’s influence on the plaintiffs’ claims.

1. There is a gap in the easement where it crosses the Clearwater River; the District Court’s finding regarding the “gap” is correct.

In its ruling granting plaintiffs’ request for a preliminary injunction, the District Court acknowledged the gap in the easement. With respect to the 1994 Plum Creek Easement, the Court found [emphasis added]:

35. Easement No. 1 runs from Highway 83 to the southwest corner of the parcel of land which is now Clearwater Cove subdivision. Under the laws of the state of Montana in place in 1994, ***Plum Creek did not own the land under the Clearwater River***, so it did not have the power to grant Eagle Nest Investments an easement across the river. ***Consequently, there is a gap in Easement No. 1 at the river.***

Findings of Fact, p. 9, ¶ 35, Doc. 26.

While this finding is correct and in keeping with the facts and applicable law, the District Court went on to rule that the doctrine of collateral estoppel precluded Dimars from challenging plaintiffs’ claim to an easement across the river. The District Court misapplied the doctrine.

2. The District Court misapplied the doctrine of collateral estoppel to avoid addressing the implications of the gap.

With little analysis, and despite having found there was a gap in the parties' easement at the river, the District Court concluded that Judge Townsend's December 9, 2014 ruling in *Clearwater Bridge Group, LLC vs. River Watch HOA, supra*, had adjudicated the easement in question as valid, that the ruling had preclusive effect, that the validity of the 1994 Plum Creek easement was established, and that collateral estoppel barred Dimars from asserting the gap at the river. That ended the District Court's inquiry into the implications of the gap.³

***a) The issue was not addressed in the prior case;
Judge Townsend stopped at the river.***

However, it is clear from Judge Townsend's decision in *Clearwater Bridge Group* that she adjudicated only that portion of the easement from Highway 83 through the River Watch property to the river's east bank. That was the extent of her ruling and the limit of her jurisdiction. The defendant in that prior case was River Watch and the River Watch property was that portion of the servient tenement between Highway 83 and the low water mark on the east side of the river. Her ruling encompassed only that specific segment of the easement and did not extend beyond that point, across the

³ Dimars brought the *Clearwater Bridge Group* litigation as part of the bridge project. As one of the plaintiffs, Mark Carpenter, testified at the TRO hearing, the residents of River Watch "fought tooth and nail to prevent this easement and bridge from going in to begin with." *Transcript*, p. 183, ln.

river nor to any portion of the easement on the west side of the river. The Court in *Clearwater Bridge Group* had jurisdiction only over the property of the defendant, and its ruling is so limited. Stated simply, Judge Townsend's decision ended where the gap began.

Judge Townsend clearly identified the reach of her holding and the physical extent of the segment of easement she adjudicated, stating:

This case arises out of a dispute regarding an easement across the common area of the River Watch subdivision on the Clearwater River near the mouth of Salmon Lake. The River Watch subdivision is on the east side of the river, and it is bounded by Highway 83 and the river.

Clearwater Bridge Group, supra, p. 2, Attachment 4.

And with respect to the segment of easement subject to her ruling she stated [emphasis added]:

Based on the foregoing, the motion for partial summary judgment is GRANTED. Declaratory judgment is entered on behalf of Plaintiffs that the Trust possesses a 60-foot wide express easement ***from the Highway 83 right of way through the River Watch property to the low water mark of the Clearwater River.***

Id., p. 6.

Clearly, Judge Townsend's ruling addresses only a segment of the easement. That segment is the segment on the east side of the river, from “. . . the Highway 83 right of way through the River Watch property ***to the low water mark of the Clearwater River.***” *Id.*, p. 6 [emphasis added]. And obviously, Judge Townsend's reference to “the low water mark” is the mark

on the east side of the river. Her ruling stops at the edge of the river and does not adjudicate the validity of the easement beyond that very specific and important point. Judge Townsend did not rule on the status of the purported easement over the river. Her ruling was carefully confined to the River Watch property, “to the low water mark of the Clearwater River.” *Id.*, p. 6. The so-called “gap” has not been litigated and by applying collateral estoppel to avoid addressing it, the District Court erred.

b) There was no decision on the merits in the prior action.

A substantive ***decision on the merits*** in the prior action is an essential element of collateral estoppel. In *McDaniel v. State*, 2009 MT 159, 350 Mont. 422, 208 P.3d 817, ¶ 39, the Court addressed the requirement, stating [emphasis added]:

Element 2. Was there a final judgment on the merits in the prior adjudication? To determine whether a final judgment on the merits has been reached, we look to see if the issue was ***actually litigated and adjudged as shown on the face of the judgment***. *Lane v. Farmers Union Ins.*, 1999 MT 252, ¶ 41, 296 Mont. 267, 989 P.2d 309.

More recently, in *Poplar Elementary School Dist. No. 9 v. Froid Elementary School Dist. No. 65*, 2020 MT 216, 401 Mont. 152, 471 P.3d 57, ¶ 36, discussing the doctrine’s requirement of a decision on the merits, this Court noted [emphasis added]:

In determining whether there has been a final judgment on the merits, we must look to see “if the issue was ***actually litigated and adjudged*** as

shown on the face of the judgment.” Gibbs v. Altenhofen, 2014 MT 200, ¶ 23, 376 Mont. 61, 330 P.3d 458 (citation omitted).

In the *Clearwater Bridge Group* case, there was no consideration at all of the issue of the easement over the river.

c) The issues are not the same.

The element of identity of the issues is also not satisfied. This element was also addressed in *Poplar Elementary School Dist. No. 9, supra*, ¶ 34. The Court stated [emphasis added]:

The first collateral estoppel element requires that the issue in the instant case be ***identical to the issue in the prior case***. Planned Parenthood v. State, 2015 MT 31, ¶ 13, 378 Mont. 151, 342 P.3d 684 (citation omitted). In other words, the ***precise question*** involved in the second case must have been ***raised and determined*** in the former case. Planned Parenthood, ¶ 13 (citation omitted).

See, also, Estate of Watkins v. Hedman, et al., 2004 MT 143, 321 Mont. 419, 91 P.3d 1264, ¶ 33 (“Identity of issues is the most crucial element of collateral estoppel”).

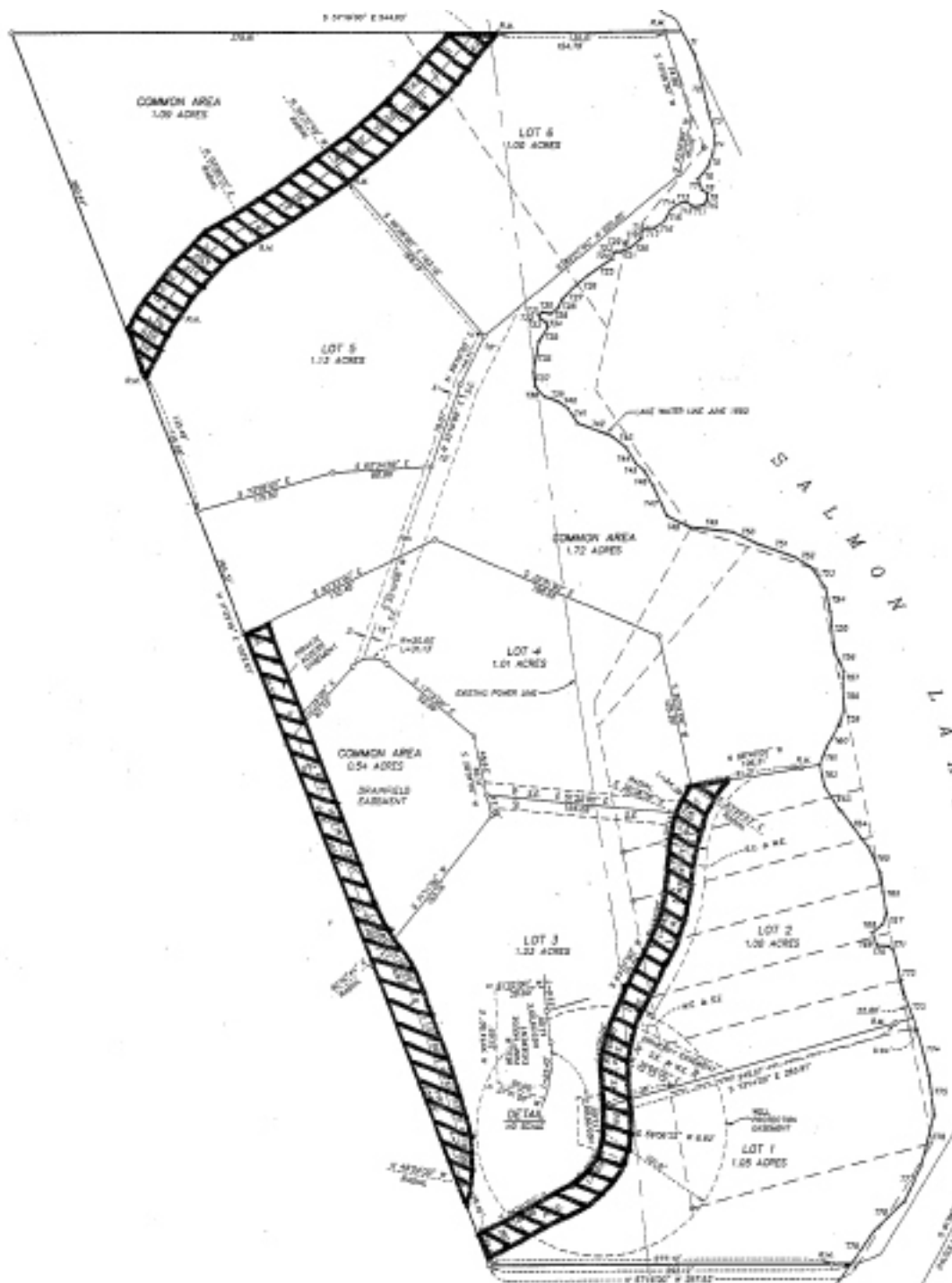
The issues in the prior case all related to the validity of a segment of the easement over the River Watch property on the east side of the river and River Watch’s claims the easement had been abandoned or extinguished. The issues that pertain to the gap – the legal intricacies of riverbed

ownership in 1994 (and today) – are very different and were not considered.⁴

***d) Collateral estoppel is inapplicable; there is no preclusion
and the implications of the gap should be addressed.***

Here, the District Court recognized the gap resulting from Plum Creek's inability to grant an easement over a riverbed it did not own, but it then determined that collateral estoppel precluded it from addressing the gap's implications on plaintiffs' claim of the right to unrestricted use of the bridge on the theory it was built on ***their easement***. Since the District Court granted injunctive relief based on plaintiffs' claim that Dimars built the bridge on plaintiffs' easement, consideration of the implications of the gap is essential. Collateral estoppel is inapplicable and the District Court erred in invoking it.

⁴ In regard to the interesting and complex issues that govern riverbed ownership, both in 1994 when the subject easement was granted and the very different rules applicable today, reference is made to Dimars' *Brief in Support of Defendants' and Counterclaimants Motion for Summary Judgment*, Doc. 28, pp. 4-5 and pp. 13-18.





III. THE DISTRICT COURT’S DUAL RULINGS GIVING PLAINTIFFS UNLIMITED USE OF THE BRIDGE WHILE FINDING THEY HAVE NO OBLIGATION TO CONTRIBUTE TO ITS COST UNJUSTLY ENRICHES THE PLAINTFFS

With little analysis, the District Court adopted the plaintiffs’ arguments on collateral estoppel and paragraph 6 of the 1994 Plum Creek easement, and concluded they have no obligation to contribute to the cost of the bridge.

1. The plaintiffs are being unjustly enriched at Dimars’ expense.

With a preliminary injunction giving them unlimited use of the bridge and relieving them of any obligation to contribute to the cost of its construction, the plaintiffs are being unjustly enriched at the expense of the Dimars.

As the Court stated recently in *Hamlin Constr. & Dev. Co. v. Mont. Dep’t of Transp.*, 410 Mont. 187, 521 P.3d 9, ¶30 (2022) [citations omitted]:

A successful unjust enrichment claim requires: (1) a benefit conferred on one party by another; (2) the other’s appreciation or knowledge of the benefit; and (3) the other’s acceptance or retention of the benefit under circumstances that would render it inequitable for the other to retain the benefit without compensating the first party for the value of the benefit.

And as the Court explained in *Associated Mgmt. Servs., Inc. v. Ruff*, 2018 MT 182, 392 Mont. 139, 424 P.3d 571, 594-95, ¶¶ 64, 65:

The essential elements of an unjust enrichment claim are: (1) a benefit conferred on one party by another; (2) the other’s appreciation or

knowledge of the benefit; and (3) the other's acceptance or retention of the benefit under circumstances that would render it inequitable for the other to retain the benefit without compensating the first party for the value of the benefit. N. Cheyenne Tribe, ¶¶ 33 and 36.²³ While restitution remains an available remedy to prevent a party from unjustly benefitting from "fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act," see *In re Estate of McDermott*, 2002 MT 164, ¶ 26, 310 Mont. 435, 51 P.3d 486 (discussing constructive trusts), unjust enrichment does not necessarily require proof of a wrongful act or conduct. *Volk*, ¶¶ 45 and 50 (affirming imposition of constructive trust where defendant "has done nothing wrong"); N. Cheyenne Tribe, ¶¶ 29-35 and 38-39 (discussing constructive trusts); Restatement (Third) of Restitution § 1 cmt. f. Unjust enrichment merely requires proof that a party unjustly gained something of value, regardless of wrongful conduct. N. Cheyenne Tribe, ¶ 38; Restatement (Third) of Restitution § 1 cmt. A.

The Court went on to note that wrongful conduct is no longer a required element of a claim of unjust enrichment, stating:

However, the court's analysis overlooked our subsequent holding that unjust enrichment no longer requires proof of a wrongful act or conduct. N. Cheyenne Tribe, ¶¶ 30-35 and 39 (noting statutory abandonment of former requirement for proof of a wrongful act or conduct as a prerequisite for a constructive trust). Accord *Volk*, ¶¶ 45 and 50 (affirming imposition of constructive trust where defendant "has done nothing wrong"); Restatement (Third) of Restitution § 1 cmt. f.²⁴ Thus, the District Court erroneously granted summary judgment to AMS on Ruff's unjust enrichment claim on the ground AMS did not commit a wrongful act.

Associated Mgmt. Servs., Inc., supra, 424 P.3d 571, ¶66.

Storms v. Bergsieker, 254 Mont. 130, 835 P.2d 738 (1992), presented facts similar to those here where one of several users of a shared access over Fortine Creek built a bridge (it was a replacement of a deteriorated bridge) that benefitted all. The Court ruled that restitution was required, stating:

We conclude that the above cited Robertus rule is controlling in the present case. We further conclude that the measure of the unjust enrichment as to any of the three defendants is measured either by the quantum meruit value of plaintiff's labor and materials furnished in the bridge construction, or in the alternative, the value of the enhancement to the defendants' properties.

Under the theory of unjust enrichment, the obligation of the respective parties is based upon the proportionate benefit to each in connection with bridge construction. The determination of this proportionate benefit will be an issue for consideration by the District Court.

Storms, supra, 835 P.2d at 741.

Here, the case for unjust enrichment is stronger than in *Storms*. All of the plaintiffs wanted the bridge and all (with the exception of those who acquired their properties after the bridge was built) were aware of the project. Several plaintiffs participated in advancing the project and one, Mark Carpenter, testified at the TRO hearing that he, together other neighbors, would have pursued the project themselves had Dimars not taken it on or had Dimars abandoned the effort. *Transcript*, p. 183, ln. 12. And in contrast to *Storms* where the bridge builder was the permanent resident and the defendants were sporadic users, here Dimars are seasonal residents where some of the plaintiffs reside on their properties year round. Notably, with their filing of this action the plaintiffs alleged that without the use of the bridge they would be irreparably harmed. Conversely, unless they contribute to the cost of the bridge, they will be unjustly enriched.

The Court should remand with instructions to the District Court to

determine the appropriate amount of restitution, “the measure of [which] is the amount of the [plaintiffs’] inequitable gain.” *Associated Mgmt. Servs., Inc., supra*, 424 P.3d 571, ¶ 64.

IV. THE APPROPRIATE REMEDY – REMAND TO THE DISTRICT COURT WITH INSTRUCTIONS

1. The case should be sent back to the District Court.

This Court should grant relief as follows:

1. Reverse the District Court’s ruling that collateral estoppel applies and remand to the District Court to consider the implications of the “gap” in the parties’ easement at the river.

2. Reverse the District Court’s ruling that paragraph 6 of the 1994 Plum Creek easement applies, and remand with instructions to order that plaintiffs have an obligation to share in the cost of constructing the bridge, and conduct further proceedings to determine the amount of such contribution.

3. On remand, consider ordering the District Court to appoint (or consider appointing) a special master pursuant to Rule 53, M.R.Civ.P., to 1) determine the appropriate amount of plaintiffs’ contribution to the cost of the bridge project, and 2) facilitate the parties’ efforts to reach an agreement on the structure and operation of a bridge users association.

2. The parties are in agreement – they need a bridge users association.

In the findings and conclusions plaintiffs proposed to the District Court following the TRO hearing, they advocated for both the formation of a

bridge owners association and mediation to resolve the issues necessary to establish such an organization:

17. The Court further encourages the parties to form a bridge owners' association to purchase insurance for the bridge during the pendency of the litigation.

3. The Parties must mediate this matter by November 30, 2022, to try to come up with a bridge association agreement that governs the maintenance and insurance of the bridge during the pendency of the litigation . . .

[Plaintiffs' Proposed] *Findings of Fact, Conclusions of Law and Order*, pp. 12 and 13, Conclusions ¶ 17, Order ¶ 3.

3. This Court should instruct the District Court to consider the appointment of a special master to assist the parties in a working out the details of a bridge users association.

Here, a special master could prove helpful in assisting these parties, who all seek essentially the same thing – proportionate, fair contribution to the cost of the bridge's construction and creation of an organization to oversee the bridge's use and maintenance, admission of new users, and so forth. The parties will continue to struggle to resolve the issues that have proven barriers to these objectives; this lawsuit is testament to the challenges the parties face and have been unable to resolve themselves.

CONCLUSION

Applying a three-decade-old road users agreement between a timber

company and a real estate developer to this group of neighbors and the bridge built by one for their mutual benefit was error. Interpreting the agreement to bring the bridge within the scope of the “improvements” provision of that road users agreement was error. Invoking collateral estoppel to ignore the gap in the parties’ easement was also error.

The District Court’s grant of summary judgment in favor of the plaintiffs and its rulings on each of these issues should be reversed and the case remanded to the District Court with instructions to grant the relief as outlined in the previous section of this brief.

DATED the 13th day of November, 2023.

Respectfully Submitted,

DOWDALL LAW

Electronically signed by

/s/ *Colleen M. Dowdall*

By: Colleen M. Dowdall
4900 Lower Miller Creek Rd
Missoula, MT 59803

HASH, O’BRIEN, BIBY & MURRAY PLLP

Electronically signed by

/s/ *Donald R. Murray*

By: Donald R. Murray
136 First Avenue West
P.O. Box 1178
Kalispell, MT 59903-1178

Attorneys for Appellants/Defendants, John Dimar, et al.

[Certificate of Compliance on following page]

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11, M.R.App.P., I hereby certify that this *Opening Brief* of the Appellant is printed with proportionately spaced Times New Roman typeface of 14 points (footnotes are 11 points; indented, quoted material is 13), is double spaced except for footnotes and for quoted and indented material (which is single spaced), and the word count calculated by Microsoft Word for Mac is not more than 10,000 words, excluding the cover page, tables of contents and authorities, signature block, this *Certificate of Compliance* and the *Certificate of Service*.

HASH, O'BRIEN, BIBY & MURRAY PLLP

[Electronically signed by]

/s/ Donald R. Murray

By: Donald R. Murray
Attorney for the Appellants, Dimars

CERTIFICATE OF SERVICE

I, Donald R. Murray, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 11-13-2023:

Nicole Lynn Siefert (Attorney)
1135 Strand Ave., Suite A
Missoula MT 59801

Representing: Curt Bates, Sally Jo Beck, Mark Carpenter, Courtney Family Trust, Don Courtney, Donald Hall, Phillip Hall, Kevin Huguet, Libecap Revocable Trust, Gary Libecap, Shalom House, LLC, Vivid Properties, LLC, Carrie Bates, Anita Courtney, Nancy Hall, Jane Hall, Margie Huguet, Ann Libecap

Service Method: eService

Colleen M. Dowdall (Attorney)
4900 Lower Miller Creek Road
Missoula MT 59803

Representing: Dimar Family LLC, Dimar Family Partnership, LTD, John Dimar

Service Method: eService

Electronically signed by Lacie LeeAnn Hill on behalf of Donald R. Murray
Dated: 11-13-2023