

**FILED: December 3, 2014**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

LIBERTY OAKS HOMEOWNERS ASSOCIATION, an Oregon non-profit  
corporation,  
Plaintiff,

v.

LIBERTY OAKS, LLC, an Oregon limited liability company; J.T. SMITH  
COMPANIES, an Oregon corporation; and JEFFREY D. SMITH, an individual,  
Defendants.

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LIBERTY OAKS HOMEOWNERS ASSOCIATION, an Oregon non-profit corporation;  
J.T. SMITH COMPANIES, an Oregon corporation; and JEFFREY D. SMITH, an  
individual,  
Third-Party Plaintiffs-Appellants,

v.

A & D PRESTIGE BUILDING, LLC, an Oregon limited liability company; RAIN-  
MASTER ROOFING CO., INC., an Oregon corporation; and REX HILL MASONRY,  
INC., an Oregon corporation,  
Third-Party Defendants,

and

ADVANCED CONSTRUCTION, an assumed business name of Vasily A. Sharabarin;  
HOME EXTERIORS, INC., nka BELA, INC., an Oregon corporation; and SQUARE  
DEAL CONCRETE CONSTRUCTION INCORPORATED, an Oregon corporation,  
Third-Party Defendants-Respondents.

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D.L. LYTSELL CONSTRUCTION, INC., an Oregon corporation,  
Fourth-Party Plaintiff,

v.

ANGELFIRE, INC., an Oregon corporation,  
Fourth-Party Defendant.

Washington County Circuit Court  
C096255CV

A149141

Thomas W. Kohl, Judge.

Argued and submitted on September 16, 2014.

W. Frank Elsasser argued the cause for appellant Liberty Oaks Homeowners Association. With him on the briefs were Elsasser Law Office; Richard Levin and Richard Levin Law Group.

Skip Winters, Jason A. Gardner, and Bodyfelt Mount LLP, appeared for appellants J.T. Smith Companies and Jeffrey D. Smith.

Jonathan Henderson argued the cause for respondents. With him on the brief were Christopher J. Drotzmann, Patrick C. Wylie, and Davis Rothwell, Earle & Xochihua, P.C.

Before Duncan, Presiding Judge, and Lagesen, Judge, and Wollheim, Senior Judge.

LAGESEN, J.

Appeal dismissed.

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**DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS**

Prevailing party: Respondents

- No costs allowed.  
 Costs allowed, payable by Appellant Liberty Oaks Homeowners Association.  
 Costs allowed, to abide the outcome on remand, payable by
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1           LAGESEN, J.

2           This appeal arises out of a construction-defect case. We conclude that the  
3 appeal is moot and, accordingly, dismiss.<sup>1</sup>

4           This case involves a common configuration of parties in construction-  
5 defect cases. The Liberty Oaks Homeowners Association (the HOA) sued the original set  
6 of appellants in this matter, Liberty Oaks, LLC, J.T. Smith Companies, and Jeffery D.  
7 Smith (developers), alleging that developers were responsible for construction defects in  
8 the Liberty Oaks townhomes. Developers, in turn, filed a third-party complaint under  
9 ORCP 22 C against various subcontractors that worked on the project, including  
10 respondents in this matter, Advanced Construction, Home Exteriors, Inc., and Square  
11 Deal Concrete Construction Incorporated (subcontractors). In accordance with the  
12 specifications of ORCP 22 C, the claims alleged in the third-party complaint--for  
13 contribution and indemnity--were derivative of the claims alleged in the HOA's primary  
14 complaint. Specifically, the operative third-party complaint alleged that, "if" developers  
15 were found liable to the HOA, then developers would be entitled to contribution from  
16 subcontractors. The third-party complaint also alleged that, "to the extent" developers  
17 were found liable to the HOA, subcontractors would be liable to developers to the same  
18 extent.

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<sup>1</sup> Respondents previously moved to dismiss the appeal on the ground that the claims alleged in the third-party complaint are not ripe and that the appeal was nonjusticiable for that reason. We have denied that motion by a separate order based on our decision in *Riverview Condo. Assn. v. Cypress Ventures (A149542)*, 266 Or App 612, \_\_\_ P3d \_\_\_ (2014), which rejected an identical argument regarding justiciability.

1           The trial court granted summary judgment to developers against the HOA  
2 on the ground that the HOA's claims were barred by the statute of limitations. It granted  
3 summary judgment to subcontractors against developers on the third-party claims on the  
4 ground that those claims also were time-barred. The trial court thereafter entered  
5 separate judgments dismissing both the HOA's primary complaint and the developers'  
6 third-party complaint.

7           The HOA thereafter appealed the judgment dismissing the primary  
8 complaint. Developers, in turn, appealed the judgment dismissing the third-party  
9 complaint, presumably to protect their ability to seek contribution and indemnity from  
10 subcontractors in the event that the HOA obtained a reversal of the judgment dismissing  
11 the primary complaint. According to information provided to us by the parties, the HOA  
12 thereafter settled with developers and dismissed its appeal, leaving in place the judgment  
13 dismissing with prejudice the HOA's primary complaint against developers. As part of  
14 the settlement, developers assigned their rights in this appeal to the HOA, and the HOA  
15 has continued to prosecute the appeal as the assignee of developers. That is, for purposes  
16 of this appeal, the HOA stands in the shoes of developers and seeks reversal of the  
17 dismissal of the third-party complaint.<sup>2</sup>

18           In the light of this procedural posture, subcontractors argue, among other  
19 things, that this appeal is moot. They point out that, as a result of the HOA's dismissal of

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<sup>2</sup> The HOA moved to substitute itself for Liberty Oaks, LLC, as appellant on appeal. We granted the motion, which is why the case caption identifies the HOA as both plaintiff and third-party plaintiff.

1 its appeal, the trial court's judgment dismissing the HOA's primary complaint remains in  
2 effect and is no longer subject to reversal on appeal; in other words, the judgment's  
3 finality is no longer in doubt. Given the final judgment establishing that developers are  
4 not liable to the HOA, subcontractors argue that there is no longer any basis to impose  
5 liability on the derivative claims alleged in the third-party complaint. In response, the  
6 HOA (now standing in the shoes of developers) does not dispute that the judgment  
7 dismissing the primary complaint was not vacated as a result of the parties' settlement.  
8 Instead, the HOA argues that the developers' third-party claims are not moot because,  
9 according to the HOA, the settlement agreement between the HOA and developers  
10 allocates settlement amounts to subcontractors.

11           We agree with subcontractors that this appeal is moot. As the claims  
12 against subcontractors are pleaded in the third-party complaint, subcontractors' liability is  
13 contingent upon developers being found liable to the HOA on the claims alleged in the  
14 primary complaint. But, as noted, the judgment dismissing the HOA's primary complaint  
15 establishes as a matter of law that developers are not liable to the HOA on the claims  
16 alleged in the primary complaint. Although the HOA and developers chose to settle the  
17 HOA's appeal of the dismissal of the primary complaint, that settlement did not result in  
18 the reversal or vacation of the *judgment* dismissing the HOA's complaint. The HOA  
19 identifies no authority, and we are aware of none, that would permit us to disregard the  
20 legal effect of that judgment on the ground that the HOA and developers settled their  
21 dispute post-judgment. Accordingly, because the judgment dismissing the primary

1 complaint establishes that developers are not liable to the HOA on the claims alleged in  
2 the primary complaint, the derivative claims alleged in the third-party complaint are  
3 moot, as is this appeal. *See First Commerce of America v. Nimbus Center Assoc.*, 329 Or  
4 199, 207-08, 986 P2d 556 (1999) (derivative third-party claims became moot upon  
5 dismissal of primary claims); *Sells v. Blazer Homes, Inc.*, 203 Or App 317, 319, 124 P3d  
6 1249 (2005).<sup>3</sup>

7 Appeal dismissed.

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<sup>3</sup> Our decision is without prejudice to the ability of any party to seek relief under ORCP 71 in the trial court, although we express no opinion on the appropriateness of granting or denying such relief, if it is sought. *See Marton v. Ater Construction Co., LLC*, 256 Or App 554, 557-58, 302 P3d 1198 (2013) (discussing process employed in similarly postured case).