**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**January 10, 2008**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2007AP580** **Cir. Ct. No. 2004CV3749**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT IV**

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**CULLEN-SMITH LLC,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MERRILL IRON & STEEL, INC.,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed.*

Before Dykman, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Merrill Iron & Steel appeals an order that it pay respondent Cullen-Smith, LLC, contractual attorneys' fees as the prevailing party in a declaratory judgment suit. The issues are whether the circuit court properly determined that Cullen-Smith prevailed even though other issues related to the

contract were pending between the parties in different litigation, and whether the amount of the fees awarded was reasonable. We affirm.

¶2 This suit was commenced by Cullen-Smith in a complaint naming Merrill as defendant. The complaint alleged that Cullen-Smith was a general contractor on a State of Wisconsin project, and that Merrill was one of its subcontractors. The complaint alleged that Merrill was claiming Cullen-Smith owed it damages as the result of an alleged design error in drawings and specifications provided by the State, which allegedly rendered portions of Merrill's work "unconstructable." The complaint further asserted that, under the terms of the subcontract, such a claim can be brought against only the State. As a result, Cullen-Smith sought a declaration that Merrill may not recover these damages from Cullen-Smith, and that any such claim is not subject to arbitration with Cullen-Smith.

¶3 In its answer, Merrill asserted that the suit is barred by the arbitration clause of the subcontract and, accordingly, Merrill also filed a motion to compel arbitration. In a March 2006 order, the circuit court concluded that the design-error claim could not be pursued against Cullen-Smith and was not subject to arbitration. In addition, the court concluded that certain other potential claims by Merrill regarding this subcontract could not be pursued against Cullen-Smith and were not subject to arbitration. Merrill moved for reconsideration. As to the other potential claims, the court agreed it had erred by disposing of them and vacated that part of the earlier decision.

¶4 While reconsideration was pending, Cullen-Smith moved for an award of attorneys' fees under the subcontract. The subcontract provided: "Should either party employ or engage an attorney to institute suit or demand

arbitration to enforce any of the provisions hereof, … the prevailing party shall be entitled to recover reasonable attorneys' fees, costs, charges, and expenses expended or incurred therein." (Emphasis in original.) The court eventually awarded attorneys' fees and costs of approximately $75,000, and Merrill appeals that order.

¶5 Merrill's first argument is based on the fact that, at least at the time of the circuit court's attorney fee decision, litigation between these parties was proceeding in Fond du Lac County on Merrill's other claims under the subcontract. Merrill argues that it was premature to conclude Cullen-Smith was the prevailing party because doing so, while other related litigation was in progress, is akin to deciding which party prevails on an "inning-by-inning" basis, rather than deciding which party ultimately prevails. Merrill argues that the question is basically one of contract interpretation, and that the contract language does not contemplate multiple prevailing "parties," but only a single prevailing party. If attorney fee issues are decided separately in this case from the other litigation, Merrill contends, the result could be that each party would be found to have prevailed which is inconsistent with the contract's single prevailing party language. Merrill proposes, instead, that the fee motion should have been denied without prejudice so that, if appropriate, the motion could be filed at the conclusion of *all* of the litigation between the parties.

¶6 We agree with Merrill that the issue is one of contract interpretation. The contract describes what happens if a party uses counsel "to institute suit." We note that "suit" is used here in the singular and, accordingly, we conclude that the proper unit of measurement is whether a party prevails in a single lawsuit. The Dane County suit and the Fond du Lac County suit are separate suits. Merrill does not dispute that Cullen-Smith is properly described as having prevailed in the

Dane County suit. We therefore affirm the circuit court's conclusion that Cullen-Smith is entitled to fees as the prevailing party in that suit.

¶7 Merrill also argues that the amount awarded by the court was unreasonable. We note that Merrill's arguments are made without discussion of a standard of review and without citation to case law on the subject of contractual attorney fees. Merrill asserts that Cullen-Smith was required to "prove a reasonable fee with precision," but Merrill cites no legal authority for that proposition. The contract does not include any such requirement. The contract specifies the recovery of "reasonable" fees, a term that suggests something less than mathematical precision, because no precise dollar amount is "reasonable" to the exclusion of all other amounts. Instead, reasonableness is likely to lie within a range of amounts.

¶8 Merrill disputes the number of hours of work that "likely" was performed by Cullen-Smith's attorneys. This argument appears to be based on nothing more than Merrill's own assessment of how much time was appropriate for certain described tasks, such as document preparation and preparations for hearings. However, Merrill provides us with no evidentiary basis to reject the number of hours Cullen-Smith's attorney provided by affidavit. There is no indication that an evidentiary hearing was held at which Merrill cross-examined the attorneys as to the number of hours spent.

¶9 Merrill also argues that, in calculating the number of hours, Cullen-Smith's attorneys failed to separate the time they spent on Merrill's other claims that were then still in litigation in another county. The circuit court rejected this argument by relying on the Cullen-Smith attorney affidavit's statement that time spent on the other claims was required in this suit to explain why Merrill's design-

error claim in this suit was separable from those other claims, contrary to Merrill's assertions. The court also relied on Cullen-Smith's attorney's assertion to this effect during oral argument, and rejected Merrill's position as an attempt to "obfuscate the issues before the court." Merrill's argument on appeal repeats its circuit court contention that Cullen-Smith did not separate the time spent on other theories, but Merrill does not dispute the analysis on which the circuit court's decision was based. We therefore affirm the conclusion.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).