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DISTRICT I

June 5, 2013

To:

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Circuit Court Judge
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You are hereby notified that the Court has entered the following opinion and order:

2012AP462 Dennis L. Schmirler v. Gary A. Essmann and Andrus, Sceales, Starke & Sawall, LLP (L.C. #2011CV241)

Before Fine, Kessler and Brennan, JJ.

Dennis L. Schmirler appeals a circuit court order dismissing his action for legal malpractice. Upon our review of the briefs and the record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1] We summarily reverse the order and remand for further proceedings.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

The complaint underlying this appeal alleges that Gary Essmann and his law firm, Andrus, Sceales, Stark & Sawall, LLP (Essman), committed legal malpractice when representing Schmirler before the United States Patent and Trademark Office in connection with a patent application and the payment of a patent issue fee. Essman moved to dismiss Schmirler's malpractice action, contending that it arose under patent law and therefore must be litigated in federal court. *See* 28 U.S.C. § 1338(a) (2006 ed., Supp. V) (providing that federal courts have exclusive jurisdiction over cases "arising under any Act of Congress relating to patents"). The circuit court agreed. Citing § 1338(a), the circuit court concluded that the questions raised by Schmirler's legal malpractice claims require interpretation of patent regulations, placing the matter within the exclusive jurisdiction of the federal courts. The circuit court therefore dismissed the action for lack of subject matter jurisdiction, and Schmirler appeals.

While this appeal was pending, the United States Supreme Court decided ***Gunn v. Minton***, 133 S. Ct. 1059 (2013). There, the Court considered whether, in light of 28 U.S.C. § 1338(a), a state law claim alleging legal malpractice in the handling of a patent case must be brought in federal court. ***Gunn***, 133 S. Ct. at 1062. The Court answered that question in the negative. Further, the Court concluded that "state legal malpractice claims based on underlying patent matters will rarely, if ever, arise under federal patent law for purposes of § 1338(a)." ***Id.*** at 1065.

We are satisfied that ***Gunn*** mandates a reversal here. In ***Gunn***, the Supreme Court indicated that it was unable to hypothesize a set of facts in which state legal malpractice claims would arise under federal patent law for purposes of 28 U.S.C. § 1338(a). *See* ***Gunn***, 133 S. Ct.

at 1062. Nothing in the record or in the respondent's brief demonstrates that Schmirler's claims present the singular circumstance that eluded the imagination of the Supreme Court.[2]

Therefore,

IT IS ORDERED that the order of the circuit court is summarily reversed, and this matter is remanded for further proceedings.

Diane M. Fremgen
Clerk of Court of Appeals

[2] Essman did not move this court for leave to file a supplemental memorandum after the release of ***Gunn v. Minton***, 133 S. Ct. 1059 (2013).