

A FOX GUARDING THE HENHOUSE: A COMMENT ON *EX PARTE PANELL*

Lawyers use the law as shoemakers use leather; rubbing it, pressing it, and stretching it with their teeth. . . .

King Louis XII of France¹

In *Ex parte Panell*² the Supreme Court of Alabama changed its interpretation of the statute of limitations provision applicable to the Alabama Legal Services Liability Act³ ("ALSLA").⁴ The Court overruled its previous interpretation of when the statute of limitations begins to run under the ALSLA and held that a client seeking to sue a legal service provider has a much shorter time in which to bring an action under the applicable statute of limitations.⁵ The court's new interpretation generally benefits lawyers by shortening the time in which an action against an attorney must be brought. However, *Panell*'s new interpretation raises policy concerns, as it diminishes the rights of clients. Consumers of legal services could argue that the *Panell* case was decided by lawyers to protect lawyers.

Part I of this Comment discusses the ALSLA's major provisions, including the provision governing the statute of limitations under which a person must bring an ALSLA claim. Part II discusses the Supreme Court of Alabama's new interpretation of the statute of limitations under the *Panell* decision, as well as *Michael v. Beasley*,⁶ the case *Panell* overruled. Part II also discusses the consequences of the new interpretation of the statute of limitations and the policy issues raised by shortening a client's statute of limitations under the ALSLA. Part III of the Comment examines the facts of two cases decided under the *Michael* interpretation of the statute of limitations and applies the *Panell* interpretation to illustrate the differences between these holdings and the

1. David A. Green, *Balancing Ethical Concerns Against Liberal Discovery*, 8 GEO. J. LEGAL ETHICS 283, 283 (1994) (citing Tuli Kupferberg, *An Insulting Look at Lawyers Through the Ages*, JURIS DR., Oct.-Nov. 1978, at 62).

2. 756 So. 2d 862 (Ala. 1999).

3. ALA. CODE § 6-5-570 (1993).

4. *Panell*, 756 So. 2d at 868.

5. *Id.*

6. 583 So. 2d 245 (Ala. 1991), overruled by *Ex parte Panell*, 756 So. 2d 862 (Ala. 1999).

consequences of the interpretation of a shortened statute of limitations.

I. ALABAMA'S LEGAL SERVICES LIABILITY ACT

Alabama's Legal Services Liability Act was enacted to combat a growing crisis in the legal service provider community.⁷ The Alabama legislature determined that rising costs of legal services were a direct result of an increase in actions against legal service providers.⁸ To protect the rights of Alabama citizens, and to decrease the costs of legal services, the legislature unified the actions brought against legal service providers.⁹ The major policy provision of the ALSLA, found in Alabama Code Section 6-5-570, states:

The legislature finds that in order to protect the rights and welfare of all Alabama citizens and in order to provide for the fair, orderly and efficient administration of legal actions against legal service providers in the courts of this state, this article provides a complete and unified approach to legal actions against legal service providers and creates a new and single form of action and cause of action exclusively governing the liability of legal service providers known as a legal service liability action and provides for the time in which a legal service liability action may be brought and maintained is required.¹⁰

The ALSLA combined numerous available actions into one cause of action, termed a legal service liability action.¹¹ Along with consolidating the actions against legal service providers, the ALSLA also shortened the statute of limitations applicable when bringing an action against a legal service provider.¹² The main provision governing the statute of limitations, Alabama Code Section 6-5-574, states:

(a) All legal service liability actions against a legal service provider must be commenced within two years after the act or omission or failure giving rise to the claim, and not afterwards; provided, that if the cause of

7. ALA. CODE § 6-5-570.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* § 6-5-573.

12. ALA. CODE § 6-5-574.

action is not discovered and could not reasonably have been discovered within such period, then the action may be commenced within six months from the date of such discovery or the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; provided, further, that in no event may the action be commenced more than four years after such act or omission or failure; except, that an act or omission or failure giving rise to a claim which occurred before August 1, 1987, shall not in any event be barred until the expiration of one year from such date.¹³

This statute of limitations provision was at issue in *Panell*.¹⁴ The interpretation of when the statute of limitations begins to run is extremely important in determining the outcome of legal service liability actions; many of the cases decided under the ALSLA turned on when the statute of limitations period began to run.¹⁵ From when to measure the statute of limitations is also important because the ALSLA substantially diminished the time in which a client may bring an action against his attorney. "Prior to the Legal Liability Act, the applicable statute of limitations for actions against lawyers was six years pursuant to *Alabama Code* § 6-2-34(8). . . . The Act reduced the limitations period to two years."¹⁶

II. STATUTE OF LIMITATIONS UNDER *PANELL*

The Supreme Court of Alabama held in *Panell* that the statute of limitations under the ALSLA begins to run when the "'act or omission or failure giving rise to the claim' occurs."¹⁷ Accordingly, the *Panell* court found that the statute of limitations began to run when the attorney agreed to a settlement without the client's consent.¹⁸ In so holding,

13. *Id.*

14. *Panell*, 756 So. 2d at 862.

15. See *Mississippi Valley Title Ins. Co. v. Hooper*, 707 So. 2d 209 (Ala. 1997); *Ex parte Burnham, Klinefelter, Halsey, Jones & Cater, P.C.*, 674 So. 2d 1287 (Ala. 1995); *McKinnon v. Romeo*, 645 So. 2d 1388 (Ala. 1994); *Jones v. Blanton*, 644 So. 2d 882 (Ala. 1994); *Hutchinson v. Attorneys Ins. Mut. of Ala., Inc.*, 631 So. 2d 975 (Ala. 1994); *Jackson v. Kimbrough*, 622 So. 2d 321 (Ala. 1993); *Ladner v. Inge*, 603 So. 2d 1012 (Ala. 1992); *Leighton Ave. Office Plaza, Ltd. v. Campbell*, 584 So. 2d 1340 (Ala. 1991); *Howard v. Clayton*, 583 So. 2d 255 (Ala. 1991); *Pearce v. Schrimsher*, 583 So. 2d 253 (Ala. 1991); *Michael v. Beasley*, 583 So. 2d 245 (Ala. 1991); *Lomax v. Gibson*, 584 So. 2d 445 (Ala. 1991); *Adams v. Erben*, 681 So. 2d 594 (Ala. Civ. App. 1996); *Kachler v. Taylor*, 849 F. Supp. 1503 (M.D. Ala. 1994).

16. Jonathan H. Waller, *Statute of Limitations: Under the Alabama Legal Services Liability Act*, ALA. LAW., Sept. 1991, at 276. (citing *Baker v. Ball*, 446 So. 2d 39 (Ala. 1984)).

17. *Panell*, 756 So. 2d at 868 (quoting ALA. CODE § 6-5-574(a) (1993)).

18. *Id.* at 869.

the court overruled *Michael v. Beasley*,¹⁹ a case where the court previously interpreted the statute of limitations under the ALSLA to begin to run "from the date of the accrual of a cause of action and not from the date of the occurrence of the act or omission."²⁰ In overruling *Michael* and establishing a new period from which to measure the start of the statute of limitations, the court discussed the history of the ALSLA and the court's prior interpretation of the ALSLA's statute of limitations.²¹ Justice See, writing for the majority, relied on four main arguments: (1) a 1984 Nebraska case decided under a similar statute, (2) the language of the Act, (3) the ameliorative discovery provision of section 6-5-574, and (4) the four-year time limit imposed on a client regardless of whether the client has suffered damage.²² Justices Cook, Lyons, and Johnstone concurred in the result but dissented from the rationale based on policy reasons.²³ The remainder of this Comment discusses these policy reasons.

The facts of *Panell* are similar to many of the malpractice actions brought under the ALSLA. The plaintiff, Mr. Panell, brought an action against his attorney for negligence.²⁴ He alleged that his attorney barred his involvement in settlement discussions and agreed to a settlement without his consent.²⁵ The settlement was unsatisfactory to Mr. Panell, and although he never signed a settlement agreement, he was coerced into signing warranty deeds which executed the settlement.²⁶ He filed a legal malpractice action against his attorney, and the trial court granted the defendant attorney's motion for summary judgment on the ground that the claim was barred by the two-year statute of limitations imposed by section 6-5-574 of the Alabama Code.²⁷ The Court of Civil Appeals affirmed without decision, and the Supreme Court of Alabama granted Panell's writ of certiorari "to review the narrow issue of when Panell's legal-malpractice cause of action accrued and when the statute-of-limitations period provided by the ALSLA began to run."²⁸

The majority opinion discussed how the ALSLA's statute of limitations provision shortened the time in which a client could bring a claim

19. 583 So. 2d 245 (Ala. 1991).

20. *Michael*, 583 So. 2d at 252.

21. *Panell*, 756 So. 2d at 869.

22. *Id.* at 865-67.

23. *Id.* at 869-74.

24. *Id.* at 863.

25. *Id.*

26. *Panell*, 756 So. 2d at 863.

27. *Id.*

28. *Id.*

against his legal service provider.²⁹ When the court previously interpreted this provision in *Michael*, it held that “the statute-of-limitations period established by § 6-5-574(a) begins to run ‘from the date of the accrual of a cause of action and not from the date of the occurrence of the act or omission.’”³⁰ In *Michael*, former clients brought an action under the ALSLA against their attorney for negligence.³¹ In concluding that the statute of limitations provision was to be measured from the accrual of the cause of action, the *Michael* court relied on “the legislative intent expressed in § 6-5-570”³² and a comparison of the ALSLA to the Alabama Medical Liability Act (“AMLA”).³³ The court discussed and relied on *Cofield v. Smith*³⁴ and *Garrett v. Raytheon Co.*³⁵ in determining that the statute of limitations began to run upon the accrual of a cause of action—when the plaintiff suffers any injury.³⁶

The court further modified this statute of limitations interpretation in *Ex parte Burnham, Klinefelter, Halsey, Jones and Cater, P.C.*,³⁷ which distinguished between offensive and defensive representation in determining when the statute of limitations commenced.³⁸ In *Ex parte Burnham*, the court held that (1) in a defensive representation (when an attorney is hired to defend a lawsuit) a legal malpractice cause of action accrues when the client first suffers mental anguish and (2) in an offensive representation “no legal damage [is] suffered until an adverse

29. *Id.* at 864-65.

30. *Id.* at 865 (quoting *Michael*, 583 So. 2d at 252) (emphasis omitted).

31. *Michael*, 583 So. 2d at 245.

32. *Id.* at 246.

33. *Id.* at 247 n.2 (citing ALA. CODE § 6-5-540 (1993)). In recognizing the similar provisions regarding the statute of limitations in the ALSLA and the “act or omission” language in the AMLA, the Court noted that “[i]n *Street v. City of Anniston*, 381 So. 2d 26, 31 (Ala. 1980), the Court stated that ‘the Medical Liability Act contains a traditional statute of limitations, one which commences the running of the statute from the accrual of the cause of action, and is not subject to constitutional infirmity under § 45’ This same rationale applies to the [A]LSLA.”

34. *Id.* at 251 (citing *Cofield v. Smith*, 496 So. 2d 61, 62-63 (Ala. 1986) (holding that plaintiff’s legal malpractice action was time-barred under the six-year period in ALA CODE § 6-2-34)). The *Cofield* court relied on *Payne v. Alabama Cemetery Ass’n*, 413 So. 2d 1067 (Ala. 1982), which discussed the law concerning the accrual of a cause of action:

“The statute . . . will not begin to run until some injury occurs which gives rise to a maintainable cause of action In actions such as the case at bar, the act complained of does not itself inflict a legal injury at the time it is done, but plaintiff’s injury only follows as a result and a subsequent development of the defendant’s act.” In such cases, the cause of action “accrues,” and the statute of limitations begins to run, “when and only when the damages are sustained.”

Cofield, 496 So. 2d at 62 (quoting *Payne*, 413 So. 2d at 1072).

35. 368 So. 2d 516 (Ala. 1979) (holding that the limitations period begins to run when the plaintiff suffered any injury, however slight, entitling the plaintiff to file suit, and even though the plaintiff is not aware of the injury); see *Waller*, *supra* note, at 278.

36. *Michael*, 583 So. 2d at 251-52.

37. 674 So. 2d 1287, 1289 (Ala. 1995).

38. *Panell*, 756 So. 2d at 865.

or insufficient judgment is entered against the person injured."³⁹

In *Panell* the Supreme Court of Alabama abandoned the interpretation of when the statute of limitations begins to run that was utilized in *Michael and Burnham*.⁴⁰ The court relied primarily on a case in which the Nebraska Supreme Court interpreted a similar provision of a similar statute.⁴¹ The court stated that in *Rosnick v. Marks*⁴²

[t]he Nebraska Supreme Court discussed the distinction between the 'damage rule,' . . . which provides that a cause of action for legal malpractice accrues, and the statute-of-limitations period begins to run, when the client sustains actual damage, and the 'occurrence rule,' which provides that a cause of action for legal malpractice accrues, and the statute-of-limitations period begins to run, upon the occurrence of the tortuous act or omission.⁴³

The Nebraska court held that the "act or omission" language found in its statutory provision,⁴⁴ which is similar to Alabama Code Section 6-5-574(a),⁴⁵ provided that "tortuous invasion of another's legal right is the triggering device for the statute of limitations."⁴⁶ Because the Nebraska legislature "rejected the damage rule for the accrual of a legal-malpractice cause of action" under the similar statute, the Supreme

39. *Burnham*, 674 So. 2d 1284.

40. *Panell*, 756 So. 2d at 865-66.

41. *Id.*

42. 357 N.W.2d 186 (Neb. 1984).

43. *Panell*, 756 So. 2d at 866 (citing *Rosnick v. Marks*, 357 N.W.2d 186 (1984)). Jurisdictions differ as to whether they follow the damage or occurrence rule for determining the statute of limitations, and further discussion regarding these rules is beyond the scope of this Comment. For a further discussion see Francis M. Dougherty, Annotation, *When Statute of Limitations Begins to Run upon Action Against Attorney for Malpractice*, 32 A.L.R. 4TH 260 (1984).

44. NEB. REV. STAT. § 25-222 (1995). That statute states:

Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery . . . of facts which would reasonably lead to such discovery, whichever is earlier; *and provided further*, that in no event may any action be commenced to recover damages for professional negligence or breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action.

(emphasis in original).

45. *Panell*, 756 So. 2d at 866.

46. *Id.* (quoting *Rosnick*, 357 N.W.2d at 190).

Court of Alabama reasoned that the Alabama legislature, "by adopting the 'act or omission or failure' language in section 6-5-574, rejected the damage rule."⁴⁷

The court further explained how the legislative intent in drafting this statute supports this new interpretation⁴⁸ and it justified the majority holding by stating that the language of the statute is to be given its plain meaning.⁴⁹ The ameliorative discovery provision, which tolls the statute of limitations an extra six months where "the cause of action is not discovered and could not reasonably have been discovered within such period," also supports this construction.⁵⁰ Finally, the court found support for this construction in the language of section 6-5-574(a), which provides that "in no event may the action be commenced more than four years after [the] act or omission or failure," regardless of when the client suffers damage.⁵¹

Justices Cook, Lyons, and Johnstone concurred in the result but dissented from the rationale in *Panell*.⁵² Each justice believed that Mr. Panell's action was time-barred under the statute of limitations in section 6-5-574 but wrote separately and emphasized different reasons for his failure to join the majority's construction of the statute of limitations.⁵³

Justice Cook dissented from the rationale for three main reasons.⁵⁴ First, he argued that the majority's rule was unclear and difficult to apply.⁵⁵ Because the majority overruled its previous holding and held that the statute of limitations begins to run when the "act or omission" occurs, Cook argued "the bench and bar would have great difficulty in applying this new rule, especially given that it is not necessary to have this disconnect to occur between 'act or omission' and 'accrual of the cause of action.'"⁵⁶ Next, Justice Cook believed that the majority read the holding of *Michael* incorrectly as establishing "a bright-line rule requiring the entry of a final judgment as a threshold event sufficient to trigger the running of the limitations period."⁵⁷ Cook argued that *Michael* did not establish a bright line rule, as evidenced by its application in *Burnham*.⁵⁸ Therefore, the majority should not have overruled

47. *Id.* at 867.

48. *Id.*

49. *Id.*

50. *Panell*, 756 So. 2d at 867 (quoting ALA. CODE § 6-5-574(a) (1993)).

51. *Id.* (quoting ALA. CODE § 6-5-574 (a) (1993)).

52. *Id.* at 869.

53. *Id.* at 869-74.

54. *Id.* at 870.

55. *Panell*, 756 So. 2d at 870 (Cook, J., concurring in result but dissenting from rationale).

56. *Id.*

57. *Id.*

58. *Id.*

Michael and should have applied the rule that the statute of limitations commences upon the accrual of a cause of action.⁵⁹ Finally, Justice Cook recognized the practical consideration that "some of the language in the main opinion seems to suggest that the limitations period could begin to run before, or, in fact, whether or not, a cause of action ever accrues."⁶⁰ According to Cook, this interpretation is nonsensical.⁶¹ He presented a hypothetical case to prove his point.⁶²

Justice Lyons dissented from the rationale because the court, in *Street v. City of Anniston*,⁶³ previously construed the substantially same language in the Alabama Medical Liability Act⁶⁴ ("AMLA") to mean that a statute of limitations begins to run on the accrual of the cause of action.⁶⁵ "[W]hen a legislature borrows an already judicially interpreted phrase from an old statute to use it in a new statute, it is presumed that the legislature intends to adopt not merely the old phrase but the judicial construction of that phrase."⁶⁶ Noting that the legislature has not amended the statute of limitations provision of the ALSLA since the Supreme Court of Alabama interpreted it in *Michael*,⁶⁷ Justice

59. *Id.*

60. *Panell*, 756 So. 2d at 870-71 (Cook, J., concurring in result but dissenting from rationale).

61. *Id.* at 872.

62. *Id.* The hypothetical involved a case in which a plaintiff sued multiple defendants and the original limitations period ran before the lawyer included a material defendant in the action. The lawyer moved to amend the complaint to include the material party. The client learned of the lawyer's failure one year, eleven months and twenty-nine days after the original limitations period expired. The plaintiff's cause of action only accrues if the amendment is denied, but the plaintiff must immediately file a suit against the lawyer because the limitations period under the ALSLA will run before the court rules on the motion to amend. *Id.*

63. 381 So. 2d 26 (Ala. 1980); see also *Ramey v. Guyton*, 394 So. 2d 2, 4 (Ala. 1980).

64. Alabama Medical Liability Act, ALA. CODE § 6-5-482(a) (1993). The provision provides:

(a) All actions against physicians, surgeons, dentists, medical institutions, or other health care providers for liability, error, mistake, or failure to cure, whether based on contract or tort, must be commenced within two years next after the act, or omission, or failure giving rise to the claim, and not afterwards; provided, that if the cause of action is not discovered and could not reasonably have been discovered within such period, then the action may be commenced within six months from the date of such discovery or the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; provided further, that in no event may the action be commenced more than four years after such act; except, that an error, mistake, act, omission, or failure to cure giving rise to a claim which occurred before September 23, 1975, shall not in any event be barred until the expiration of one year from such date.

65. *Panell*, 756 So. 2d at 873 (Lyons, J., concurring in result but dissenting from rationale).

66. *Id.* (quoting *Fusco v. Perini N. River Assocs.*, 601 F.2d 659, 664 (2d Cir. 1979), vacated on other grounds) (citing *Burnet v. Harmel*, 287 U.S. 103, 108 (1932); *Long v. Office of Workers' Compensation Programs*, 767 F.2d 1578, 1581 (9th Cir. 1985); *Harper v. Southern Coal & Coke Co.*, 73 F.2d 792, 794 (5th Cir. 1934)).

67. *Id.*

Lyons would adhere to the interpretation that the statute of limitations begins to run when the cause of action accrues.⁶⁸

Justice Johnstone dissented from the rationale because he believed the majority's construction of the provision went against the Legislature's intent.⁶⁹ "[T]he Legislature would not be remedying that 'crisis' by authorizing clients to sue their lawyers for acts, omissions, or failures which have not yet caused, and may never cause, any damage whatsoever."⁷⁰

These dissents from the majority's rationale, along with other practical considerations, raise serious policy concerns about the court's interpretation of section 6-5-574 of the ALSLA. First, the interpretation further restricts the time limit for a client to bring a claim against a legal service provider. It suggests that a client's statute of limitations could run before a cause of action accrues.⁷¹ Legal representation is often a long and protracted process,⁷² thus increasing the likelihood that the statute of limitations for an "act or omission" could run before a cause of action accrues. Second, the holding is inconsistent with previous case law interpreting when a statute of limitations begins to run.⁷³ The court did not address why it abandoned the previous statute of limitations rules or why it abandoned the reasoning under which these previous rules were decided. Third, the holding in *Panell* is also contrary to the court's interpretation of similar statutory language found in the AMLA.⁷⁴ When the legislature used the substantially same language in the ALSLA after the court had interpreted it under the AMLA, it is presumed that the legislature knew of and accepted the courts' previous interpretation.⁷⁵ The majority opinion in *Panell* did

68. *Id.*

69. *Id.* at 873-74. Justice Johnstone later referred to *Panell* and its effect in his dissent in *Ritch v. Robinson-Humphrey Company*, 748 So. 2d 861 (Ala. 1999). According to Justice Johnstone, *Ritch* was "the second departure by [the Supreme Court of Alabama] in the past several months from the traditional precept that no one can recover for wrongdoing without proximately caused damages This trend will generate a lot of lawsuits for errors and omissions harmful only in the abstract." *Ritch*, 748 So. 2d at 863.

70. *Panell*, 756 So. 2d 873-74 (Lyons, J., concurring in result but dissenting from rationale).

71. *Id.* at 869-70 (Cook, J., concurring in result but dissenting from rationale).

72. See Dan Freedman & Jennifer Corbett Dooren, *Survey finds judges trusted but not courts; System is biased, expensive and slow, say respondents, but justices are fair*, THE SAN FRANCISCO EXAMINER, May 15, 1999, at A2. A survey of public perception revealed "concern over the slow pace of justice. Eighty percent said cases were not resolved in a timely manner, . . ." *Id.*

73. See *Michael v. Beasley*, 583 So. 2d 245 (Ala. 1991); *Cofield v. Smith*, 495 So. 2d 61 (Ala. 1986); *Payne v. Alabama Cemetery Ass'n*, 413 So. 2d 1067 (Ala. 1982).

74. *Panell*, 756 So. 2d at 870 (Lyons, J., concurring in judgment but dissenting from rationale); see also *Street v. City of Anniston*, 381 So. 2d 26 (Ala. 1980).

75. *Panell*, 756 So. 2d at 873 (Lyons, J., concurring in judgment but dissenting from rationale).

not explain why it abandoned this presumption or why it changed the interpretation when this language is applied under the ALSLA.

The *Panell* holding will have two possible effects in practice.⁷⁶ First, as Justice Johnstone suggested in his opinion, the interpretation of section 6-5-574 commencing the statute of limitations when an "act or omission occurs" will lead to an increase in claims filed against lawyers while they are representing their clients.⁷⁷ Under this interpretation, a client may file a legal service liability claim against his lawyer when the act or omission occurs regardless of whether any damages ever occur.⁷⁸ This result was clearly not intended, as the legislature stated in Section 6-5-570 of the ALSLA.⁷⁹ The second effect of the *Panell* decision will be increased protection for lawyers against claims filed under the ALSLA. As Justice Cook suggested, a client's statute of limitations may run before damages ever occur.⁸⁰ Even if this situation never occurs, under the "act or omission" interpretation a client's statute of limitations may be drastically shortened, thus increasing the chance a client's claim will be time-barred.

III. PANELL'S "ACT OR OMISSION" INTERPRETATION APPLIED TO PAST CASES DECIDED UNDER THE "ACCRUAL OF A CAUSE OF ACTION" STANDARD

To illustrate the policy questions raised in the previous discussion, this section will examine two prior cases decided under the ALSLA and explain how those cases would have been affected under the *Panell* "act or omission" interpretation of section 6-5-574. The cases exam-

76. The interpretation of the statute of limitations in *Panell* may not be controlling precedent in all ALSLA actions. As a federal district court noted in *Panell v. American Home Prods. Corp.*, 106 F. Supp. 2d 1240, 1242 (N.D. Ala. 2000), "the [*Panell*] decision is not controlling. Of the nine justices on the court only two concurred with the result reached by Justice See. In light of *stare decisis*, *Panell* cannot stand." The court further noted "[t]he *Panell* opinion, joined by only three justices, does not change the well-established law of Alabama." *Panell*, 106 F. Supp. 2d at 1242. Despite the federal court's dismissal of the effects of *Panell*, the *Panell* decision continues to be important to attorneys considering an action under the ALSLA. The decision represents the Supreme Court of Alabama's division when interpreting the statute of limitations language under the ALSLA. This division creates confusion as to when the statute of limitations begins to run in an action against a legal service provider. It is unclear whether the court will apply the new interpretation of the statute of limitations under *Panell*, or whether the court will follow the "traditional precept that no one can recover for wrongdoing without proximately caused damages." *Ritch v. Robinson-Humphrey Co.* 748 So. 2d 861, 863 (Ala. 1999) (Johnstone, J., dissenting).

77. See *Panell*, 756 So. 2d at 873-74 (Johnstone, J., concurring in result but dissenting from rationale).

78. *Id.*

79. ALA. CODE § 6-5-570 (1993).

80. *Panell*, 756 So. 2d at 869-70 (Cook, J., concurring in result but dissenting from rationale).

ined are *Welborn v. Shipman*⁸¹ and *Brewer v. Davis*.⁸² Each of these cases was decided under the ALSLA and applied "accrual of a cause of action" standard for statute of limitation explained in *Michael*.⁸³

A. Application of Panell to Wellborn

In *Welborn* the court held that the plaintiff timely filed her negligence claim against the defendant, her prior attorney.⁸⁴ The attorney represented Ms. Welborn in a Title VII case for which the plaintiff received nominal damages because the attorney failed to present evidence of backpay and loss of fringe benefits at a November 27, 1984 bench hearing.⁸⁵ The court denied the motion for a further evidentiary hearing, and entered a final judgment in the amount of one dollar for Welborn on October 23, 1987.⁸⁶ The court, relying on *Michael*, held that Welborn's statute of limitations began to run on October 23, 1987, because that was when her damage occurred and thus, when her cause of action for legal malpractice accrued.⁸⁷ Welborn filed her ALSLA action on June 6, 1989, which was within the two-year time limit under section 6-5-574.⁸⁸ Therefore, her claim was not time-barred.⁸⁹

Under a *Panell* interpretation, Welborn's claim would have been time-barred before her cause of action ever accrued. *Panell* would apply a rule that the statute of limitations begins to run when the "act or omission or failure" occurred.⁹⁰ The "act or omission" in question was the attorney's failure to provide evidence of damages at the November 27, 1984 bench hearing. If the two-year statute of limitations period in section 6-5-574 began to run at that time, the statute of limitations would have run as early as November 27, 1986. However, as the court in *Welborn* noted, the cause of action did not accrue until October 23, 1987, when the district court entered its final judgment.⁹¹ Therefore, under a *Panell* interpretation Welborn's claim would have been time-barred.

81. 608 So. 2d 334 (Ala. 1992).

82. 593 So. 2d 67 (Ala. 1991).

83. *Welborn*, 608 So. 2d at 335-36; *Brewer*, 593 So. 2d at 68.

84. *Welborn*, 608 So. 2d at 336.

85. *Id.* at 335.

86. *Id.* at 336.

87. *Id.*

88. *Id.*

89. *Welborn*, 608 So. 2d at 336.

90. *Panell*, 756 So. 2d at 868 (quoting ALA. CODE § 6-5-574(a) (1993)).

91. *Welborn*, 608 So. 2d at 336.

B. Application of Panell to Brewer

In *Brewer*, the court held that the plaintiff clients' action against the defendant attorney was not time-barred under section 6-5-574 of the ALSLA under the *Michael* interpretation of the statute of limitations.⁹² The clients hired an attorney to contest a will.⁹³ The attorney filed a petition to remove the estate to Circuit Court, and then filed an amendment to the petition for removal.⁹⁴ In the trial court, the jury returned a verdict against the will.⁹⁵ On appeal, the Supreme Court of Alabama reversed the trial court and held that "the petition for removal did not constitute a proper complaint to contest the will and that the amendment to the petition for removal was not effective because there was no complaint to amend. . . ."⁹⁶ The final judgment was entered on November 8, 1988, and the clients brought a legal malpractice suit against the attorney on March 22, 1990.⁹⁷ The trial court granted summary judgment, believing the action to be time-barred under section 6-5-574.⁹⁸ It reasoned that the "cause of action accrued on November 2, 1986 (the last date to file a will contest)."⁹⁹ The Supreme Court reversed the trial court, stating that under *Michael* the statute of limitations began to run when the cause of action accrued, and the cause of action did not accrue "until this Court reversed the trial court's judgment and overruled the application" (November 8, 1988).¹⁰⁰ Therefore, the plaintiff clients' action was not time-barred because they filed the ALSLA action on March 22, 1990, before the two-year statute of limitations ran.¹⁰¹

Under *Panell*, the statute of limitations would have begun to run when the "act or omission or failure" occurred, and the clients' action would have been time-barred. The "act or omission" of legal malpractice against this attorney was her failure to file a complaint to contest the will on November 2, 1986, which was the last date to file a will contest.¹⁰² Using this date, the statute of limitations to bring an ALSLA action against the attorney would have run on November 2, 1988. Therefore, the plaintiff's action, which was filed on March 22, 1990,

92. *Brewer*, 593 So. 2d at 69.

93. *Id.* at 67.

94. *Id.* at 67-68.

95. *Id.*

96. *Id.*

97. *Brewer*, 593 So. 2d at 68.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 68-69.

102. *Brewer*, 593 So. 2d at 68.

would have been time-barred.

IV. CONCLUSION

In conclusion, *Panell* drastically changes the way the statute of limitations is calculated under the ALSLA.¹⁰³ This new interpretation reduces the time in which a client may bring a claim against his attorney under the ALSLA and may create instances where a client's statute of limitations runs before his cause of action ever accrues. By interpreting the ALSLA to require the statute of limitations to begin to run when an "act or omission" occurs rather than when the cause of action accrues, the Supreme Court of Alabama is putting clients in a difficult position. The client may be faced with a difficult choice if an attorney performs an "act or omission" which would give rise to an ALSLA claim. On one hand, the client could bring an action immediately, regardless of whether he would ever sustain damages from this "act or omission." This would most likely terminate the attorney-client relationship, and the client would have problems proving any damage in his ALSLA action. Alternatively, the client could wait to see if this "act or omission" results in damages. This alternative involves a risk that the statute of limitations will run before representation has concluded or any injury has occurred. The *Panell* decision and this new construction of the statute of limitations increases the difficulty for a client bringing an ALSLA action against the attorney while affording greater protection to Alabama lawyers. Because of these difficulties, the Alabama Legislature should amend the "act or omission" language under the ALSLA and provide that the statute of limitations period for a legal service liability action commences when an injury occurs.

Amy Ann Ray

103. *But see supra* note 76. These conclusions are based on an assumption the Supreme Court of Alabama will follow the *Panell* interpretation that the statute of limitations begins to run when an act or omission occurs.

