VIRGINIA

IN THE ARLINGTON COUNTY CIRCUIT COURT

KIRK A. JACKSON, *Plaintiff*	)	
v.	)	**Case No. CL2010-1533**
CARL E. TANNER, *Defendant*	)	

RESPONSE TO PLEA IN BAR

COMES NOW your Plaintiff, Kirk A. Jackson, by counsel, and respectfully responds to Defendant's Plea in Bar as follows:

This matter is before this Court on a Complaint alleging injury to Plaintiff stemming from sexual abuse suffered by Plaintiff at the hands of Defendant while plaintiff was a minor over twenty years ago. Defendant has filed a plea in bar alleging the statute of limitations as the sole bar to this action.

A plea in bar presents an issue of fact which, if proven, would create a bar to plaintiff's recovery. *Station #2, Inc. v. Lynch*, 280 Va. 166, 175 (2010). In a plea in bar based on the statute of limitations, the burden is on the Defendant to prove that the applicable statute of limitations had run when the Complaint was filed. *Van Dam v. Gay*, 280 Va. 457, 460 (2010).

A statute of limitations is a procedural rule put in place by the legislature which runs when the period designated by statute elapses. *See Haas v. Lee*, 263 Va. 273, 276 (2002). The period begins to run at the accrual of the cause of action, which is not at the time of injury in certain instances. *Roller v. Basic Constr. Co.*, 238 Va. 321, 328 (1989). Further, that period can be tolled for certain reasons. *Harmon v. Sadjadi*, 273 Va. 184,

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188 (2007). There is no dispute in this matter as to the time periods for the matters complained of - the events which are the subject of the complaint occurred in late 1987 and early 1988, Plaintiff turned 18 years old on December 25, 1988, and the present matter was filed on October 14, 2010. There is no claim of tolling, except as conceded by the Defendant as to the time period when Plaintiff was a minor. Instead, the question is when the cause of action accrued.

Defendant has correctly identified that this matter is governed by the provisions of Va. Code § 8.01-249 (6) regarding childhood sexual abuse. The acts complained of occurred during the infancy of Plaintiff, and involved "acts constituting ... sodomy". § 8.01-249 (6). The statute requires that in a claim of childhood sexual abuse, regardless of the cause of action sued under, the childhood victim must know both the fact of injury and the causal connection between the sexual abuse and his injury or else the cause of action will not have accrued. *Id.* If the childhood victim does not know either of these facts, the statute of limitations will not begin to run until that information is communicated to the victim by a licensed physician, psychologist, or clinical psychologist. *Id.* The time the original cause of action arose is immaterial, as the statute applies retroactively. *McConville v. Rhoads*, 67 Va. Cir. 392, 393 (Norfolk 2005); *see also Haas v. Lee*, 263 Va. 273, 276 (2002) (as a procedural matter, a statute of limitations can be retroactively changed where there is clear legislative intent).

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In the present matter, although the Plaintiff knew that he had significant mental health barriers to a normal life and related illnesses, he did not know that they were caused by acts of trauma nor that these injuries were caused by the abuse he suffered at the hands of Defendant. That knowledge was conveyed for the first time within the last

two years by Dr. Ned Rodriguez, as will be demonstrated by the evidence upon the hearing of this matter.

As described above, this plea in bar turns on two facts: (1) did Plaintiff know that that Mr. Tanner had injured him and know the causal connection between the sexual abuse and this injury? and if not, (2) when was that information communicated to Plaintiff by a licensed physician, psychologist, or clinical psychologist? Where this information is not present in the complaint, it should be resolved by an evidentiary hearing, either *ore tenus* or before a jury. *See Hawthorne v. VanMarter*, 279 Va. 566, 577-78 (2010). The evidence which would decide the matter would be the testimony of Dr. Ned Rodriguez, the licensed psychologist who first notified the Plaintiff of this causal connection less than two years before the present matter was filed, and that of the Plaintiff himself, who can identify that this identification was made less than two years before filing. Dr. Rodriguez lives in California, and his important testimony in this matter will have to be taken directly in court or by de bene esse deposition, but will in either case require this Court to conduct a hearing *ore tenus*. The Defendant does not have any firsthand testimony which would speak to the timing of this revelation. *See* Defendant's Response to Request to Admit No. 20, attached as Exhibit 1. The parties will schedule such matter with Judges Chambers in the future, as the information necessary for such hearing is still being gathered by both parties.

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The Defendant has failed to prove that under § 8.01-249(6) the cause of action accrued more than two years ago, and accordingly has not shown that the matter is time barred under § 8.01-243(A), and has not shown that the Plaintiff is barred from proceeding with his cause of action against the Defendant.

WHEREFORE, in consideration of the allegations outlined above, your Plaintiff, Kirk A. Jackson, requests an *ore tenus* hearing on this plea in bar, to be scheduled by the parties in the future, and further requests that this Court deny Defendant's Plea in Bar or in the alternative to hold the plea in bar under consideration until the trial of this matter when Dr. Rodriguez would be able to discuss in open court before the jury any questions with regard to the timing of Mr. Jackson's knowledge.

Respectfully Submitted,
KIRK A. JACKSON
By counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of this Response to Plea in Bar has been sent on this 21st day of January, 2011 by U.S. Mail, First Class and by facsimile to counsel for Defendant at:

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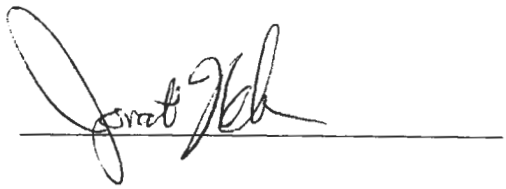

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