

affirm the judgment of the circuit court of Madison County.

¶ 3

FACTS

¶ 4 Plaintiff was a railroad employee from 1969 until 2002. For approximately 30 years of that period, plaintiff was required to walk on ballast in various job assignments. Ballast consists of uneven surfaces and places stress on the pedestrian's knees.

¶ 5 Plaintiff sought medical attention in November of 2000 concerning pain in his left knee. His physician referred him to an orthopedist, Dr. Scott, who scheduled plaintiff for an MRI on November 20, 2000. Dr. Scott, on that date, informed plaintiff that his diagnosis was osteoarthritis and that his left knee injury was caused by his railroad work on uneven surfaces, including the ballast. Plaintiff, in a subsequent deposition, admitted that he was told on November 20, 2000, that his left knee injury was work-related.

¶ 6 Plaintiff continued his railroad employment and in January 2002 received a new work assignment which he claimed aggravated his left knee problem. There was more walking on ballast and other movements, and he was not able to control the pain level in his left knee. In mid-2002, plaintiff asked to be transferred to his prior job assignment. The railroad refused to reassign him and also refused to modify his current job duties that required walking on ballast and climbing. Plaintiff's doctor's office note of September 13, 2002, noted that plaintiff would be "getting along okay" but for this change in his job assignment adversely affecting his injured knee. Plaintiff subsequently left the employ of the Norfolk Southern Railway Company due to his left knee disability.

¶ 7 Plaintiff engaged the services of defendant Tobin and his firm in January 2005 for prosecution of an FELA case against the Norfolk Southern Railway Company. No case was filed by defendants against the railroad in 2005, and they were discharged by plaintiff in 2006. Subsequent counsel hired by plaintiff filed suit in St. Louis County, Missouri, against the railroad in August 2006. The case was dismissed without prejudice on a forum *non*

conveniens motion in 2007. The case was refiled in Macon County, Illinois, in June of 2007. The circuit court of Macon County granted the railroad's motion for summary judgment in July 2008 on the basis that the statute of limitations had run. The instant case was filed in February 2009.

¶ 8 During the course of this litigation, various discovery disputes arose, with plaintiff arguing that defendants were not cooperative concerning responses to discovery and the designation and subsequent cancellation of deposition dates. These disputes led to the filing by plaintiff of motions for sanctions against defendants based on alleged discovery violations. Subsequent to the filing of these motions for sanctions, defendants filed a motion for summary judgment based on the statute of limitations. In essence, their argument was that plaintiff's FELA claim accrued in 2002 and, accordingly, by the time the services of defendants were engaged in 2005, the statute of limitations for his FELA action had already run. The circuit court, with both parties present by counsel, noted the pending sanctions questions but, in the exercise of its discretion, determined to consider the motion for summary judgment first since it was potentially dispositive. The circuit court granted summary judgment to defendants based on their statute of limitations argument. Plaintiff timely appealed.

¶ 9 ANALYSIS

¶ 10 Plaintiff, on appeal, argues: (1) that a genuine issue of material fact exists regarding the date on which the three-year statute of limitations period under FELA expired; (2) whether aggravation of a chronic injury by work conditions can trigger the FELA statute of limitations period, and accordingly whether there was a genuine issue of material fact as to whether plaintiff's action was time-barred; and (3) whether the circuit court should have sanctioned defendants for alleged discovery abuses and barred them from arguing the FELA limitations period.

¶ 11 We note that under section 2-1005(c) of the Code of Civil Procedure (735 ILCS 5/2-1005(c) (West 2010)) summary judgment is appropriate when there exists no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Citing *Arangold Corp. v. Zehnder*, 204 Ill. 2d 142, 146, 787 N.E.2d 786, 789 (2003), we review the summary judgment question *de novo*.

¶ 12 The Federal Employers' Liability Act (45 U.S.C. § 56 (2006)) indicates that "[n]o action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued." We, accordingly, consider the dispositive question in this appeal, when plaintiff's cause of action accrued.

¶ 13 It is uncontested by the parties that plaintiff was told in November of 2000 by his orthopedist that his railroad work caused his knee problems. He was also informed on that date of the nature of the injury to his left knee. The Seventh Circuit Court of Appeals in *Fries v. Chicago & Northwestern Transportation Co.*, indicated that "a cause of action accrues for statute of limitations purposes when a reasonable person knows or in the exercise of reasonable diligence should have known of both the injury and its governing cause." *Fries v. Chicago & Northwestern Transportation Co.*, 909 F.2d 1092, 1095 (7th Cir. 1990). The *Fries* court also stated that actual knowledge of causation is not required for accrual. *Fries*, 909 F.2d at 1096. The record indicates, and plaintiff in his deposition admitted, that he was informed in 2000 of both the nature of his injury and the cause. Further, it is uncontested that defendant and his firm were hired in January of 2005 for that particular injury as the basis of an FELA action against Norfolk Southern Railway Company. Clearly the period between November 2000 and January 2005 is a period in excess of three years. Plaintiff, in response, argues that in fact his FELA cause of action accrued in January of 2002 after his job assignment changed and his supervisors refused to either assign him to a less injurious job or modify his assignment or equipment after he informed them that the new job might harm

his left knee.

¶ 14 As an accrual date, plaintiff argues that the appropriate point of accrual of his cause of action would be September 13, 2002, when he was informed by his orthopedic specialist that he would "still be getting along okay" if there had not been a change in his work requirements. Plaintiff argues this as a distinct act of negligence, the existence of which, in relation to his injury, was not known prior to 2002, citing *Mix v. Delaware & Hudson Ry. Co.*, 345 F.3d 82 (2d Cir. 2003). Defendants argue that the date of actual knowledge by plaintiff should apply rather than the date of aggravation, and they note that in November 2000, plaintiff had actual knowledge of both his injury and the injury's cause, his years of walking on railroad ballast, again citing *Fries v. Chicago & Northwestern Transportation Co.*, 909 F.2d 1092, 1095 (7th Cir. 1990).

¶ 15 We have considered our opinion in *Axe v. Norfolk Southern Ry. Co.*, 2012 IL App (5th) 110277. In *Axe*, the plaintiff, a retired railroad conductor, sought damages pursuant to the FELA alleging injuries caused by repetitive trauma to his knees. *Axe*'s suit was filed on August 23, 2010. The circuit court of Madison County granted the defendants' motion for summary judgment on the basis of the plaintiff's cause being barred by the three-year statute of limitations, the same statute cited above. The court in *Axe* noted:

"In its ruling, the court found that the plaintiff had a duty to investigate the cause of his injuries because his condition of severe degenerative arthritis had been diagnosed and had manifested itself no later than July 24, 2006, more than three years before he filed his complaint. Because the plaintiff reasonably should have known of both the injury and its cause more than three years before filing his complaint, the court granted the defendants' motion for summary judgment." *Axe*, 2012 IL App (5th) 110277, ¶ 1.

In affirming the judgment of the circuit court, the *Axe* court stated, quoting *Fries*:

"Causes of action accrue for statute of limitations purposes 'when a reasonable person knows or in the exercise of reasonable diligence should have known of both the injury and its governing cause.'" *Axe*, 2012 IL App (5th) 110277, ¶ 11 (quoting *Fries*, 909 F.2d at 1095).

The *Axe* court, citing *Fries*, further noted it is not necessary that the plaintiff possess actual knowledge in order that the cause of action had accrued. *Axe*, 2012 IL App (5th) 110277, ¶ 11. In *Axe*, the record indicated that the plaintiff had retired as a railroad conductor in 2002 and had been treated for severe degenerative arthritis in both knees before July 2006. He argued on appeal that the statute of limitations did not begin to run because none of his doctors indicated that his medical condition was related to his work on the railroad, in essence arguing that the statute did not begin to run until he acquired actual knowledge of the cause of his injury. The *Axe* court disagreed, citing *Tolston v. National R.R. Passenger Corp.*, 102 F.3d 863 (7th Cir. 1996), in which the dismissal of Tolston's action against her former railroad employer was dismissed on statute of limitation grounds. The *Tolston* court found that her history of extreme knee pain was sufficient to require investigation of the potential cause of her condition and, therefore, she failed to exercise reasonable diligence to determine the cause of her condition within the statute of limitations period. In considering *Fries* and *Tolston*, the *Axe* court found that *Tolston* was "indistinguishable" from its case. *Axe*, 2012 IL App (5th) 110277, ¶ 15. The court noted that *Axe* had been treated for pain and degenerative arthritis in both knees prior to July of 2006 but "did not seek any advice from anyone in the medical or legal community about the cause of his painful knee problem." *Axe*, 2012 IL App (5th) 110277, ¶ 15. *Axe* had retired in 2002 and filed his action in 2010, but the court found that he should have known about the cause of his condition prior to July 2006. The judgment of the circuit court was affirmed.

¶ 16 In the instant case, plaintiff had actual knowledge, of both his condition and its cause,

in 2000. He also exhibited actual knowledge of his condition in 2002 in dealing with his new job assignment. Based on these salient points and the facts recited above, we conclude that *Fries*, *Tolston*, and *Axe* guide our disposition in this cause and that, based on the uncontested facts before us, the circuit court of Madison County appropriately entered summary judgment in favor of defendants.

¶ 17 The last argument made by plaintiff is that the circuit court abused its discretion in taking up defendants' motion for summary judgment prior to and without resolving plaintiff's motions for sanctions for alleged discovery violations and should have barred defendants from arguing their statute of limitations motion. We disagree. We conclude that the circuit court of Madison County did not abuse its discretion when, faced with both multiple discovery-related sanctions motions and a motion that potentially could resolve the entire controversy before it, it chose to consider first the summary judgment motion.

¶ 18 For the reasons stated above, we affirm the judgment of the circuit court of Madison County.

¶ 19 Affirmed.