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7 IN THE UNITED STATES DISTRICT COURT
 8 FOR THE DISTRICT OF ARIZONA

9 MAJOR E. BEESLEY,
 10 Plaintiff,

11 vs.

12 UNION PACIFIC RAILROAD COMPANY,
 13 a corporation; JOHN DOES and
 14 JANE DOES, corporation I through V,
 15 WHITE PARTNERSHIP I through V,
 16 Defendants.

17 **CASE NO. CV 05 0114 PHX DKD**

18 **PLAINTIFF MAJOR BEESLEY'S
 19 RESPONSE TO DEFENDANT'S
 20 MOTION FOR SUMMARY
 21 JUDGMENT**

22 (Assigned to the Hon. Robert C. Broomfield)

23 Plaintiff, Major Beesley, by and through counsel undersigned, hereby responds to the
 24 Defendant Union Pacific Railroad Company's ("Union Pacific") Motion for Summary Judgment.
 25 Defendant's motion should be denied because a possessor of land who knows, or from facts
 26 within his knowledge should know, that trespassers constantly intrude upon a limited area
 27 thereof, is subject to liability for bodily harm there caused to them by his failure to carry on an
 28 activity involving a risk of death or serious bodily harm with reasonable care for their safety.

This response is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Plaintiff's Facts.

23 This action arises out of an accident that occurred on Union Pacific's railroad tracks at or
 24 near 1600 South Stanley in Tempe, Arizona on September 9th, 2002. Locomotive engineer John
 25 Prentice and conductor Christopher Lewis were then operating a train owned by Union Pacific
 26 within the course and scope of their employment. (Defendant Union Pacific's Statement of Facts
 27 ("DSOF"), ¶ 1.) The Union Pacific train struck Plaintiff, and he sustained serious injuries as a
 28 result of the accident, including amputation of his left leg above the knee. (DSOF, ¶ 2.)

1 Plaintiff's Beesley's complaint alleges that on or about September 9th, 2002, train
2 conductors John Pierce and Lewis Christopher were operating a train at or near 1600 South
3 Stanley on the Rail Road in Tempe, Arizona. John Prentice and Lewis Christopher were
4 operating a train verily believed and therefore alleged to be owned by UNION PACIFIC
5 RAILROAD COMPANY; that John Prentice and Lewis Christopher, acting within the course
6 and scope on their employment with Defendant, UNION PACIFIC RAILROAD COMPANY,
7 did then and there carelessly, negligently and recklessly operate the train causing it to run over
8 Plaintiff, MAJOR BEESLEY. (PSOF, ¶ 3.)

9 Plaintiff's Beesley's complaint alleges that on or about September 9th, 2002, Defendant,
10 UNION PACIFIC RAILROAD COMPANY, allowed a dangerous condition, which involved
11 a risk of death or serious bodily harm, to exist on its property in the approximate location of 1600
12 South Stanley on the Rail road in Tempe, Arizona. That Defendant, UNION PACIFIC
13 RAILROAD COMPANY, failed to warn Plaintiff of the existence of the dangerous condition.
14 That Defendant, UNION PACIFIC RAILROAD COMPANY, failed to fence off the area in
15 which the dangerous condition existed. That Defendant, UNION PACIFIC RAILROAD
16 COMPANY'S, failure to warn, correct the dangerous condition, or fence off the area constitutes
17 negligence. (PSOF, ¶ 4)

18 On September 9th, 2002, at or near 1600 South Stanley in Tempe, Arizona, locomotive
19 engineer John Prentice and conductor Lewis Christopher were operating Union Pacific train No.
20 4813. The train was moving at approximately 20 miles per hour. Prior to impact, Mr. Prentice
21 and Mr. Christopher observed what looked like a pile of clothes on the track in front of them.
22 As they continued, Mr. Prentice and Mr. Christopher became aware that it was a person. As soon
23 as they observed it was a person on the tracks, they began emergency braking procedures.
24 (PSOF, ¶ 5)

25 Plaintiff Beesley lived and worked in the area near 1600 S. Stanley Drive and 1700 S.
26 Dorsey Ln. in Tempe, Arizona for over 3 years. He is very familiar with the area in and around
27 the scene of the accident. He is also very familiar with pedestrian traffic in and around the area
28 of 1600 S. Stanley Drive and 1700 S. Dorsey Ln. in Tempe, Arizona. (PSOF, ¶ 6)

1 To the north and south of the railroad tracks, in the area of 1600 S. Stanley Drive and 1700
2 S. Dorsey Ln. in Tempe, Arizona, there are many apartment complexes. (PSOF, ¶ 7)

3 There are well beaten foot paths where residents of the apartment complex's and others
4 pedestrians cross the railroad tracks from north to south and south to north. The residents of the
5 neighborhood cross the railroad tracks in the area on a daily basis. (PSOF, ¶ 8)

6 Plaintiff Beesley crossed the railroad tracks in the area of 1600 S. Stanley Drive and 1700
7 S. Dorsey Ln. in Tempe, Arizona, on numerous occasions, prior to the accident. On some of
8 those occasions railroad employees had observed Plaintiff cross the railroad tracks in the area.
9 Plaintiff was never told by a railroad employee that he could not be on the railroad tracks.
10 (PSOF, ¶ 9)

11 Plaintiff Beesely has personal knowledge that a pedestrian was killed by a train in the area
12 of 1600 S. Stanley Drive and 1700 S. Dorsey Ln. in Tempe, Arizona, shortly before his accident
13 of September 9th, 2002. (PSOF, ¶ 10)

14 Plaintiff Beesely, on or about September 9th, 2002, observed old furniture and clothing in and
15 around the railroad tracks in the area of 1600 S. Stanley Drive and 1700 S. Dorsey Ln. in
16 Tempe, Arizona. (PSOF, ¶ 11)

17 **II. Under Arizona Law, Union Pacific's Duty to Plaintiff as a Trespasser was to Carry on**
18 **Activities Involving a Risk of Death or Serious Injury with Reasonable Care for**
Plaintiff's Safety.

19 Arizona law controls this diversity case, *Delgado v. Southern Pacific Transp. Co.*, 763
20 F.Supp. 1509, 1511 (D. Ariz. 1991), citing *Torres v. Southern Pacific Transp. Co.*, 584 F.2d 900
21 (9th Cir. 1978).

22 With regard to a possessor of land duties toward trespassers, Arizona follows the general
23 rule set forth in Restatement (Second) of Torts Section 333 of the Restatement (Second)
24 provides:

25 "Except as stated in §334-339, a possessor of land is not liable to trespassers for
26 physical harm caused by his failure to exercise reasonable care.

27 (a) to put the land in a condition reasonably safe for their reception, or

28 (b) to carry on his activities so as not to endanger them.

1 An exception to this general rule has developed in cases where one is carrying on an
2 activity dangerous to life and limb in a limited area where trespassers are know to constantly
3 intrude. As applied to railroads , this exception deals with the so called "pathway cases". See
4 *Barry v. Southern Pacific*, supra, 166 P.2d at 827-28, and *Southern Pac. Co. v. Bolen*, 76 Ariz.
5 317, 264 P.2d 401.

6 This exception is covered by section 334 of the Restatement of Torts (Second) and
7 provides:

8 A possessor of land who knows, or from facts within his knowledge should know,
9 that trespassers constantly intrude upon a limited area thereof, is subject to liability
10 for bodily harm there caused to them by his failure to carry on an activity involving
11 a risk of death or serious bodily harm with reasonable care for their safety.

12 Plaintiff contends that the facts of his case fit with in the exception of Section 334 of the
13 Restatement of Torts (Second). Plaintiff asserts that Union Pacific, as a possessor of land knew
14 or should have known that resident's of the area constantly cross the tracks in the area of where
15 Plaintiff was injured. This area is surrounded by apartment complexes and there are paths leading
16 north and south across the tracks. There have been other accidents in that area. There is trash,
17 couches and clothing in the area of the accident which indicate that people are present in that
18 area.

19 In support of their motion for summary judgment, Defendant argues that Plaintiff did not
20 allege that there was a pathway leading up to or across the tracks where the train struck Plaintiff,
21 nor that anyone used the particular place to cross the tracks. Plaintiff did not make such
22 allegation in his complaint. However, Plaintiff contends that he did not need to make these
23 allegation in the complaint. The complaint alleges that Defendant breached its duty to use
24 reasonable care. The above allegation is sufficient.

25 Plaintiff has established that there are genuine issues of fact under section 334 of the
26 Restatement of Torts (Second).

27 Restatement (Second) of Torts Section 336 provides:

28 A possessor of land who knows or has reason to know of the presence of
another who is trespassing on the land is subject to liability for physical
harm thereafter caused to the trespasser by the possessor's failure to carry
on his activities upon the land with reasonable care for the trespasser's
safety.

1
2 Comment (a) to the above section, states

3 The rule stated in this Section applies to determine the liability of a
4 possessor of land for harm legally caused to a trespasser by the manner
5 in which the possessor carries on his activity after he knows, or has reason
6 to know, that the trespasser is upon his land and is likely to be harmed
7 unless the activities are carefully carried on.

8 Plaintiff contends that locomotive engineer John Prentice and conductor Christopher
9 Lewis saw him prior to the accident. It is Plaintiff's position that Restatement (Second) of Torts
10 Section 336 is applicable to his case. Whether Mr. Prentice and Mr. Lewis saw Plaintiff prior to
11 the accident is a question of fact for the trier of fact to determine. Plaintiff has established that
12 there are genuine issues of fact under section 336 of the Restatement of Torts (Second).

13 **III. Summary Judgment Is Not Proper In This Case As Genuine Issues Of Material Fact
14 Exist.**

15 The court must deny summary judgment when a genuine issue of material fact remains
16 to be tried, or where the moving party is not entitled to a judgment as a matter of law. In all
17 other cases, the court enjoys some discretion to deny summary judgment where the court
18 concludes that a fuller factual development is necessary or where there is some particular reason
19 to believe that the wiser course would be to proceed to trial. *Kennedy v. Silas Mason Co.*, 334
20 U.S. 249, 68 S.Ct. 1031, 92 L.Ed. 1347 (1948), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
21 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986).

22 A "genuine issue" exists where the evidence before the court is of such a nature that a
23 reasonable jury could return a verdict in favor of the non-moving party. Whether a fact is
24 "material" hinges on the substantive law at issue. A fact is "material" if it might affect the
25 outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 A.Ct. 2505, 2510,
26 91 L.Ed.2d 202 (1986). *See also Wright ex rel. Trust Co. Of Kansas v. Abbott Laboratories,*
27 *Inc.*, 259 F3d 1226, 1231-32 (10th Cir. 2001), *Hoffman-Dombrowski v. Arlington Int'l*
28 *Racecourse, Inc.*, 254 F3d 644, 650 (7th Cir. 2001).


Summary Judgment is only appropriate when there is no genuine issue of material fact
to be determined by the trier of fact. In the case before this Court, genuine issues of material

1 fact clearly exist. Specifically, the trier of fact must determine if there is a well beaten pathway
2 as claimed by Plaintiff and if so did Defendant know about the path. The trier of fact must
3 determine whether Mr. Prentice and Mr. Lewis saw Plaintiff prior to he accident so as to make
4 Restatement (Second) of Torts Section 336 provides applicable to this case. Defendant's motion
5 falls well short of the standard necessary to obtain summary judgement.

6 **III CONCLUSION**

7 Plaintiff has established that genuine issues of material fact exist in this case.
8 Therefore, Plaintiff requests that this Court deny Defendant's Motion for Summary Judgment.

9 DATED this 30th day of August, 2005.

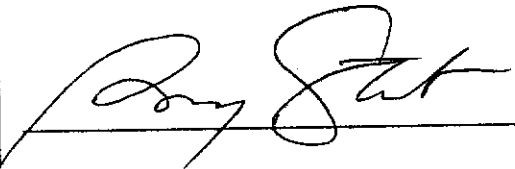
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15 **ORIGINAL AND COPY**
16 of the foregoing filed this 30
day of Aug, 2005, with:

17 **United States District Court**
18 **Sandra Day O'Connor Courthouse**
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Phoenix, Arizona 85003-2156

19
20 **COPY** of the foregoing
21 mailed this 30 day of Aug, 2005,
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