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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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MAJOR E. BEESLEY,)

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Plaintiff,)

No. CIV 05-114 PHX RCB

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vs.)

O R D E R

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UNION PACIFIC RAILROAD COMPANY,)

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a corporation,)

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Defendant.)

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This action arises out of a personal injury suit originally filed in the Superior Court of Arizona for Maricopa County, and later removed to this Court by Defendant Union Pacific Railroad Company on January 10, 2005 (doc. # 1). Currently pending before the Court is Defendant's motion for summary judgment filed on July 29, 2005 (doc. # 15). Plaintiff filed a response in opposition to Defendant's motion on August 30, 2005 (doc. # 17), and Defendants filed a reply on September 19, 2005 (doc. # 20). The Court finds the matter suitable for decision without oral argument. Having carefully considered the arguments raised by the parties' briefs, the Court now rules.

1 **I. BACKGROUND**

2 At some time between 11:00 p.m. on September 8, 2002 and the
3 early morning on September 9, 2002, a train owned and operated by
4 Defendant struck Plaintiff while he was lying on Defendant's
5 railroad tracks at or near 1600 South Stanley Place in Tempe,
6 Arizona. Def.'s Statement of Facts (doc. # 16) ("DSOF") ¶¶ 1-4.

7 The railroad tracks in the area of the accident are situated
8 between apartment complexes whose residents apparently cross the
9 tracks on a daily basis by using various well beaten footpaths.

10 Pl.'s Statement of Facts (doc. # 19) ("PSOF"), Ex. 1 ¶¶ 5-7.

11 Plaintiff states that he has crossed the tracks on numerous
12 occasions, presumably by using the same footpaths. Id. ¶ 8.

13 However, he has no recollection of the accident, and remembers
14 nothing from approximately 11:00 p.m. on September 8, 2002 until
15 waking up in the hospital on September 9, 2002 after the accident.
16 See DSOF ¶ 4. He does remember drinking beer on the night of the
17 accident, and leaving his apartment with a beer in hand, intending
18 to visit a friend at another apartment. Id.

19 According to the incident report prepared by the Tempe Police
20 Department, the train was proceeding at a speed of approximately
21 twenty miles per hour when the crew saw what appeared to be a pile
22 of clothes on the tracks. PSOF, Ex. 2. Upon observing Plaintiff
23 in a recumbent pose with his hands behind his head, the train crew
24 immediately began emergency breaking procedures, and sounded the
25 train's horn in an attempt to alert Plaintiff of his danger. Id.

26 As a result of the accident, Plaintiff was gravely injured.
27 His left leg was severed above the knee, and he received numerous
28 scrapes and scratches to his face, arms, and torso. Id.

1 **II. STANDARD OF REVIEW**

2 Summary judgment is appropriate "when there is no genuine
3 issue of material fact" such that "the moving party is entitled to
4 judgment as a matter of law." Fed. R. Civ. P. 56. In determining
5 whether to grant summary judgment, a district court must view the
6 underlying facts and the inferences to be drawn from those facts in
7 the light most favorable to the nonmoving party. See Matsushita
8 Elec. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). If a
9 party will bear the burden of proof at trial as to an element
10 essential to its claim, and fails to adduce evidence establishing a
11 genuine issue of material fact with respect to the existence of
12 that element, then summary judgment is appropriate. See Celotex
13 Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

14 To survive summary judgment, the nonmoving party must show
15 that there is a genuine issue of material fact. See Anderson v.
16 Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). A factual
17 dispute is genuine if the evidence is such that a rational trier of
18 fact could resolve the dispute in favor of the nonmoving party.
19 Id. at 248. A fact is material if determination of the issue might
20 affect the outcome of the case under the governing substantive law.
21 Id. Thus, a party opposing a motion for summary judgment cannot
22 rest upon bare allegations or denials in the pleadings, but must
23 set forth specific facts demonstrating a genuine issue for trial.
24 See id. at 250. If the nonmoving party's evidence is merely
25 colorable or not significantly probative, a court may grant summary
26 judgment. See id. at 249; accord Cal. Architectural Build. Prods.,
27 Inc. v. Franciscan Ceramics, 818 F.2d 1466, 1468 (9th Cir. 1987).
28 ...

1 **III. DISCUSSION**

2 The parties do not dispute that Plaintiff was a trespasser on
3 Defendant's railroad tracks at the time of the accident. The only
4 issue involved is whether Defendant breached a duty of care owed to
5 Plaintiff as a trespasser. Because this is a diversity case
6 arising from alleged negligence occurring in Arizona, the Court
7 must apply Arizona substantive law. Erie R.R. v. Tompkins, 304
8 U.S. 64, 78-79 (1938). With regard to the duties owed trespassers,
9 Arizona law follows the general rule that, with certain exceptions,
10 a landowner owes no duty toward a trespasser except not to
11 willfully or wantonly injure him after discovering his peril.
12 Barnhizer v. Paradise Valley Unified Sch. Dist., 123 Ariz. 253, 599
13 P.2d 209, 210 (1979); Barry v. S. Pac. Co., 64 Ariz. 116, 166 P.2d
14 825, 828 (1946). Based on Plaintiff's response, only two such
15 exceptions, which are summarized in sections 334 and 336 of the
16 Restatement (Second) of Torts¹, are relevant in the instant case.

17 **A. Liability Under Restatement (Second) of Torts § 334**

18 Section 334 of the Restatement (Second) of Torts provides
19 that:

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

25 ¹ Although the controlling Arizona case law predates the
26 Restatement (Second) of Torts, the Ninth Circuit and at least one
27 other court in this District have noted that there is no conflict
28 between the Arizona railroad cases and the Restatement. See Torres
v. S. Pac. Transp. Co., 584 F.2d 900, 903 (9th Cir. 1978); Delgado v.
S. Pac. Transp. Co., 763 F. Supp. 1509, 1511-16 (D. Ariz. 1991).

1 Restatement (Second) of Torts § 334 (1965) (emphasis added). In
2 other words, section 334 contemplates a "limited area" of land in
3 which a landowner owes a duty of care toward trespassers. Comment
4 d to this section explains that the "limited area" must be "some
5 particular place within the land," and adds that "[i]t is not
6 enough that [the landowner] know or should have reason to know that
7 persons persistently roam at large over his land." Id., cmt. d.

8 As applied to railroad companies, Arizona courts have
9 traditionally limited this rule to railroad crossings and pathways
10 of which the company was, or should have been, aware.² See S. Pac.
11 Co. v. Bolen, 76 Ariz. 317, 264 P.2d 401, 407-08 (1953); Barry, 166
12 P.2d at 828. In Bolen, the Supreme Court of Arizona reversed a
13 jury verdict for the plaintiff, because the jury was improperly
14 instructed on the railroad company's duty of care. Bolen, 264 P.2d
15 at 408. The court noted the classic formulation of the standard of
16 care-- "reasonable care under all the circumstances"-- and
17 explained that for a railroad company, one circumstance to be
18 considered is the probability of a person's presence on the tracks
19 at the time of injury. Id. Accordingly, the court held that a
20 railroad company owes a duty of care toward a trespasser when the

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22 ² In a few cases, trespassers who were injured after illegally
23 hitching rides have argued that liability under section 334 should
24 extend beyond railroad crossings to include the train cars they
25 surreptitiously boarded. Federal courts applying Arizona law have
26 taken guidance from comment d to section 334, and rejected these
27 arguments. See Torres, 584 F.2d at 903 ("There is no indication in
28 the record that anyone has ever hitched a ride on this particular car
before, nor that any trespasser had at any previous occasion boarded
any freight car at or near this precise location.") (emphasis added);
Delgado, 763 F. Supp. at 1515 ("If trains stop at various locations
throughout the Yuma yard, intrusions upon all of those areas indicate
that trespassers roam at large over the Yuma yard.").

1 presence of persons on the tracks is to be reasonably anticipated--
2 in other words, at railroad crossings or other commonly used
3 footways. Id. at 408-09.

4 A person's presence in a railroad crossing, however, does not
5 impose a duty of care if they were lying down in the crossing
6 instead of traversing the tracks. In a case with facts remarkably
7 similar to the instant case, the Supreme Court of Arizona affirmed
8 a jury verdict finding that the defendant railroad company was not
9 liable for the death of a pedestrian sleeping on the tracks. See
10 Barry, 166 P.2d at 826-30. The decedent was crossing the tracks at
11 or near a commonly used footpath while intoxicated. Id. at 827.
12 In so doing, he either stumbled or laid down, and ultimately fell
13 asleep on the tracks. Id. Although he was killed at or near the
14 pathway, the court sardonically observed the lack of evidence
15 showing a "local custom by residents of the neighborhood or the
16 general public to use the track for a bed at night." Id. at 828.
17 The court concluded that the railroad company, while it may be
18 expected to anticipate the presence of pedestrians walking across
19 the pathway, was under no duty to discover those lying prostrate
20 within it. Id. at 829.

21 In its motion for summary judgment, Defendant argues that
22 there are no triable facts upon which the Court can find liability
23 under section 334, because (1) Plaintiff cannot prove that he was
24 injured in a pathway regularly used to traverse the tracks, and (2)
25 Defendant could not have reasonably anticipated Plaintiff's
26 presence due to his recumbent pose. Mot. (doc. # 15) at 9.

27 In response, Plaintiff only contends that there were pathways
28 in the general area of the accident of which Defendant knew, or

1 should have known. Response (doc. # 17). Even if this were true,
2 the most important question remains unanswered. Was Plaintiff
3 actually injured in such a pathway? Although he claims to have
4 crossed the tracks using these pathways in the past, Plaintiff has
5 adduced no evidence that he was injured in one on the night in
6 question. See PSOF, Ex. 1 ¶¶ 6-9. Furthermore, it seems that he
7 cannot offer his own testimony on the matter, because he has no
8 recollection of the accident or the events leading up to it. See
9 DSOF, Ex. D at 85:23-86:4, 88:1-5, 92:23-93:1.

10 For the foregoing reasons alone, Plaintiff cannot survive
11 summary judgment on the issue of liability based on section 334.
12 Assuming arguendo that Plaintiff had produced evidence that he was
13 injured in a pathway, he would still fail because there is no
14 indication that Defendant breached a duty of care toward him.
15 Plaintiff must at least raise a question as to the reasonableness
16 of Defendant's conduct. Instead, he only argues that "[w]hether
17 [Defendant's employees] saw Plaintiff prior to the accident is a
18 question of fact for the trier of fact to determine."³ Response
19 (doc. # 17) at 5:8-9. Even if the train crew did see him-- a fact
20 which Defendant does not appear to deny⁴-- Plaintiff does not
21 explain how they were negligent. By his own account, the train
22 crew began emergency breaking procedures "[a]s soon as they
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24 ³ Plaintiff actually raises this argument in an effort to
25 establish liability under section 336 of the Restatement (Second) of
26 Torts. See Response (doc. # 17) at 5. However, because he maintains
27 that section 334 also provides a basis for liability, the Court will
28 construe this as an argument that Defendant breached its duty of care
toward Plaintiff-- whatever the basis for that duty may be.

⁴ See Reply (doc. # 20) at 8:17-21.

1 observed it was a person on the tracks." PSOF ¶ 5; Id., Ex. 2. No
2 rational trier of fact could conclude from these facts that
3 Defendant breached a duty of care toward Plaintiff, and therefore,
4 summary judgment for Defendant is inescapable on the issue of
5 liability based on section 334 of the Restatement.

6 **B. Liability Under Restatement (Second) of Torts § 336**

7 Section 336 of the Restatement (Second) of Torts provides
8 that:

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

13 Restatement (Second) of Torts § 336 (1965). According to the
14 American Law Institute, this section simply restates the well-known
15 rule that a landowner has a duty to avoid willful or wanton injury
16 to persons of whose presence he is, or should be, aware. See id.,
17 special note; id., cmt. c (landowner's duty of care arises from
18 "his knowledge of the presence of the trespasser as a man and not
19 as a trespasser").

20 As discussed in Part III.A, supra, Plaintiff argues that
21 Defendant's employees saw him prior to the accident. However, he
22 fails to explain how their subsequent conduct fell below any
23 standard of care. Plaintiff's statement of facts, apparently
24 drawing from the incident report prepared by the Tempe Police
25 Department, merely indicates that:

26 Prior to impact, [Defendant's employees] observed what
27 looked like a pile of clothes on the track in front of
28 them. As they continued, [they] became aware that it was
a person. As soon as they observed it was a person on
the tracks, they began emergency breaking procedures.

1 Response (doc. # 17) at 2; PSOF ¶ 5; id., Ex. 2. Plaintiff
2 presents no evidence even remotely suggesting that Defendant's
3 employees were willful or wanton in injuring him, or that they
4 failed to exercise reasonable care for his safety at any time. For
5 example, he does not point to any facts showing that the engineer
6 failed to keep the engine under control at any time prior to the
7 accident. In fact, his admission that the crew applied emergency
8 breaking procedures as soon as they observed his presence on the
9 tracks tends to show that reasonable care was taken. Furthermore,
10 there is no indication that Plaintiff contests the facts contained
11 in the incident report. Because there are no facts from which a
12 rational trier of fact could find liability based on section 336 of
13 the Restatement (Second) of Torts, the Court must grant Defendant's
14 motion for summary judgment.

15 Finally, the Court is mindful that the discovery deadline has
16 not yet passed in this case, and that "[o]rdinarily summary
17 judgment should not be granted where there are relevant facts yet
18 to be discovered." See Order (doc. # 11); Order (doc. # 22); see
19 also Taylor v. Sentry Life Ins. Co., 729 F.2d 652, 656 (9th Cir.
20 1984) (citation omitted). However, it is the responsibility of the
21 nonmoving party to show the trial court what facts he would hope to
22 discover to raise a genuine issue of material fact. Taylor, 729
23 F.2d at 656 (citation omitted). This is normally achieved by
24 bringing a motion for continuance pursuant to Federal Rule of Civil
25 Procedure 56(f). Because Plaintiff has not made such a request,
26 and, as the record reflects, has not pursued any significant
27 discovery to date, the Court can only conclude that he was content
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1 to rely on the facts currently before the Court.⁵ Therefore, the
2 Court finds it entirely appropriate at this time to grant
3 Defendant's motion for summary judgment.

4 **IV. CONCLUSION**

5 In light of the forgoing analysis,
6 IT IS ORDERED that Defendant's motion for summary judgment
7 (doc. # 15) is GRANTED.

8 IT IS FURTHER ORDERED directing the Clerk of Court to enter
9 judgment in favor of Defendant and terminate this case.

10 DATED this 10th day of January, 2006.

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17 Copies to counsel of record

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27 ⁵ For reasons not revealed to the Court, Plaintiff's counsel had
28 noticed the depositions of the two members of Defendant's train crew,
but later cancelled them. See Mot. (doc. # 15) at 2:16-17.