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## Papadopoulos v. Target: Finally Melting Away the Century-Old Natural Accumulation Standard in Massachusetts

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# **PAPADOPOULOS V. TARGET: FINALLY MELTING AWAY THE CENTURY-OLD NATURAL ACCUMULATION STANDARD IN MASSACHUSETTS**

## **I. INTRODUCTION**

Most jurisdictions recognize a duty on the part of landowners to keep their premises safe for entrants; however, certain issues surrounding snow and ice removal have caused some jurisdictions to re-evaluate their standards.<sup>1</sup> Premises liability litigation in states that experience snowfall during their winter seasons often involves the property owner's duty to keep premises clear of snow and ice.<sup>2</sup> Even though most courts have held that a landlord owes a duty to entrants to maintain safe premises, some jurisdictions, such as Illinois and Ohio, bar recovery when a plaintiff's injury arises from the natural accumulation of snow and ice.<sup>3</sup>

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<sup>1</sup> See *Budzko v. One City Ctr. Assocs.*, 767 A.2d 310, 315 (Me. 2001) (recognizing duty of landowners to keep premises free of snow and ice); see also Vitauts M. Gulbis, Annotation, *Modern Status of Rules Conditioning Landowner's Liability Upon Status of Injured Party As Invitee, Licensee, or Trespasser*, 22 A.L.R. 4th 294, § 2(a) (1983) (citing foreseeability of injury and landowner's negligence as pertinent elements). Most jurisdictions have done away with the common law distinction of entrant status in assigning a landowner's duty to maintain safe premises. Gulbis, *supra*, at § 2(a). Some states have found it appropriate to enact statutes to define the standard of care landowners owe occupants or classes of entrants. Gulbis, *supra*, at § 2(b). But see *Krywin v. Chi. Transit Auth.*, 938 N.E.2d 440, 450 (Ill. 2010) (holding landowners have no duty to remove natural accumulations of snow and ice).

<sup>2</sup> See *Nowak v. Coghill*, 695 N.E.2d 532, 537 (Ill. App. Ct. 1998) (laying out landowner's duties regarding snow and ice in Illinois). While a landowner does not have a duty to remove snow or ice when it is a natural accumulation, if the landowner undertakes to remove the snow or ice and someone is injured as a result, the landowner may be liable. *Id.*; see also Gregory G. Sarno, Annotation, *Liability for Injuries in Connection with Ice or Snow on Nonresidential Premises*, 95 A.L.R.3d 15, § 2(a) (1979) (describing lack of uniformity among courts regarding owners' duty to remove snow).

<sup>3</sup> See RESTATEMENT (SECOND) OF TORTS § 343 (1965). Section 343 states:

- A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
  - (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
  - (c) fails to exercise reasonable care to protect them against the danger.

Plaintiffs in jurisdictions that apply the natural accumulation rule, which bars recovery for injuries caused by snow and ice that have accumulated naturally, are confronted with many obstacles when bringing their claims, specifically overcoming the burden of proof that the landowner had a duty to maintain safe premises.<sup>4</sup> Though this strict standard once prevented many Massachusetts plaintiffs from recovering for injuries sustained due to snowy or icy conditions, Massachusetts has abandoned the natural accumulation standard in favor of the more plaintiff-friendly general premises liability standard.<sup>5</sup> In 2010, the Massachusetts Supreme Judicial Court decided *Papadopoulos v. Target Corp.*,<sup>6</sup> signifying the end of the centuries' old natural accumulation standard in Massachusetts.<sup>7</sup>

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*Id.*; see also *Krywin*, 938 N.E.2d at 450 (upholding natural accumulation standard in Illinois); *Moore v. Kroger Co.*, No. 10AP-431, 2010 WL 4793385, at \*8 (Ohio Ct. App. Nov. 23, 2010) (affirming lower court's recognition of natural accumulation standard in Ohio); Jennifer Williams, Note, *Budzko v. One City Center Associates Limited Partnership: Maine's Unique Approach to Business Owners' Duty to Remove Ice and Snow*, 55 ME. L. REV. 517, 525 (2003) (discussing landowners' general lack of duty to remove snow and ice). Where there is a natural accumulation of snow and ice and no other defect to the property that could have contributed to the injury, the landowner is not liable for injuries sustained on his or her property. See Williams, *supra*, at 525.

<sup>4</sup> See *Graf v. St. Luke's Evangelical Lutheran Church*, 625 N.E.2d 851, 854-56 (Ill. App. Ct. 1993) (establishing requirements for recovering under natural accumulation standard in Illinois). A plaintiff can recover from a slip and fall on snow and ice if she proves that the accumulation was artificial or unnatural or there was a defect in the premises that created the unsafe condition. *Id.* at 854-55; see also Michael J. Polelle, *Is the Natural Accumulation Rule All Wet?*, 26 LOY. U. CHI. L.J. 631, 641-42 (1995) (differentiating between natural and unnatural accumulation). In jurisdictions that apply the natural accumulation rule, a plaintiff attempting to recover for injuries resulting from snow and ice must prove that the snow or ice was an unnatural accumulation. Polelle, *supra*, at 641-42; see also 65A C.J.S. *Negligence* § 681 (2012) (qualifying duties of landowner to remove snow and ice). Because snow and ice is considered to "be among the normal hazards of life," landowners have no duty to remove natural snow and ice accumulation from their premises. 65A C.J.S. *Negligence* § 681. However, where unnatural accumulations of snow or ice exist, there is a duty on the part of the landowner to remove it. *Id.*

<sup>5</sup> See Matthew C. Welnicki, *The Abolition of the "Natural" Accumulation Defense in Snow and Ice Cases: An Overview of Papadopoulos v. Target*, 55 BOS. B.J. 6, 6-8 (2011) (discussing shift in standard for snow and ice removal). The Massachusetts Supreme Judicial Court rejected the centuries-old standard protecting landowners from liability for injuries on their property due to natural accumulation of snow and ice. *Id.*

<sup>6</sup> 930 N.E.2d 142 (Mass. 2010).

<sup>7</sup> See *id.* at 156 (abandoning natural accumulation standard). To quote the *Papadopoulos* opinion:

We now will apply to hazards arising from snow and ice the same obligation that a property owner owes to lawful visitors as to all other hazards: a duty to "act as a reasonable person under all of the circumstances including the likelihood of injury to others, the probable seriousness of such injuries, and

Premises liability includes a duty of reasonable care to all entrants and has its roots in the latter half of the twentieth century when most jurisdictions abandoned the tripartite system of apportioning liability to entrants based on their relationship to the landowner.<sup>8</sup> Despite the complexities of enforcing the previous natural accumulation standard, the new standard has some landowners concerned over the extent of the duty they now owe to entrants and how this duty might affect them financially, specifically in terms of rising insurance needs and premiums.<sup>9</sup> The natural accumulation standard stands in stark contrast to the needs of society in terms of industrialization and urbanization, which has resulted in a lesser demand for landowner protection.<sup>10</sup> Although the *Papadopoulos* decision could promote increased litigation for snow and ice injuries, it should not come as a surprise to Massachusetts courts considering the standards that are already in place regarding premises liability and snow and ice removal.<sup>11</sup> This new standard should not be viewed as an increased burden

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the burden of reducing or avoiding the risk.”

*Id.* at 154 (quoting *Young v. Garwacki*, 402 N.E.2d 1045, 1049 (Mass. 1980)).

<sup>8</sup> See *Gulbis*, *supra* note 1, at § 2(a) (defining new duty of reasonable care for premises liability). The common law standard identifies invitees, licensees, and trespassers as the three types of entrants and describes the duty of care to each as being “accordingly graduated.” *Id.*; see also Robert S. Driscoll, Note, *The Law of Premises Liability in America: Its Past, Present, and Some Considerations for Its Future*, 82 NOTRE DAME L. REV. 881, 881-91 (2006) (discussing movement away from tripartite system in United States). A duty of reasonable care is based on negligence; therefore, a landowner who breaches a duty of care to keep their premises safe for entrants is liable for any injuries that result. See generally RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARMS § 3 (2010).

<sup>9</sup> See *Watson v. J.C. Penney Co., Inc.*, 605 N.E.2d 723, 727 (Ill. App. Ct. 1992) (Knecht, J., dissenting) (disagreeing with majority because natural accumulation concept vague and confusing); see also *Papadopoulos*, 930 N.E.2d at 153-54 (discussing difficulty of distinguishing between natural and unnatural accumulation). The *Papadopoulos* court offered a few reference points for determining the appropriate time for snow removal and how much snow should be removed. *Papadopoulos*, 930 N.E.2d at 154. Furthermore, the court states that the new standard “does not make a property owner an insurer of its property.” *Id.*; see also Stephen D. Sugarman, *A Century of Change in Personal Injury Law*, 88 CALIF. L. REV. 2403, 2412 (2000) (attributing motor vehicle and commercial liability insurance increases to tort litigation surge); Welnicki, *supra* note 5, at 7-8 (addressing Massachusetts Supreme Judicial Court’s regarding complexity of “natural” or “unnatural” distinction).

<sup>10</sup> See generally Donald F. Burke, Jr., *Slipping Through the Cracks: The Shoddy State of New Jersey Sidewalk Liability Law Cries Out for Repair*, 36 SETON HALL LEGIS. J. 225, 250 (2012) (differentiating need for landowner protection in rural communities versus urban communities).

<sup>11</sup> See *infra* note 54 and accompanying text (listing ordinances in Massachusetts that required snow and ice removal before *Papadopoulos*); see also MASS. GEN. LAWS ch. 84, § 17 (2010) (protecting cities and towns in Massachusetts from liability for snow and ice injuries); 105 MASS. CODE REGS. 410.452 (2013) (listing requirements for human habitation in State sanitary code). “[T]he occupant is responsible for maintaining free of snow and ice, the means of egress under

on landowners or a negative impact on the legal system; rather, for those who brave the dangers of our harsh New England winters, it is not only good policy, but is consistent with premises liability laws in Massachusetts and throughout New England.<sup>12</sup>

## II. THE SNOWSTORM THAT STARTED IT ALL

In December of 2002, Emanuel Papadopoulos was visiting the Target department store at the Liberty Tree Mall in Danvers shortly after a large snowstorm had passed through Massachusetts.<sup>13</sup> While walking to his car from Target, Mr. Papadopoulos slipped on a patch of ice and injured his hip.<sup>14</sup> Mr. Papadopoulos brought suit against Target, but despite the legitimacy of his claim and large amount of damages he suffered, the trial court judge granted summary judgment to the defendant, Target, on all claims.<sup>15</sup> The judge, relying on then existing Massachusetts case law, determined that the ice was a natural accumulation based on the likelihood that the snow had formed after running off from the snow pile and refreezing on the pavement, and therefore, any proof of negligence was

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his or her exclusive use and control.” 105 MASS. CODE REGS. 410.452; *see also* *Marlatt v. Lubrizol Advanced Materials Inc.*, No. CIV. 09-10647-PBS, 2011 WL 1344460, at \*3 (Mass. Dist. Ct. Feb. 14, 2011) (recommending Supreme Judicial Court deny defendants motion for summary judgment). In *Marlatt*, the plaintiff slipped and fell on icy steps at the defendant’s plant during a heavy snowstorm, despite arguments by the defendant that it had been clearing the steps all morning. *Marlatt*, 2011 WL 1344460, at \*1-2. The magistrate judge recommended that the Supreme Judicial Court deny the defendant’s motion for summary judgment on the grounds that the jury should decide whether or not defendant breached its duty to the plaintiff in light of *Papadopoulos*. *Id.* at \*2. This new standard should be no surprise for landowners since State regulations have long required property owners to remove snow and ice from means of access and egress at all times. *See generally* Brian MacQuarrie, *Snow Removal Law May Face Test*, BOS. GLOBE, Dec. 25, 2010, [http://www.boston.com/news/local/massachusetts/articles/2010/12/25/shoveling\\_ruling\\_may\\_face\\_its\\_1st\\_major\\_test/](http://www.boston.com/news/local/massachusetts/articles/2010/12/25/shoveling_ruling_may_face_its_1st_major_test/) (highlighting concerns among Massachusetts residents and lawyers regarding new standard).

<sup>12</sup> *See Papadopoulos*, 930 N.E.2d at 156 (discussing confusion of natural accumulation and welcoming change). The SJC reasoned that the natural accumulation standard created too much confusion because it was difficult to distinguish between natural and unnatural accumulation. *Id.* The court also recognized that there were already state ordinances in place that required snow and ice removal. *Id.*

<sup>13</sup> *See id.* at 144. After an earlier snowfall, the snowplows attempted to push as much snow as possible on the medians. *Id.* However, they left some snow on the ground by the medians. *Id.*

<sup>14</sup> *See id.* (describing events leading up to incident). Mr. Papadopoulos had walked by the snow pile on his way into Target but failed to notice the pieces of snow and ice that had fallen from the snow bank on the median and accumulated on the pavement. *See id.*

<sup>15</sup> *See id.* (clarifying reasons for granting defendant’s motions for summary judgment). The trial court judge concluded that the ice was the result of a “natural accumulation.” *Id.* at 144. As such, plaintiff could not prevail, despite his strong argument of defendant’s negligence. *Id.* at 145.

irrelevant.<sup>16</sup> On appeal, the Massachusetts Supreme Judicial Court (“SJC”) decided it was time to revisit and reconsider the viability of this centuries-old standard for apportioning liability for injuries resulting from the accumulation of snow and ice.<sup>17</sup>

The SJC reversed the lower court’s decision and granted Mr. Papadopoulos relief by applying the new standard retroactively.<sup>18</sup> This ruling appears to leave the landowner with a heightened responsibility to all entrants; however, the court argued that this new standard would not create any undue burden on the landowner.<sup>19</sup> The SJC also refused to recognize

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<sup>16</sup> See *Papadopoulos v. Target Corp.*, 903 N.E.2d 1144, 1144 (Mass. App. Ct. 2009) (unpublished table decision) (relying on precedent in determining whether accumulation was natural); see also *Sullivan v. Town of Brookline*, 626 N.E.2d 870, 872 (Mass. 1994) (describing plaintiff’s burden in proving an unnatural accumulation existed). In *Sullivan*, the plaintiff slipped on an icy ramp that was under the care and control of the town of Brookline. *Sullivan*, 626 N.E.2d at 871-72. The plaintiff was unable to prove by a preponderance of the evidence that the town’s employees created the hazardous condition when they shoveled the ramp. *Id.* at 872. Before *Papadopoulos*, the existing case law did not force property owners “to remove or warn of ‘natural’ accumulations of snow and ice.” Welnicki, *supra* note 5, at 6.

<sup>17</sup> *Papadopoulos*, 930 N.E.2d at 144 (revisiting natural accumulation standard and accepting reasonableness standard). The natural accumulation standard included the “open and obvious” doctrine, which effectively apportioned liability on the injured plaintiff for failing to recognize an open and obvious danger. See Welnicki, *supra* note 5, at 7-8 (emphasizing significance of “open and obvious” doctrine as integral to natural accumulation standard); see also Sara Falkinham, *Torts—Premises Liability—The “Open and Obvious” Defense is No Longer a Complete Bar to Plaintiff Recovery*, 64 MISS. L.J. 241, 244-45 (1994). The “open and obvious” doctrine was created as a landowner’s defense against injuries arising out of premise liability claims. Falkinham, *supra*, at 244-45. The purpose of this doctrine is to show that the plaintiff was equally negligent when confronting “an obvious danger created by the owner.” *Id.*; Audra Annette Arndt, Comment, *The Evolution of Michigan’s Open and Obvious Doctrine in Premises Liability and Recreational Activities Cases and the Lessening of Liability for Defendants*, 81 U. DET. MERCY L. REV. 191, 191 (2004) (defining open and obvious doctrine). The doctrine describes when the duty arises to warn of hazards on property and when the landowner should be liable for hazards that are not “open and obvious to a reasonable person.” Arndt, *supra*, at 191.

<sup>18</sup> See *Papadopoulos*, 930 N.E.2d at 155 (announcing holding of case). Despite the defendant’s urging that this holding be applied prospectively, the court followed the reasoning of a previous SJC decision, *Halley v. Birbiglia*, which stated that “[i]n general, changes in the common law brought about by judicial decisions are given retroactive effect.” *Id.* (quoting *Halley v. Birbiglia*, 458 N.E.2d 710, 713 (Mass. 1983)).

<sup>19</sup> See *Papadopoulos*, 930 N.E.2d at 154 (reasoning burden placed on landowner is minimal). The traditional premises liability standards provide the fact finder with the ability to balance the feasibility of snow and ice removal against the expense imposed upon the landowner, as well as the likelihood of potential injury. *Id.* Based on a cost-benefit analysis standard, a landowner should be able to determine the degree of responsibility to remove or warn of hazards on their property to potential entrants. *Id.*; see also Mark J. Welter, Comment, *Premises Liability: A Proposal to Abrogate the Status Distinctions of ‘Trespasser,’ ‘Licensee’ and ‘Invitee’ as Determinative of a Land Occupier’s Duty of Care Owed to an Entrant*, 33 S.D. L. REV. 66, 86 (1987/1988) (describing cost-benefit analysis). The level of property maintenance that a landowner must provide is based on factors such as foreseeability of harm, magnitude of risk of injury, benefits of maintaining the property, burden placed on the landowner to maintain his or

the “open and obvious” doctrine as a defense in slip and fall cases resulting from snow and ice accumulation because a reasonable person in Massachusetts would conclude it more practical to risk injury on snow and ice as opposed to refusing to leave the home.<sup>20</sup> The SJC also denied the accuracy of the second justification for the natural accumulation rule: removal of natural snow and ice is impractical in a climate that experiences frequent snowfall and icy conditions.<sup>21</sup> Massachusetts was the last state to abandon this standard in New England and has thus created a uniform standard of premises liability on the northern East Coast.<sup>22</sup>

Although Massachusetts has taken a bold step in the direction of a more plaintiff-friendly premise liability standard, Illinois continues to preserve the natural accumulation standard in both their legal and legislative systems.<sup>23</sup> Many states continue to recognize the “open and obvious” doctrine as a defense to injuries involving premises liability, and some states allow landowners to use this doctrine to defend against injuries

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her property, and cost of the maintenance. *See Welter, supra*, at 86.

<sup>20</sup> *See Papadopoulos*, 930 N.E.2d at 151 (discounting “open and obvious” doctrine as viable defense); *see also Dos Santos v. Coleta*, 957 N.E.2d 1125, 1128 (Mass. App. Ct. 2011) (asserting *Papadopoulos*’ open and obvious reasoning is legitimate)

<sup>21</sup> *See Papadopoulos*, 930 N.E.2d at 151-52 (arguing against impracticality justification to natural accumulation rule); *see also Fuller v. Hous. Auth. of Providence*, 279 A.2d 438, 440-41 (R.I. 1971) (explaining disagreement with natural accumulation standard in Massachusetts pre-*Papadopoulos*). The Rhode Island Supreme Court refused to accept the Massachusetts courts’ conclusion that snow and ice removal is impractical in New England, stating grounds for their disagreement:

We believe that today a landlord, armed with an ample supply of salt, sand, scrapers, shovels and even perhaps a snow blower, can acquit himself quite admirably as he takes to the common passageways to do battle with the fallen snow, the sun-melted snow now turned to ice, or the frozen rain.

*Fuller*, 270 A.2d at 440. *But see Dailey v. Mayo Family Ltd. P’ship*, 684 N.E.2d 746, 749 (Ohio Ct. App. 1996) (listing impracticality and foreseeability as reasons supporting natural accumulation standard).

<sup>22</sup> *See Papadopoulos*, 930 N.E.2d at 151 (noting every other New England States rejected Massachusetts Rule). Until this decision, Massachusetts remained the only state in New England that maintained a seasonal exception for premises liability standards. *See id.*

<sup>23</sup> *See 745 ILL. COMP. STAT. ANN. 75/2* (West 1993) (offering immunity to property owners who attempt to keep premises free of snow and ice); *745 ILL. COMP. STAT. ANN. 10/2-101* (West 1993) (creating legislative protection for governmental entities and tort immunity). The Illinois Tort Immunity Act protects government entities from liability for injuries caused by natural accumulation of snow and ice. *745 ILL. COMP. STAT. ANN. 10/2-101*; *see also Krywin v. Chi. Transit Auth.*, 938 N.E.2d 440, 452 (Ill. 2010) (denying relief for injury caused by natural accumulation of snow). The Supreme Court of Illinois denied a passenger relief after she slipped on snow while exiting a train, holding that the natural accumulation rule protects common carriers. *Krywin*, 938 N.E.2d at 452.

caused by snow and ice.<sup>24</sup> Even Connecticut and now Massachusetts, both reasonable care standard states, maintain some leniency for landowners depending upon the parties' notice of hazardous conditions, the landowner's control over the property, and weather related factors.<sup>25</sup> The purpose of having exceptions to a reasonable care standard for premises liability is to avoid imposing a duty on landowners to be insurers of their property, as well as to ensure that the standard does not go beyond the ordinary and predictable duty expected of a landowner.<sup>26</sup>

### III. THE BEGINNING AND THE END FOR THE NATURAL ACCUMULATION STANDARD

In order to understand how the natural accumulation rule developed, it is important to understand the history of premises liability as it was adopted from England into our common law system in the United States.<sup>27</sup> Common law described the relationship between the landowner

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<sup>24</sup> See *Joyce v. Rubin*, 642 N.W.2d 360, 368 (Mich. Ct. App. 2002) (providing immunity to defendant under open and obvious defense); *Dunbar v. Denny's Rest.*, No. 86385, 2006 WL 668544, at \*3 (Ohio Ct. App. Mar. 16, 2006) (holding slush left on handicap ramp open and obvious danger and barred plaintiff's recovery); see also *Arndt*, *supra* note 17, at 217-18 (explaining popularity of open and obvious defense). The open and obvious defense is becoming increasingly utilized in Michigan premises liability lawsuits, thus resulting in fewer slip-and-fall cases being resolved in the plaintiff's favor. *Arndt*, *supra* note 17, at 217-18.

<sup>25</sup> See *Levey v. Wildwood Realty Assocs.*, 958 N.E.2d 1182, 1182 (Mass. App. Ct. 2012) (unpublished table decision) (granting defendant landowner's summary judgment on basis of control). In *Levey*, the plaintiff slipped on ice in the parking lot owned by the defendant, but because there was no evidence that the defendant "monitored the parking lot, provided notice of intent to enter the premises, or otherwise knew of an unsafe condition and had the opportunity and sufficient control to eliminate it," the defendant owed no duty of care to the plaintiff. *Id.*; see also *Douglas W. Hammond*, *1995 Connecticut Tort Law Review*, 70 CONN. B.J. 161, 162-63 (1996) (describing exceptions for defendant landowners under Connecticut Rule). Under the "storm in progress" doctrine, a property owner may await the end of a storm where removal of snow and ice is not feasible due to consistent and continuous accumulation, thus making it difficult for plaintiffs to recover for injuries sustained during a snowstorm. *Hammond*, *supra*, at 162-63; see also *Williams*, *supra* note 3, at 521-25 (describing "storm in progress" doctrine). The "storm in progress" doctrine provides a landowner with reasonable time after a storm to remove snow and ice from his or her property. *Williams*, *supra* note 3, at 522.

<sup>26</sup> See *Williams*, *supra* note 3, at 522-25 (defining and laying out rationale behind "storm in progress" doctrine). The "storm in progress" doctrine protects defendants in unusual circumstances where they cannot feasibly remove snow and ice. *Id.* at 524-25. While the courts have been unable to explicitly define these unusual circumstances, it is nonetheless unlikely that an exception based on unusual circumstances will grant a defendant protection from liability where his or her property is a public place with heavy foot traffic. See *id.* at 525.

<sup>27</sup> See *Papadopoulos*, 930 N.E.2d at 145 (noting importance of history behind natural accumulation rule); see also *Driscoll*, *supra* note 8, at 883-85 (describing evolution of premises liability). The common law system of premises liability was adopted from English common law and establishes the landowner's duty to the entrant based on the nature of the relationship



and the entrant in terms of a tripartite system made up of three classes of entrants—licensee, invitee, and trespasser—with their status determining the duty of care they would receive from the landowner.<sup>28</sup> During the mid-twentieth century, the tripartite system began to erode in the United States after the California Supreme Court abandoned the classification system in *Rowland v. Christian*,<sup>29</sup> upon determining that the California code governing premises liability between a landlord and a tenant called for a duty of reasonable care.<sup>30</sup> Following *Rowland*, there was a national movement among courts to abolish the tripartite system.<sup>31</sup> Although many

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between the two, i.e., landlord-tenant. Driscoll, *supra* note 8, at 883.

<sup>28</sup> See *Papadopoulos*, 930 N.E.2d at 145-46 (differentiating classes of entrants and duty of care owed to each). During the first half of the twentieth century, the landowner's responsibility for injuries sustained on his property was invariably related to the status of the entrant. *Id.* at 145. If the entrant was a tenant, the landowner owed no duty to maintain his property in a safe condition: "the lease was treated as a transfer of property, and the landlord was only potentially liable for failing to warn the tenant of hidden defects that the landlord was aware of at the time of the lease." *Id.* If the entrant was an invitee, "a person invited onto the property by the property owner," the landowner owed a duty of reasonable care to maintain the premises in a reasonably safe condition in light of such circumstances such as the "likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk." *Id.* at 145-46 (citing *Mounsey v. Ellard*, 297 N.E.2d 43, 52 (Mass. 1973)). If the entrant was a licensee, a person who enters the landowner's property for his own benefit or business, the landowner only owed a duty to "forbear from inflicting wilful or wanton injury on him." *Id.* at 146 (citing *Mounsey*, 297 N.E.2d at 45-46). If the plaintiff was a trespasser, the landowner's "only duty was to refrain from wanton and wilful misconduct." *Id.* (citing *Soule v. Mass. Elec. Co.*, 390 N.E.2d 716, 718 (Mass. 1979)).

<sup>29</sup> 443 P.2d 561 (Cal. 1968).

<sup>30</sup> See *id.* at 566-69 (providing reasons for abandoning entrant classification system). The *Rowland* court reasoned that the common law classification system was no longer fit for use in modern society, and that the classifications themselves did not "reflect the major factors which should determine whether immunity should be conferred upon the possessor of land." *Id.* at 567; see also CAL. CIV. CODE § 1714 (West 2009) (imposing general liability on all landowners to maintain safe premises); see also *Papadopoulos*, 930 N.E.2d at 146 (discussing period of "reconsideration and reform" in United States). The Code provides in relevant part:

Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself.

*Id.* The SJC abolished the tripartite system when it eradicated the differences in status of entrants and collapsed the classes of licensee and invitee, coupled with the application of the standard of reasonable care generally to most entrants. *Papadopoulos*, 930 N.E.2d at 146. However, the SJC still recognized that adult trespassers were not entitled to the same duty of care as other entrants. *Papadopoulos*, 930 N.E.2d at 146.

<sup>31</sup> See *Smith v. Arbaugh's Rest., Inc.*, 469 F.2d 97, 99-100 (D.C. Cir. 1972) (rejecting tripartite system); *Webb v. City of Sitka*, 561 P.2d 731, 732-34 (Alaska 1977) (same); *Pickard v. City of Honolulu*, 452 P.2d 445, 446 (Haw. 1969) (same); *Ouellette v. Blanchard*, 364 A.2d 631, 634 (N.H. 1976) (same); *Mariorenzi v. Joseph DiPonte, Inc.*, 333 A.2d 127, 133 (R.I. 1975)

courts have abandoned the tripartite system, most still recognize a landowner's right to exclude trespassers and, implicit in this right, a forfeiture of the duty of reasonable care to trespassers.<sup>32</sup> The natural accumulation standard has always been a notable exception to the reasonable care standard.<sup>33</sup>

Massachusetts became the first state to judicially recognize the natural accumulation standard in *Woods v. Naumkeag Steam Cotton Co.*,<sup>34</sup> holding that "there was no duty on the part of the [landlord] to the [tenant] to remove from the steps the ice and snow which naturally accumulated thereon."<sup>35</sup> In order for the plaintiff to recover for injuries sustained on

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(same); see also *Gallegos v. Phipps*, 779 P.2d 856, 862 (Colo. 1989) (criticizing attempts to reestablish tripartite system in Colorado); *Driscoll*, *supra* note 8, at 888-89 (listing courts that abandoned tripartite system during twentieth century). In 1986, Colorado attempted to reestablish the tripartite classification of entrants through the legislative system, specifically proposing section 13-21-115 of the Colorado Revised Statutes. *Gallegos*, 779 P.2d at 862. However, the Colorado Supreme Court struck it down on the grounds of equal protection because "[t]he effect of this classification scheme of duties is to impose on landowners a higher standard of care with respect to a licensee than an invitee." *Id.*

<sup>32</sup> See *Mounsey*, 297 N.E.2d at 51-52 (expressing early abstention from natural accumulation rule). In *Mounsey*, a police officer brought suit against defendants when he slipped on an accumulation of snow on the defendants' premises after he served them with a criminal summons. *Id.* at 44. The court held that regardless of the natural accumulation standard in Massachusetts, the property owner still owed a duty to maintain safe premises for all licensees who would foreseeably come onto the premises. *Id.* at 46-48. However, the court considered the reasoning of *Rowland* and determined that the licensee-invitee distinction was too complicated. *Id.* at 51. Instead, the court decided that "reasonable care in all the circumstances" was the appropriate standard to follow for premises liability. *Id.* at 52; see also *Tantimonico v. Allendale Mut. Ins. Co.*, 637 A.2d 1056, 1061-62 (R.I. 1994) (announcing Rhode Island's position on trespassers in premises liability cases). The Rhode Island Supreme Court overruled its previous stance by holding that a landowner does not owe a duty of reasonable care to trespassers. *Tantimonico*, 637 A.2d at 1061-62; *Marioenzi*, 333 A.2d at 133; see also *Driscoll*, *supra* note 8, at 884-85 (discussing exceptions for trespassers). Many courts recognize exceptions for trespassers in premises liability law. *Driscoll*, *supra* note 8, at 885. Most of these exceptions apply to situations where the "landowner knows or has reason to know that members of the public constantly trespass, knows or has reason to know of a specific trespasser on the land, or with trespassers who are children." *Id.*

<sup>33</sup> See *Williams*, *supra* note 3, at 525-26 (highlighting natural accumulation rule).

<sup>34</sup> 134 Mass. 357 (1883).

<sup>35</sup> *Id.* at 361 (ruling plaintiff foreclosed from recovery against landlord for injury caused by natural accumulation of ice). In *Woods*, the plaintiff brought suit against her landlord when she slipped on icy steps. *Id.* at 359. The appellate court reaffirmed the trial court's judgment in favor of the defendant landlord because the ice was a natural accumulation. *Id.* at 361; see also *Papadopoulos*, 930 N.E.2d at 147 (highlighting early distinctions in natural accumulation rule). When the courts first utilized the natural accumulation rule, only landlords were protected because the rule was meant to "determine whether the landlord had placed a dangerous obstruction in a common area." *Papadopoulos*, 930 N.E.2d at 147. The natural accumulation rule did not apply to invitees, "such as employees of a business, because a property owner owed a duty of reasonable care to invitees." *Id.*; see also *Swann v. Flatley*, 749 F.Supp. 338, 342 (D. Mass. 1990) (applying "Massachusetts Rule"); *Aylward v. McCloskey*, 587 N.E.2d 228, 230

snow or ice accumulation, he or she would have the burden of proving that the landowner could have easily removed an unnatural or artificial accumulation of snow or ice.<sup>36</sup> A natural accumulation is snow or ice that accumulates without any act or omission on the part of the landowner whereas an unnatural accumulation is the result of the landowner acting in such a way that creates the snow or ice accumulation.<sup>37</sup> Although the natural accumulation rule works to generally exonerate landowners from liability, many states maintain a different level of liability for common carriers, government entities, and business owners.<sup>38</sup> Even states that have

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(Mass. 1992) (extending natural accumulation rule to all landowners); Theodore Richgels, *Unnaturally Stubborn: Illinois' Reluctance in Krywin v. Chicago Transit Authority to Do Away With the Natural Accumulation Rule, and the Resulting Impact Upon the Duty of Common Carriers*, 31 N. ILL. U. L. REV. 613, 620 (2011) (recognizing *Woods v. Naumkaeg Steam Cotton Co.* as origin of natural accumulation standard). The natural accumulation rule was later extended to include the duty owed by municipalities to its citizens. Richgels, *supra*, at 620, 625-26. What later became known as the "Massachusetts Rule" grew to excuse all landowners from liability where the injury sustained on their property was the result of a natural accumulation of snow or ice. *Id.* at 621.

<sup>36</sup> See *Watkins v. Goodall*, 138 Mass. 533, 537 (1885) (affirming lower court's holding landlord liable for tenant's injuries in slip-and-fall). In *Watkins*, the plaintiff-tenant was able to recover against the defendant-landlord after slipping on an ice-covered walkway because the ice was caused by a broken pipe and was, therefore, an unnatural accumulation of ice. *Id.* at 536-37; see also Polelle, *supra* note 4, at 641-43 (discussing plaintiff's burden in proving unnatural accumulation). The natural versus unnatural distinction works to "exonerate landowners and business owners from liability caused by natural hazards." Polelle, *supra* note 4, at 641; see also Williams, *supra* note 3, at 525 (explaining reasons behind natural accumulation rule). It is the responsibility of the plaintiff to prove that something other than the usual conditions caused by severe weather was the result of the plaintiff's injury. Williams, *supra* note 3, at 525.

<sup>37</sup> See *Ordman v. Dacon Mgmt. Corp.*, 633 N.E.2d 1307, 1311-12 (Ill. App. Ct. 1994) (differentiating natural accumulation and unnatural accumulation regarding landowner action). The general rule is a landowner has no duty to remove a natural accumulation of snow or ice. *Id.* at 1310. "However, a duty may arise on the part of the [landowner], if the [landowner] voluntarily undertook the task of removing natural accumulations of ice or snow and did so negligently or if the [landowner] was responsible for an unnatural accumulation of ice or snow." *Id.*

<sup>38</sup> See *Krywin v. Chi. Transit Auth.*, 938 N.E.2d 440, 447 (Ill. 2010) (holding common carriers have no duty to remove natural accumulations of snow or ice); *Graham v. City of Chi.*, 178 N.E. 911, 913 (Ill. 1931) (stating municipalities owe no duty to remove natural accumulation of snow or ice); *Budzko v. One City Ctr. Assocs.*, 767 A.2d 310, 315 (Me. 2001) (reaffirming business owner's duty to maintain safe premises for customers). In *Krywin*, the plaintiff sued the Chicago Transit Authority (CTA) when she slipped on a natural accumulation of snow while alighting from the train to the platform. *Krywin*, 938 N.E.2d at 442. The Illinois Supreme Court held that the CTA did not have a duty to remove the natural accumulation of snow and ice from its platforms or to warn passengers of the snow and ice. *Id.* at 452. As a result, the CTA was not liable for plaintiff's injuries. *Id.* In *Graham*, the Illinois Supreme Court held that municipalities were not liable for injuries sustained on natural accumulations of snow or ice, but were liable when the accumulation of ice resulted from an overflow of water from an ice-skating rink. *Graham*, 178 N.E. at 912-13; see also Polelle, *supra* note 4, at 632-35 (discussing liability of government entities for natural accumulation injuries). When a government entity is a defendant in a natural accumulation case, some courts have exonerated the government entity using the

rejected the natural accumulation rule apply different standards of care for business owners, landlords, and government entities.<sup>39</sup> Illinois has specifically granted all residential landowners immunity from injuries sustained from natural accumulations of snow or ice through legislation.<sup>40</sup>

Many states that experience snow and ice during their winters do not apply the natural accumulation standard, instead requiring that landowners exercise a standard of reasonable care in removing accumulations of snow and ice.<sup>41</sup> This alternative is also known as the Connecticut Rule and has far more support than the natural accumulation

natural accumulation rule, while others have imposed a reasonable standard of care in certain situations. See Polelle, *supra* note 4, at 632-34. On the other hand, in *Budzko* the plaintiff slipped and fell while exiting One City Center because the steps had not been shoveled or sanded after an earlier snowstorm. *Budzko*, 767 A.2d at 312. The Supreme Judicial Court of Maine decided for the first time that the business owner owed a duty of reasonable care to its customers despite Maine's acceptance of the "storm in progress" doctrine. See *id.* at 314-15.

<sup>39</sup> See, e.g., *Pessagno v. Euclid Inv. Co.*, 112 F.2d 577, 579 (D.C. Cir. 1940) (requiring landowner exercise general duty of care for benefit of invitee); *Bittle v. Brunetti*, 750 P.2d 49, 59 (Colo. 1988) (holding municipality not liable for plaintiff's injuries); *Burns v. Boudwin*, 282 A.2d 620, 622 (Del. 1971) (holding Delaware municipality not liable for slip-and-fall on icy public sidewalk); *Williams v. Lincoln Tower Assocs.*, 566 N.E.2d 501, 506 (Ill. App. Ct. 1991) (holding landlord not liable for plaintiff's injury on icy parking lot); *Quinlivan v. Great Atl. & Pac. Tea Co., Inc.*, 235 N.W.2d 732, 744-45 (Mich. 1975) (holding business owner owed no duty where parking lot was leased by another company).

<sup>40</sup> See 745 ILL. COMP. STAT. ANN. 75/2 (West 1993) (offering immunity to all residential property owners in Illinois under Snow and Ice Removal Act).

Any owner, lessor, occupant or other person in charge of any residential property, or any agent of or other person engaged by any such party, who removes or attempts to remove snow or ice from sidewalks abutting the property shall not be liable for any personal injuries allegedly caused by the snowy or icy condition of the sidewalk resulting from his or her acts or omissions unless the alleged misconduct was willful or wanton.

*Id.*; see also Anne M. O'Brien, *Walking (With All Due Care) In A Winter Wonderland*, 17 DCBA BRIEF 10, 11 (2004) (discussing Illinois statute). "The Snow and Ice Removal Act ["Act"] offers qualified immunity to owners or occupants of residential property and their agents who make efforts to clear the sidewalks adjacent to the property." O'Brien, *supra*, at 12. The purpose of the act is to encourage landowners to clear their sidewalks. *Id.*

<sup>41</sup> See, e.g., *Lord v. Lencshire House, Ltd.*, 272 F.2d 557, 560 (D.C. Cir. 1959) (stating reasonable care standard applies when removing snow and ice); *Kopke v. AAA Warehouse Corp.*, 494 P.2d 1307, 1308-09 (Colo. App. 1972) (same); *Kraus v. Newton*, 558 A.2d 240, 242-43 (Conn. 1989) (same); *Budzko*, 767 A.2d at 315 (same); *Strong v. Shefelvland*, 81 N.W.2d 247, 253 (Minn. 1957) (same); see also Polelle, *supra* note 4, at 646-47 (reviewing standards adopted by most states). Forty states and the District of Columbia require that landlords exercise a duty of reasonable care toward their tenants, and thirty-four states and the District of Columbia require that business owners exercise reasonable care. Polelle, *supra* note 4, at 646-47. However, only nineteen states require that municipalities exercise a duty of reasonable care for natural accumulations on streets and sidewalks, while the remaining thirty-one states grant municipalities some form of immunity for natural accumulations. *Id.* at 647-48.

standard.<sup>42</sup> This rule is thought to be fair to both the landowner and the entrant because it takes into consideration the landowner's obligations to entrants, the burden of removing snow or ice, the relationship between the parties, the public policy implications, and general fairness.<sup>43</sup> Many states that recognize the Connecticut Rule have also adopted the "storm in progress" doctrine as a guideline for defining the extent of the landowner's duties.<sup>44</sup> The "storm in progress" doctrine is a bright-line rule that allows a landowner reasonable time after a storm to remove snow and ice and protects the landowner from liability for injuries sustained during a

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<sup>42</sup> See *Kraus*, 558 A.2d at 243 (establishing Connecticut's position on premises liability for snow and ice removal); *Reardon v. Shimelman*, 128 A. 705, 706-07 (Conn. 1925) (disagreeing with Massachusetts' natural accumulation rule in favor of reasonable care standard). The *Kraus* court held that "in the absence of unusual circumstances, a property owner, in fulfilling the duty owed to invitees upon his property to exercise reasonable diligence in removing dangerous accumulations of snow and ice, may await the end of a storm and a reasonable time thereafter before removing ice and snow from outside walks and steps." *Kraus*, 558 A.2d at 243; see also Douglas W. Hammond, *1995 Connecticut Tort Law Review*, 70 CONN. BUS. J. 161, 163-64 (1996) (extrapolating on Connecticut's treatment of slip-and-falls cases); Shad Miller, *2009 Survey of Rhode Island Law*, 15 ROGER WILLIAMS U. L. REV. 415, 417-18 (2010) (defining Connecticut Rule). The Connecticut Rule "provides that a landlord or business invitor owes a duty to a tenant or business invitee 'to use reasonable care to see that the common areas are kept reasonably safe from the dangers created by an accumulation of snow and ice which is attributed to purely natural causes.'" *Miller, supra*, at 417-18 (quoting *Berardis v. Louangxay*, 969 A.2d 1288, 1291-92 (R.I. 2009)).

<sup>43</sup> See *Berardis*, 969 A.2d at 1291-92 (reaffirming Rhode Island's acceptance of Connecticut Rule). The Connecticut Rule "does not depend on how . . . the snow and ice is characterized," but rather a balancing of several factors, such as fairness, public policy, and the defendant's burden to remove snow and ice. *Id.* at 1293; see also Mark S. Dennison, *Landlord's Liability for Injury Caused by Accumulation of Snow and Ice on Common Areas of Leased Premises*, 88 AM. JUR. 3D *Proof of Facts* 307, § 10 (2006) (describing landlord's burden under Connecticut Rule). The Connecticut Rule places the burden on a landlord to exercise reasonable care to prevent the occurrence of dangerous conditions in the common areas, regardless of whether the snow or ice is a natural accumulation. *Dennison, supra*, at § 10.

<sup>44</sup> See *Munsill v. United States*, 14 F. Supp. 2d 214, 222 (D.R.I. 1998) (adopting "storm in progress" doctrine); *Mattson v. St. Luke's Hosp. of St. Paul*, 89 N.W.2d 743, 745 (Minn. 1958) (recognizing "storm in progress" doctrine in Minnesota); *Olejniczak v. E.I. Du Pont De Nemours & Co.*, 998 F. Supp. 274, 280 (W.D.N.Y. 1998) (recognizing "storm in progress" doctrine); *Walker v. Mem'l Hosp.* 45 S.E.2d 898, 907 (Va. 1948) (recognizing "storm in progress" doctrine in Virginia). The *Munsill* court held that defendant owed no duty to clear snow before the end of a snowstorm. *Munsill*, 14 F. Supp. 2d at 222. Similarly, the *Olejniczak* court held that "[u]nder New York law, a party in possession or control of real property is afforded a reasonable time after the cessation of the storm or temperature fluctuations which created a dangerous condition to exercise due care in order to correct the situation." *Olejniczak*, 998 F. Supp. At 280; see also *Marlatt v. Lubrizol Advanced Materials Inc.*, No. 09-10647-PBS, 2011 WL 1344460, at \*7 (D. Mass. Feb. 14, 2011) (recommending Massachusetts courts follow the "storm in progress" doctrine); *Williams, supra* note 3, at 518 (discussing popularity of "storm in progress" doctrine as applies to business owners). A business owner should not attempt to clear snow as it is falling where it would be "unreasonable, inexpedient, impractical, and has the potential of erroneously turning the business owner into an insurer of invitee safety." *Williams, supra* note 3, at 518.

snowstorm.<sup>45</sup> Many states that follow the Connecticut Rule maintain separate requirements depending on the type of landowner, such as fewer requirements for municipalities and stricter requirements for landlords and business owners.<sup>46</sup> Still other states attempt to further limit the Connecticut Rule by adopting defensive measures to protect landowners through the application of the “open and obvious” doctrine.<sup>47</sup>

Other states, such as Michigan, recognize the “open and obvious” doctrine as a complete defense to injuries sustained on snow or ice accumulations regardless of whether the accumulation is natural or artificial.<sup>48</sup> The “open and obvious” doctrine works as a complete defense against claims of injuries sustained on premises that contain a danger,

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<sup>45</sup> See Williams, *supra* note 3, at 522-25 (explaining “storm in progress” doctrine); see also Connor Fallon, Note, *Premises Liability—Breaking News: It Snows in Massachusetts and Snow is Slippery. Why Massachusetts Should Adopt the Storm-in-Progress Rule*, 34 W. NEW ENG. L. REV. 579, 597 (2012) (illustrating “storm in progress” doctrine as bright-line rule). The “storm in progress” doctrine requires several factual determinations, such as when the snowfall actually ceases and whether the plaintiff slipped on “old” or “new” snow. Fallon, *supra*, at 598-99.

<sup>46</sup> See *Olejniczak*, 998 F. Supp. at 280 (addressing business owner’s liability as landlord). In New York, a business owner must keep premises in a “reasonably safe condition.” *Id.* However, in slip-and-falls on snow and ice, “the plaintiff must . . . show that the defendant had actual or constructive notice of the . . . condition” and that the landowner “failed to use reasonable care to remedy [it].” *Id.* at 277-78; see also Williams, *supra* note 3, at 519-21 (discussing due care required of business owners). A business owner’s duty to entrants is based on the status of the entrant while on the premises; the duty of reasonable care expected in maintaining safe premises; the absence of duty to ensure safety; and the foreseeability of injury, “both in terms of the invitor and invitee’s ability to foresee.” Williams, *supra* note 3, at 519-20; see also Polelle, *supra* note 4, at 647-48 (noting various governments’ obligations to remove snow and ice). Most states do not require due care for public entities or their employees and will grant public entities and employees immunity from tort liability. See Polelle, *supra* note 4, at 647-48.

<sup>47</sup> See Arndt, *supra* note 17, at 217-18 (describing popularity of “open and obvious” doctrine and landowner’s defense).

<sup>48</sup> See *Lugo v. Ameritech Corp.*, 629 N.W.2d 384, 386 (Mich. 2001) (announcing landmark decision in Michigan regarding “open and obvious” doctrine). The court reasoned, “the open and obvious doctrine should not be viewed as some type of ‘exception’ to the duty generally owed invitees, but rather as an integral part of the definition of that duty.” *Id.*; see also *Kenny v. Kaatz Funeral Home, Inc.*, 689 N.W.2d 737, 744 (Mich. Ct. App. 2004) (affirming “open and obvious” doctrine), *rev’d*, 697 N.W.2d 526 (Mich. 2005); cf. *Munoz v. BASF*, No. 260046, 2005 WL 1229657, at \*5-6 (Mich. Ct. App. May 24, 2005) (distinguishing *Kenny*). In *Munoz*, the plaintiff saw the snow and ice before she slipped in the parking lot, whereas in *Kenny*, the central issue was that the plaintiff did not see the black ice and, therefore, it was not open and obvious. *Munoz*, 2005 WL 1229657, at \*5-6. See generally Sarno, *supra* note 2, at § 3(a) (articulating landowner’s duty under open and obvious doctrine). When a non-obvious snow or ice hazard exists on his or her premises, or “if the hazard is open and obvious but special aspects exist,” a landowner owes a duty to the entrant and must exercise reasonable care to remove the hazard or warn the entrant of the hazard within a reasonable time of its accumulation. *Id.* If a hazard is not an open and obvious danger or does not fall within one of the special aspect categories, the landowner has reasonable time to remove the hazard. *Id.*

which should be obvious and recognizable to a reasonable person.<sup>49</sup> The one exception to the “open and obvious” doctrine is when the danger possesses special aspects, thus making the defense inoperable.<sup>50</sup> The “open and obvious” doctrine only tests the plaintiff’s objective reasonableness in recognizing, or failing to recognize, an obvious danger upon a casual inspection of the premises and does not take into consideration any subjective knowledge that the plaintiff may have possessed at the time of the injury.<sup>51</sup> This doctrine has attracted significant criticism by scholars and judges due to the confusion it has caused as a result of vague standards in its application, lack of clear instruction from the courts, and inconsistent rulings within jurisdictions that use it.<sup>52</sup>

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<sup>49</sup> See Arndt, *supra* note 17, at 193-96 (describing use of “open and obvious” doctrine). The “open and obvious” doctrine operates as a defense in most slip-and-fall cases, rendering a landowner who owes a duty to maintain safe premises not liable for any injuries sustained on his property if he fails to perform his duty if the hazards on the premises are recognizable. *Id.* at 193-94; Falkinham, *supra* note 17, at 253-54 (describing landowners’ duties under “open and obvious” doctrine). The “open and obvious” doctrine “functions as an exception to the duties all landowners owe to their visitors; it excuses deviation from reasonable care in the interest of protecting self determination over land.” Falkinham, *supra* note 17, at 253. Because the open and obvious doctrine operates as a complete defense, comparative negligence cannot be used to apportion liability between the parties. *Id.* at 253-54.

<sup>50</sup> See Lugo, 629 N.W.2d at 385-88 (discussing special aspects exception to “open and obvious” doctrine). The Michigan Supreme Court reasoned that it is a general rule that the landowner “is not required to protect an invitee from open and obvious dangers, but if special aspects of a condition make even an open and obvious risk unreasonably dangerous,” the landowner must take precautions to prevent that risk. *Id.* at 386. One of the categories of special aspects consists of conditions that impose “effectively unavoidable” dangers, such as a “commercial building with only one exit for the general public where the floor is covered with standing water.” *Id.* at 387. The other category covers avoidable conditions that impose an “unreasonably high risk of severe harm,” such as a plainly visible but “thirty foot deep pit in the middle of a parking lot.” *Id.* Overall, if a special aspect is likely to cause severe harm, then a duty of reasonable care is triggered. See *id.* at 387-88. The Lugo court reasoned its holding was consistent with § 343A of the Restatement (Second) of Torts because “there must be something out of the ordinary . . . about a particular open and obvious danger in order for a premises possessor to be expected to anticipate harm from that condition.” *Id.* at 390; see also Evan Leibhan, Note, *The Invisible Obvious: The Michigan Judiciary’s Distortion of the Open and Obvious Doctrine*, 52 WAYNE L. REV. 1483, 1485-87 (2006) (highlighting special aspects exception).

<sup>51</sup> See Joyce v. Rubin, 642 N.W.2d 360, 364 (Mich. Ct. App. 2002) (using objective test to apply “open and obvious” doctrine); Leibhan, *supra* note 50, at 1494 (delineating two-pronged test). The objective test is two-pronged, first requiring that an average person should be able to recognize the “dangerous condition upon casual inspection,” and second, that the average person be able to recognize the risk posed by that condition. Leibhan, *supra* note 50, at 1494.

<sup>52</sup> See Leibhan, *supra* note 50, at 1483 (listing reasons for disapproval of “open and obvious” doctrine); see also John A. Braden, *Adventures in Open and Obvious Land*, 86 MICH. B.J. 28, 29-30 (2007) (criticizing Michigan’s application of “open and obvious” doctrine). The “open and obvious” doctrine is unfair because it protects a landowner from hidden dangers so long as they are foreseeable. Braden, *supra*, at 29-30. During the winter, every hazard involving snow or ice is foreseeable and there is no reason a landowner should have to maintain safe premises for

IV. THE COMMUNITY REACTS TO *PAPADOPOULOS*A. *Land Owner Uncertainty*

There have been mixed feelings amongst attorneys, judges, and other members of the legal community regarding Massachusetts' departure from the natural accumulation standard.<sup>53</sup> However, this shift in standard should not create an overhaul of premises liability law or put landowners in positions of uncertainty regarding their duty to maintain their property because many cities in Massachusetts already have ordinances in place requiring landowners to remove snow and ice from their sidewalks.<sup>54</sup> Some Massachusetts attorneys argued that the natural accumulation standard was antiquated and that the new standard will bring more clarity to the application of premises liability law.<sup>55</sup> After the decision in *Papadopoulos*, plaintiffs who suffer snow and ice related injuries will have the opportunity to obtain the relief they deserve.<sup>56</sup> A plaintiff's burden in bringing a slip-and-fall claim based on improper snow and ice removal will now depend on whether the plaintiff can prove all the elements of

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passersby. See Bryan J. Waldman, *Michigan Premises Liability Law: The Open and Obvious Danger Doctrine*, 78 MICH. B.J. 544, 544 (1999) (criticizing Michigan's "open and obvious" doctrine); Braden, *supra*, at 29-30. Waldman describes the "open and obvious" doctrine as "misunderstood" and "inappropriately applied." Waldman, *supra*, at 544. In Michigan there have been cases where the same judge has ruled inconsistently regarding identical injuries to different plaintiffs in almost identical settings. *Id.*

<sup>53</sup> See MacQuarrie, *supra* note 11 (providing local attorneys' feedback regarding new standard). Attorney David White, a Boston attorney and former president of the Massachusetts Bar Association, believes that there will be more lawsuits as a result of the abandonment of the natural accumulation standard because "there are more injuries that are compensable." *Id.* However, Lisa Timberlake, spokeswoman for the Inspectional Services Department, argues that landowners will have fair warning to remove snow and ice from their sidewalks, and ticketing will only be enforced where it is deemed necessary. *Id.*

<sup>54</sup> See BOS., MASS., ORDINANCE ch. 16-12.16 (2007) (laying out parameters for required removal of snow and ice from Boston sidewalks); LYNN, MASS., ORDINANCE § 12.16.010 (1994) (requiring owner or agent to remove snow from public sidewalk abutting property); WORCESTER, MASS., ORDINANCE ch. 12 § 23(a) (2011) (allowing landowners or occupants ten hours after storm to remove snow and ice from sidewalks); see also MASS. GEN. LAWS ch. 40, § 21 (2008) (granting towns authority to make ordinances and by-laws regarding snow and ice removal). In the event a town enacts a by-law or ordinance regarding snow and ice removal, the penalty for violating said by-law or ordinance shall be no less than \$100 and no more than \$300. MASS. GEN. LAWS ch. 40, § 21.

<sup>55</sup> See David E. Frank, *Natural Accumulation Rule Abolished*, MASS. LAW. WEEKLY (Aug. 3, 2010, 9:28 AM), <http://masslawyersweekly.com/2010/08/03/natural-accumulation-rule-abolished/> (sharing legal opinions in Boston community regarding *Papadopoulos* decision).

<sup>56</sup> See *Papadopoulos v. Target Corp.*, 930 N.E.2d 142, 154 (Mass. 2010) (stating holding of case).



negligence.<sup>57</sup> Even though other New England states have demonstrated successful implementation of the reasonable care standard, there are still a few concerns that may plague Massachusetts landowners, such as how their homeowner's insurance will be affected by this new standard.<sup>58</sup>

*B. The Effect on Liability Insurance*

As personal injury lawsuits have increased over the years, so too has the demand for liability insurance.<sup>59</sup> One criticism of this development is that by increasing the availability of remedies, the courts are essentially increasing the potential for litigation, thus hampering the possibility of tort reform.<sup>60</sup> Due to the social stigma and vindication associated with personal injury, an injured person in today's society has come to believe they deserve compensation for their injuries, regardless of whether or not their claim has merit.<sup>61</sup> This has also created a situation where landowners would rather spend more money on insurance premiums to allow the insurance company to fight the claim rather than pay the money directly to the plaintiff.<sup>62</sup> Whether the new standard in Massachusetts will bring about

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<sup>57</sup> See *Levey v. Wildwood Realty Assocs.*, 958 N.E.2d 1182, 1182 (Mass. App. Ct. 2012) (unpublished table decision) (denying plaintiff's claim of negligence in slip and fall injury). The element of control over the property is a necessary aspect of duty—without this element the plaintiff cannot meet his or her burden in establishing breach of duty. *Id.*; see also *Jorgenson v. Mass. Port Auth.*, 905 F.2d 515, 522-23 (1st Cir. 1990) (laying out elements for burden of proof). A plaintiff may succeed on a claim for a slip-and-fall injury caused by improper snow and ice removal so long as he or she can show: “(1) a legal duty owed by defendant to plaintiff; (2) a breach of that duty; (3) proximate or legal cause; and (4) actual damage or injury.” *Jorgenson*, 905 F.2d at 522.

<sup>58</sup> See *Penn Nat'l Ins. Co. v. Costa*, 966 A.2d 1028, 1035 (N.J. 2009) (holding homeowners insurance company liable for plaintiff's injuries). The New Jersey Supreme Court had to decide if the injuries sustained by the plaintiff, who slipped and fell on the insured's icy driveway and hit the insured's automobile, were covered by the owner's automobile or homeowners insurance. *Id.* at 1030. Ultimately, the court reasoned that the injuries were the result of the icy sidewalk, and thus, the homeowners insurance would have to bear the cost of the judgment. *Id.* at 1035.

<sup>59</sup> See *Sugarman*, *supra* note 9, at 2412 (noting increase in motor vehicle insurance and commercial liability insurance). Despite the fact that many defendants are insolvent, the insurance companies have been forced to pick up the financial burden for their insureds in almost all cases of personal injury. *Id.*

<sup>60</sup> See *id.* at 2433-34 (describing difficulty in bringing about tort reform). Due to the very real threat of being subjected to a lawsuit, insurance companies have found it difficult to sell no-fault insurance to the public. *Id.* at 2433.

<sup>61</sup> See *Sugarman*, *supra* note 9, at 2410 (encouraging accident victims to have their day in court). Plaintiffs in personal injury cases have been drawn to the courts with hopes that their claims could result in a large judgment in their favor. *Id.* at 2413. Unfortunately, this expectation of a large jury award has also incentivized some people to commit fraud and feign a mental or bodily injury. *Id.*

<sup>62</sup> See *Arndt*, *supra* note 17, at 217 (extrapolating on personal injury litigation phenomena).

more lawsuits and put a greater strain on landowners to insure their property is not something that can be easily determined.<sup>63</sup> Nonetheless, the Massachusetts Supreme Judicial Court announced in *Papadopoulos* that the threat of forcing people to become insurers of their property is not a consequence of its decision and, therefore, is not a well-founded argument to oppose it.<sup>64</sup>

## V. SHIFTING CONCERNS

### A. Court Interpretation

The biggest concern for Massachusetts landowners should be how the courts will incorporate the new standard in their decisions and whether it signals a greater shift towards the more plaintiff-friendly approach to premises liability applied in neighboring jurisdictions.<sup>65</sup> Massachusetts has yet to adopt the “storm in progress doctrine” or define its expectations for business landowners.<sup>66</sup> The ruling in *Papadopoulos* could be viewed in the same context as the Michigan and the District of Columbia rulings on premises liability standards: relatively broad with room for judicial interpretation.<sup>67</sup> Massachusetts district and appellate courts have reasoned

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Due to increasing litigation, insurance premiums have risen. *Id.* The insurance companies have not benefitted from the increase in premiums because they are diverting most of that money to pay attorneys to defend their clients. *Id.*

<sup>63</sup> See *Papadopoulos v. Target Corp.*, 930 N.E.2d 142, 154 (Mass. 2010) (placating defendant’s concern regarding landowner burden). The *Papadopoulos* court did not cite evidence for its claim that the new standard would not create an undue burden on landowners. *Id.*

<sup>64</sup> See *id.* at 154 (reasoning burden placed on landowner minimal); see also *Mounsey v. Ellard*, 297 N.E.2d 43, 53 (Mass. 1973) (declaring reasonableness standard does not make landowners insurers of their property).

<sup>65</sup> See *Williams*, *supra* note 3, at 520-22 (explaining different states’ approaches to reasonable care standard in premises liability). Rhode Island has expanded its interpretation of premises liability by adopting the “storm in progress doctrine,” while Maine has outright rejected the “storm in progress” rule. *Id.* at 521-22.

<sup>66</sup> See *Marlatt v. Lubrizol Advanced Materials Inc.*, No. 09-10647-PBS, 2011 WL 1344460, at \*3 (D. Mass. Feb. 14, 2011) (declining to recognize “storm in progress” doctrine); *Papadopoulos*, 930 N.E.2d at 154 (describing landowner’s duty generally). A landowner is expected to act with due care when he or she becomes aware of snow or ice on their property. *Papadopoulos*, 930 N.E.2d at 154; see also *Williams*, *supra* note 3, at 521-22 (differentiating Massachusetts from Rhode Island and Maine regarding snow and ice removal).

<sup>67</sup> See *Pessagno v. Euclid Inv. Co., Inc.*, 112 F.2d 577, 579 (D.C. Cir. 1940) (imposing minimal standard on landowner); *Quinlivan v. Great Atl. & Pac. Tea Co., Inc.*, 235 N.W.2d 732, 740 (Mich. 1975) (maintaining standard that does not burden landowner); see also *Williams*, *supra* note 3, at 528 (discussing Michigan and District of Columbia standards). The D.C. Circuit has purposely left open questions regarding which types of specific duties are required of a landowner to allow for future judicial interpretation. *Williams*, *supra* note 3, at 528.

that it does not make sense to attempt to interpret or expand the new standard until a case is presented that requires the courts to do so.<sup>68</sup> However, it is clear that by forfeiting the natural accumulation standard, Massachusetts has ultimately rejected the “open and obvious” doctrine as a defense to injuries caused by snow and ice.<sup>69</sup>

*B. What Will Happen to the “Open and Obvious” Doctrine in Massachusetts?*

The “open and obvious” doctrine is still followed in a handful of states, including Massachusetts, for other premises liability injuries and by a handful of other states, such as Michigan and Ohio, where application of the doctrine has been justified according to the Restatement (Second) of Torts.<sup>70</sup> However, Massachusetts refused to recognize the “open and obvious” doctrine for snow and ice injuries due to the fact that it would be unreasonable to expect everyone to stay inside during the winter to avoid becoming the victim of a non-compensable injury.<sup>71</sup> This reasoning makes sense in light of societal evolution and the frequency and ease of transportation, where people now must traverse various terrain to get from

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<sup>68</sup> See *Marlatt*, 2011 WL 1344460, at \*3 (citing *Papadopoulos*, 930 N.E.2d at 156 n.17) (concluding that new standard need not be interpreted yet in Massachusetts). Because the plaintiff in *Papadopoulos* did not slip on snow or ice during a snow storm, it would be unreasonable to now decide whether Massachusetts should follow the “storm in progress” doctrine as integral to the duty of reasonable care. *Id.* (citing *Papadopoulos*, 930 N.E.2d at 156 n.17).

<sup>69</sup> See *Papadopoulos*, 930 N.E.2d at 151-52 (rejecting “open and obvious” doctrine as landowner defense). The “open and obvious” doctrine helped justify the natural accumulation standard by reinforcing the idea that if an entrant can anticipate a hazardous condition upon seeing snow or ice on the property, then the burden of reasonable care is on the entrant to avoid injury. *Id.*

<sup>70</sup> See *supra* note 3 and accompanying text (acknowledging foreseeability as pertinent to the Restatement (Second) of Torts’ standard for premises liability); see also *Dos Santos v. Coleta*, 957 N.E.2d 1125, 1129 (Mass. App. Ct. 2011) (recognizing “open and obvious” doctrine as defense to trampoline injury); *Lugo v. Ameritech Corp., Inc.*, 629 N.W.2d 384, 399 (Mich. 2001) (upholding “open and obvious” doctrine based on Restatement). The court in *Dos Santos* distinguished the facts of its case from the Massachusetts Supreme Court’s analysis of the “open and obvious” doctrine in *Papadopoulos*, finding that the plaintiff actively engaged in an open and obvious danger where there was no benefit to the plaintiff for engaging in such dangerous behavior. *Dos Santos*, 957 N.E.2d at 1129. The Michigan Supreme Court based its reasoning in *Lugo* on the Restatement, providing “courts must focus on whether an unreasonable danger is presented, whether harm should be anticipated, and whether the duty of care has been breached.” *Lugo*, 629 N.W.2d at 399.

<sup>71</sup> See *Dos Santos*, 957 N.E.2d at 1129 (pointing out “open and obvious” doctrine analysis in *Papadopoulos* resembles cost-benefit determination); *Papadopoulos*, 930 N.E.2d at 151 (highlighting illogic of “open and obvious” doctrine).

point A to point B.<sup>72</sup> While the natural accumulation standard will soon become an anachronism of old agrarian lifestyle, the reasonable care standard will require significant tweaking in order to eventually become the norm for premises liability in Massachusetts.<sup>73</sup> One way to facilitate and alleviate the complexity of this new standard would be to differentiate the duties owed by landlords, business owners, and municipalities.<sup>74</sup>

## VI. THE STANDARD OF REASONABLE CARE

### A. Landlords

Most states require landlords to exercise reasonable care in maintaining their premises for the benefit of tenants.<sup>75</sup> Landlords have been held to the highest scrutiny when it comes to maintaining safe premises for their tenants.<sup>76</sup> The landlord-tenant relationship is different from the relationship between other landowners and entrants because the landlord owes the tenant a duty under both tort and contract law.<sup>77</sup> The

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<sup>72</sup> See Burke, *supra* note 10, at 250 (contrasting modern society to earlier days when natural accumulation standard was necessary). In today's increasing urban society, land has been divided up between many landowners, thus lessening the individual burden of having to monitor one's property. *Id.* However, it would make sense for the natural accumulation standard to remain in rural communities, where it is not feasible for a landowner to constantly monitor and maintain their large tracts of land. *Id.*

<sup>73</sup> See *id.* at 250 (recognizing impracticality of natural accumulation standard in modern society). The duty of reasonable care, in contrast, has the ability to shift depending on a multitude of factors, thus making it more equitable. *Id.* at 250-51.

<sup>74</sup> See Richgels, *supra* note 35, at 631-32 (discussing impracticality of imposing reasonableness standard on common carriers in Illinois); Williams, *supra* note 3, at 540-41 (pointing out ambiguity in reasonableness standard as applied to business owners in Maine); see also *supra* note 38 and accompanying text (differentiating duties owed by different types of landowners).

<sup>75</sup> See *Papadopoulos*, 930 N.E.2d at 145 (defining landlord's responsibility toward tenant). Traditionally, if the plaintiff was the tenant and was injured in an area that was under the landlord's exclusive control, the landlord would be liable for the plaintiff's injuries if he acted without reasonable care in maintaining those premises. *Id.*; see also Polelle, *supra* note 4, at 646 (quantifying number of states that require landlord to exercise reasonable care). About 40 states require that the landlord exercise reasonable care, thus, the natural accumulation rule rarely, if ever, applies as a defense to tenant injuries. See Polelle, *supra* note 4, at 646.

<sup>76</sup> See Polelle, *supra* note 4, at 646 (identifying trend among states in imposing landlord liability).

<sup>77</sup> See E. GEORGE DAHER & HARVEY CHOPP, 33A MASSACHUSETTS PRACTICE SERIES: LANDLORD AND TENANT LAW § 18:13 (3d ed. 2012) (discussing unique characteristics of landlord-tenant law); see also Polelle, *supra* note 4, at 638-39 (highlighting significance of contract between landlord and tenant). Even in a natural accumulation jurisdiction, a landlord cannot escape liability for failing to remove snow and ice when he has contracted with the tenant to provide this service. Polelle, *supra* note 4, at 638.

landlord-tenant relationship is particularly distinct in that the landlord will not always prevail in natural accumulation jurisdictions due to the extent of other legal duties the landlord owes to the tenant.<sup>78</sup> Compared to other types of landowners, landlords are expected to demonstrate the highest level of reasonable care.<sup>79</sup> Where most states appear to require the highest level of responsibility to entrants on the part of the landlord, many states also impose strict requirements on business owners to maintain safe premises for customers.<sup>80</sup>

### *B. Business Owners*

In jurisdictions that have adopted specific requirements for business owners in the operation and maintenance of their premises, there is an expectation that the business owner will have a heightened awareness of customer safety.<sup>81</sup> The business owner is set apart from other landowners because of the nature of their premises in attracting customers and their capacity to handle large numbers of entrants.<sup>82</sup> One of the hardest challenges that plaintiffs have had to overcome when filing suit against business owners is identifying the correct defendant because many business owners are not responsible for the premises when they enter into a lease agreement.<sup>83</sup> Because the business owner derives significant economic benefit from his or her entrants, it is not unreasonable to expect the business owner to make sure their premises are safe and inviting.<sup>84</sup> Unlike

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<sup>78</sup> See Polelle, *supra* note 4, at 638 (enumerating circumstances where natural accumulation defense will fail). The landlord in the natural accumulation jurisdiction will not prevail under these three circumstances: (1) where a landlord creates the snow and ice accumulation or “aggravates a natural accumulation”; (2) where a “landlord negligently attempts to remove the hazard”; and (3) where a “landlord has assumed the duty by contract with the tenant.” *Id.*

<sup>79</sup> See *id.* at 646 (comparing states’ treatment of landlord liability with landowner liability).

<sup>80</sup> See sources cited *supra* note 46 and accompanying text (discussing premises liability pertaining to business owners).

<sup>81</sup> See Williams, *supra* note 3, at 522 (emphasizing Maine’s standard for business owners). If a business owner is aware of a dangerous recurrent condition on their premises, they are required to respond reasonably. *Id.*

<sup>82</sup> See *id.* at 540 (categorizing business owners and entrance capacities). In states that do not base duty of care on the entrant’s status, the volume of business a business owner operates is relevant to determining the level of reasonable care that they owe to their customers. See *id.*

<sup>83</sup> See Levey v. Wildwood Realty Assocs., 958 N.E.2d 1182, 1182 (Mass. App. Ct. 2012) (unpublished table decision) (finding landowner not responsible for plaintiff’s injury because property was leased to landowner); Quinlivan v. Great Atl. & Pac. Tea Co., Inc., 235 N.W.2d 732, 744-45 (Mich. 1975) (holding business owner not liable where parking lot was leased to another company).

<sup>84</sup> See Polelle, *supra* note 4, at 654 (differentiating priorities of business owners and landlords from government entities). Unlike a governmental entity, the business owner and the landlord derive enormous economic benefit from their “patrons or tenants in the form of prices

the business owner and the landlord, the government entity is not required to exercise the same level of due care to entrants, with its duty often the least onerous of all landowners.<sup>85</sup>

### C. Government Entities

Government entities generally receive the least amount of scrutiny in terms of premises liability and are subject to less responsibility than other types of landowners throughout the United States.<sup>86</sup> In some states, such as Illinois, statutes protect government entities if they fail to maintain safe premises for the public, especially in situations regarding snow and ice removal.<sup>87</sup> It would be reasonable to infer that common carriers, such as commuter trains and buses, would be held to the highest level of care considering their relationship and duty to their customers, but in Illinois the natural accumulation standard supersedes the duty of reasonable care.<sup>88</sup> In the context of premises liability, government entities and employees are not

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and rents.” *Id.*

<sup>85</sup> *Id.* at 646-48 (comparing how states treat different classes of landowners for premises liability). Thirty-one states have granted government entities, mostly municipalities, immunity for slip-and-fall injuries on snow and ice. *Id.* at 647-48.

<sup>86</sup> See MASS. GEN. LAWS. ch. 84, § 17 (2010) (providing immunity to towns and cities in Massachusetts from liability for ice and snow slip-and-falls).

A county, city or town shall not be liable for an injury or damage sustained upon a public way by reason of snow or ice thereon, if the place at which the injury or damage was sustained was at the time of the accident otherwise reasonably safe and convenient for travelers.

*Id.*; see also Polelle, *supra* note 4, at 647-48 (enumerating states that apply municipality liability for premises maintenance throughout country). Only twenty states require municipalities to remove snow and ice from streets and sidewalks. Polelle, *supra* note 4, at 648.

<sup>87</sup> See 745 ILL. COMP. STAT. ANN. 10/2-101-10/2-302 (West 1993) (establishing privilege of immunity for certain government entities). For instance, a government entity is not liable for an employee’s act or omission on public property that injures someone where the Government or employee is not liable. *Id.* at 10/2-109. In contrast, the Local Governmental and Governmental Employees Tort Immunity Act require a municipality to act with reasonable care in maintaining its premises for individuals using the property in a reasonably foreseeable way. *Id.* at 10/3-102(a). Neither the government entity nor the government employee are subject to liability for injuries resulting from weather conditions, such as rain, snow, ice, flood, and hail. *Id.* at 10/3-105(a); see also *Watson v. J.C. Penney Co., Inc.*, 605 N.E.2d 723, 725 (Ill. App. Ct. 4<sup>th</sup> Dist. 1992) (stating Illinois change in natural accumulation standard should be done through legislation).

<sup>88</sup> See *Krywin v. Chi. Transit Auth.*, 938 N.E.2d 440, 452 (Ill. 2010) (ruling in favor of common carrier in slip-and-fall suit). The Illinois Supreme Court held that the Chicago Transit Authority was not liable for plaintiff’s slip-and-fall injury because the ice on the train platform was the result of a natural accumulation, and Illinois follows the natural accumulation standard for government entities. *Id.*

held to the same standard of care as other landowners because the government entity is liable for maintaining significantly more property than is a private landowner and it would be almost impossible to account for every inch of property and every person who passes through it.<sup>89</sup>

## VII. WHY THE NATURAL ACCUMULATION RULE IS UNTENABLE

Even though many government entities can escape liability through immunity statutes, there are compelling reasons why all landowners should be liable for maintaining their premises, especially during the winter months.<sup>90</sup> The natural accumulation rule creates problems because it “favors inaction over action,” due to the high risks associated with attempting to remove snow and ice.<sup>91</sup> This dilemma results when the landowner realizes that attempting to remove snow and ice from the property could result in greater risk to entrants.<sup>92</sup> Furthermore, those states that apply the natural accumulation rule do not impose any duty whatsoever on a landowner who decides not to remove snow or ice because removal poses a more serious risk than had the snow and ice been left alone.<sup>93</sup> This reasoning under the natural accumulation rule contradicts the Restatement [Second] of Torts § 323, which states that a voluntarily assumed duty has to be discharged with due care.<sup>94</sup> These are some of the reasons cited by the Massachusetts Supreme Judicial Court in *Papadopoulos* for abandoning the natural accumulation rule.<sup>95</sup>

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<sup>89</sup> See Polelle, *supra* note 4, at 652-53 (differentiating between government entity and private landowner). The burden on the private landowner is “specific to their locale,” whereas the burden on the government entity is general and encompasses “combating a city-wide snowfall.” *Id.* at 652. Furthermore, the risk of injury is more foreseeable in the case of a private landowner than it is for a government entity. *Id.* at 653. Unlike the government entity, a private landowner has the ability to regularly monitor their property to determine if there is a buildup of snow and ice. *Id.*

<sup>90</sup> See *id.* at 649 (arguing in favor of abolishment of natural accumulation standard).

<sup>91</sup> See *id.* at 649.

<sup>92</sup> See *id.* at 649. “Those who try to clear away natural accumulations of snow, ice, or rain on their private property run the risk of imposing a self-inflicted duty on themselves if their actions constitute negligence.” *Id.*

<sup>93</sup> See *id.* at 649. In Illinois it is well established that if a landowner attempts to remove an overlay of snow and uncovers a sheet of ice the landowner is not liable for injuries sustained on the ice, despite the possibility that the danger has become graver and less obvious than it was when the snow was covering the ice. *Id.* at 645.

<sup>94</sup> RESTATEMENT (SECOND) OF TORTS § 323 (1965) (laying out duty for those who attempt to perform or render services); see also *Davis v. Westwood Group*, 652 N.E.2d 567, 571 & n.12 (Mass. 1995) (adopting Restatement rule). This section of the Restatement applies to a defendant who attempts to undertake or render any type of service to another, which the defendant could reasonably foresee as requiring a level of protection to the recipient of the service. *Id.*

<sup>95</sup> See *Papadopoulos v. Target Corp.*, 930 N.E.2d 142, 153-54 (Mass. 2010) (reasoning

The natural accumulation standard also creates a legal quandary that, if taken seriously, could result in disastrous consequences.<sup>96</sup> It can be further argued that the natural accumulation standard is too vague and it creates situations where parties are litigating over what is natural versus unnatural.<sup>97</sup> It is also easy for defendants to win the argument that the accumulation was natural because it is often difficult to prove when the snow and ice accumulated if a significant amount of snow and ice covered the ground throughout the season.<sup>98</sup> Lastly, the natural accumulation rule is unnecessary because there is already a duty imposed upon landowners to maintain safe premises, regardless of whether snow or ice is involved.<sup>99</sup> Requiring landowners to secure their property during the winter would not create any more of a burden on the landlord than there is during the spring, summer, and fall.<sup>100</sup>

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against natural accumulation standard in favor of reasonable care standard).

<sup>96</sup> See Polelle, *supra* note 4, at 649-50 (listing disastrous consequences of natural accumulation rule). The fact that the standard centers around the paradigm of what is “natural” creates a predicament because it would be just as reasonable for a landowner to place their property “over an earthquake fault line” as it would be for a landowner to have a “sloped roof high-rise, an inclined parking lot, an embankment, or an ice-prone bridge” in an area that experiences severe winters. *Id.* at 649.

<sup>97</sup> See *id.* at 650 (arguing vagueness is central issue with natural accumulation standard). It is difficult to classify what is “natural” because the time of year and the source of the falling precipitation can quickly change a natural accumulation into an unnatural accumulation. *Id.* “The essential problem, therefore, is that the categorical distinction between natural and artificial accumulations is an unworkable concept because it oversimplifies reality by its either-or approach.” *Id.*; see also 745 ILL. COMP. STAT. ANN. 10/3-105(a) (West 1993) (granting immunity from effects of weather conditions but not from other physical deficiencies). The Illinois Statute is an example of the vagueness that surrounds the natural accumulation standard: it provides the municipality immunity from liability for injuries that are the result of weather conditions, such as snow and ice, but does not provide immunity for weather damage to traffic signals, streets, highways, or other public ways from which injury may occur. See Polelle, *supra* note 4, at 649-50.

<sup>98</sup> See *Watson v. J.C. Penney Co., Inc.*, 605 N.E.2d 723, 727 (Ill. App. Ct. 1992) (Knecht, J., dissenting) (arguing natural accumulation standard untenable). “The trend of modern cases is to reject the natural accumulation of snow and ice rule. One reason may be no one understands the difference between a natural accumulation of ice and snow, and an unnatural accumulation.” *Id.* In its majority opinion, the Appellate Court of Illinois stated that if a change in the natural accumulation standard in Illinois were to ever occur, it should be done by the legislature and not by the courts. *Id.* at 725 (majority opinion).

<sup>99</sup> See *Upham v. Chateau de Ville Dinner Theater, Inc.*, 403 N.E.2d 384, 386 (Mass. 1980). A landowner is charged with a duty to lawful visitors to take reasonable and appropriate steps to prevent injury, taking into account likelihood of injury to others, seriousness of the injury, and allocation of the risks. *Id.*

<sup>100</sup> See *Papadopoulos*, 930 N.E.2d at 154 (rejecting argument that reasonable care standard unreasonably burdens landowner).



### VIII. WHY THE REASONABLE CARE STANDARD WORKS WELL WITH THE “STORM IN PROGRESS” DOCTRINE

Not only is the reasonable care standard more equitable for plaintiffs, it is also well-suited to landowners, especially when applied in conjunction with the “storm in progress” doctrine.<sup>101</sup> The “storm in progress” doctrine relieves the landowner of being an insurer of his property and provides guidance to the landowner with regard to the appropriate timing for snow removal based on weather conditions.<sup>102</sup> The states that have adopted the doctrine, such as Virginia and Minnesota, support their decision based on the reasoning that snow and ice is already a foreseeable danger during the winter months, and therefore, entrants assume the risk when they venture outside during a snowstorm.<sup>103</sup>

The “storm in progress” doctrine is useful because it defines the landowner’s role and provides adequate time limitations for the removal of snow and ice.<sup>104</sup> However, it provides no protection for landowners who attempt to remove snow and ice during a snowstorm, which in certain situations may be necessary.<sup>105</sup> Some states, including Rhode Island, have held that a “positive act” by the landowner during a snowstorm can result in liability, while inactivity guarantees the landowner protection under the “storm in progress doctrine.”<sup>106</sup> Although the “storm in progress” doctrine

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<sup>101</sup> See Williams, *supra* note 3, at 522 (noting majority of states with reasonable care standard adopt “storm in progress” doctrine). Most jurisdictions that have recognized the reasonable care standard for premises liability, especially for business owners, have also adopted the “storm in progress” doctrine. *Id.* at 522-23.

<sup>102</sup> See *id.* at 522-23 (discussing rationale behind “storm in progress” doctrine). One reason the “storm in progress” doctrine has been enacted in certain states is to discourage the idea that landowners should be insurers of their property. *Id.* at 522. A second reason is to eliminate the burden on the landowner of having to constantly struggle with keeping their property clear at all times. *Id.* at 523.

<sup>103</sup> See *Mattson v. St. Luke’s Hosp.*, 89 N.W.2d 743, 746 (Minn. 1958) (granting hospital reasonable time after snowstorm to clear snow and ice); *Walker v. Mem’l Hosp.*, 45 S.E.2d 898, 907 (Va. 1948) (describing rationale for adopting doctrine similar to “storm in progress”). The Supreme Court of Virginia reasoned that “[e]very pedestrian who ventures out at such times knows he is risking the chance of a fall and of a possible serious injury.” *Walker*, 45 S.E.2d at 907.

<sup>104</sup> See Fallon, *supra* note 45, at 599-600 (pointing out benefits of “storm in progress” doctrine).

<sup>105</sup> See *id.* (warning of dangers associated with removing snow and ice during storm). Under the “storm in progress doctrine” the landowner would not be liable for failing to remove snow and ice during a snowstorm, but any attempt to remove snow and ice during the storm could make the landowner liable for injuries that result from his or her attempt to remove the snow and ice. *Id.* at 599.

<sup>106</sup> *Id.* at 599-600 (clarifying difference in liability between “positive act[s]” and inactivity under “storm in progress” doctrine).

may require a more involved factual undertaking for the fact-finder, it provides great protection for landowners because it encourages landowners to maintain safe premises without overburdening them with unreasonable duties.<sup>107</sup>

Maine is the only New England state that has expressly rejected the “storm in progress” doctrine, but it did so only for business owners.<sup>108</sup> Maine based its decision not to use the “storm in progress” doctrine on the concept of foreseeability as a necessary guideline for business owners and because its application would contradict Maine’s commitment to safety for business customers.<sup>109</sup> In contrast to the foreseeability rationale behind Maine’s rejection of the “storm in progress” doctrine, Ohio has cited foreseeability as its basis for adopting the natural accumulation standard.<sup>110</sup>

### IX. WHAT DOES THE FUTURE OF THE NATURAL ACCUMULATION RULE LOOK LIKE?

While Massachusetts took a bold step in abandoning the natural accumulation standard, Illinois and Ohio still firmly enforce it, thus allowing this seasonal exception to premises liability to bar many legitimate claims of bodily injury in some jurisdictions.<sup>111</sup> The natural

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<sup>107</sup> *Id.* at 611-13 (lending support to “storm in progress” doctrine). The “storm in progress” doctrine has clear boundaries and provides guidelines to the fact-finder in determining whether the doctrine shall protect the landowner. *Id.* It is easier to calculate when there was an ongoing storm and at which point the landowner undertook the duty to remove snow; it is also easier for landowners to determine when action would be appropriate. *Id.* at 612.

<sup>108</sup> *See* *Budzko v. One City Ctr. Assocs.*, 767 A.2d 310, 314 (Me. 2001) (holding business owners are not protected by the “storm in progress doctrine”). The *Budzko* court held that “[b]usiness owners have a duty to reasonably respond to foreseeable dangers and keep premises reasonably safe when significant numbers of invitees may be anticipated to enter or leave the premises during a winter storm.” *Id.* at 315.

<sup>109</sup> *See* *Williams*, *supra* note 3, at 536 (discussing significance of foreseeability as element in premises liability). Since winter storms are an expected condition in Maine, the Maine courts have held that there is no reason that business owners should be exempt from clearing their property in certain situations, such as when snow is still falling, especially when these situations could prove to be extremely dangerous for entrants. *Id.* at 536-37.

<sup>110</sup> *See* *Dailey v. Mayo Family Ltd. P’ship*, 684 N.E.2d 746, 748-49 (Ohio Ct. App. 1996) (justifying natural accumulation standard). In climates that experience frequent snowfall and icy conditions, it is foreseeable to all entrants that there are inherent hazards in such conditions and it often becomes impractical and sometimes impossible to remedy all dangers caused by snow and ice. *Id.* at 748-49 (citing *Norwalk v. Tuttle*, 76 N.E. 617, 618 (Ohio 1906)).

<sup>111</sup> *See* *Krywin v. Chi. Transit Auth.*, 938 N.E.2d 440, 457-59 (Ill. 2010) (Freeman, J., dissenting) (agreeing with decision in *Papadopoulos* and encouraging similar approach in Illinois); *Dailey*, 684 N.E.2d at 748-49 (upholding natural accumulation standard in Ohio). In his dissenting opinion, Justice Freeman encouraged the Illinois Supreme Court to adopt the duty of reasonable care standard articulated in *Papadopoulos* because the natural accumulation rule is obsolete and “no longer has a basis in modern Illinois tort law regarding premises liability.”

accumulation standard and the reasonable care standard are examples of extreme polarity in terms of placing the burden of proof on the parties, but both require significant fact-finding to establish liability.<sup>112</sup> Although the reasonable care standard is not as predictable to landowners as the natural accumulation standard, a landowner should be able to gauge their level of duty to entrants on their premises based on where their property is situated, the level of control they exert over the property, the type of entrants entering their property, and the frequency of entrance.<sup>113</sup>

In light of Massachusetts' decision to abandon the natural accumulation standard, it would be reasonable for Illinois to do the same, especially because Illinois places a reasonable care standard upon landowners for all other types of property under premises liability.<sup>114</sup> Illinois should at least abandon the natural accumulation standard for landlords and business owners because of their ability to "reap direct economic benefits from patrons or tenants in the form of prices and rents."<sup>115</sup> Although there has been support in the Illinois legal community

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*Krywin*, 938 N.E.2d at 458 (Freeman, J., dissenting). Justice Freeman also disagreed with the majority's opinion that the reasonable care standard would unduly burden the Chicago Transit Authority. *Id.* He based this reasoning on the idea that the landowner should not have to concern himself with figuring out if his actions are reasonable at all times because that is left for the finder of fact. *Id.*; see also Richgels, *supra* note 35, at 635 (outlining Freeman's dissent). Justice Freeman's dissent is correct because "it offers an alternative that is a flexible compromise which is in stark contrast with the majority's black and white, zero liability stance." Richgels, *supra* note 35, at 640.

<sup>112</sup> See generally Fallon, *supra* note 45, at 610-11 (comparing natural accumulation standard to reasonable care standard).

<sup>113</sup> See *Papadopoulos v. Target Corp.*, 930 N.E.2d 142, 154 (Mass. 2010) (differentiating duties owed by landowners based on class of entrant and property characteristics). The snow removal reasonably expected of a landowner will depend on the frequency of people entering the property, the foreseeability of risk, and the burden and expense of removing snow and ice. *Id.* "Therefore, while an owner of a single-family home, an apartment house owner, a store owner, and a nursing home operator each owe lawful visitors to their property a duty of reasonable care, what constitutes reasonable snow removal may vary among them." *Id.*; see also *Levey v. Wildwood Realty Assocs.*, 958 N.E.2d 1182, 1182 (Mass. App. Ct. 2012) (unpublished table decision) (finding plaintiff's recovery barred where defendant lacked control over property). The *Levey* court denied the contention that the holding in *Papadopoulos* removed the requirement of control over the premises as one of the necessary elements in determining whether a duty of reasonable care existed. *Levey*, 958 N.E.2d at 1182.

<sup>114</sup> See *Polelle*, *supra* note 4, at 652-53 (emphasizing ease and practicality of removing natural accumulation standard in Illinois). Landowners would not experience added burden if a minimal duty were imposed to clear snow and ice, especially because Illinois requires this duty in other precipitation cases. *Id.*

<sup>115</sup> See *id.* at 652-53 (comparing natural accumulation standard for private landowners to that of government entities). The government entity does not derive the same economic benefit from having entrants as the business owner or landlord does. *Id.* at 654. It seems equitable that in exchange for making money on the people who enter the business landowner's premises, the business landowner should provide safe premises to encourage more entrants and thus more

to abolish the natural accumulation standard, there is no certainty whether Illinois will follow in the footsteps of Massachusetts.<sup>116</sup>

#### X. REASONABLE CARE IN MASSACHUSETTS

Despite the sensibility of the reasonable care standard, Massachusetts landowners are still left wondering about the extent of their duty to remove snow and ice under this new standard.<sup>117</sup> A good question to ask is whether Massachusetts will follow Maine and reject the “storm in progress” doctrine for certain landowners, or follow Connecticut, Rhode Island and New York, and adopt “storm in progress” as a reference for landowners.<sup>118</sup> If Massachusetts does adopt the “storm in progress” doctrine, it will grant landowners the benefit of added time for snow and ice removal and will provide the finder of fact a rudimentary guideline for establishing liability.<sup>119</sup> Another important consideration is the extent to which Massachusetts’ courts will go to define and differentiate the duties of different classes of landowners.<sup>120</sup>

It is also unlikely that the reasonable care standard in Massachusetts will have any devastating effects on landowners and their insurance rates.<sup>121</sup> Even if a plaintiff succeeds in bringing a claim for

economic gain. *Id.* A landlord or business owner may also compensate the cost of snow and ice removal by increasing rent or prices. *Id.*

<sup>116</sup> See *Krywin v. Chi. Transit Auth.*, 938 N.E.2d 440, 457-59 (Ill. 2010) (Freeman, J., dissenting) (highlighting disagreement with continuation of natural accumulation standard in Illinois); see also *Watson v. J.C. Penney Co., Inc.*, 605 N.E.2d 723, 725 (Ill. App. Ct. 1992) (stating change in natural accumulation standard in Illinois should be done through legislature).

<sup>117</sup> See *Marlatt v. Lubrizol Advanced Materials Inc.*, No. CIV. 09-10647-PBS, 2011 WL 1344460, at \*3 (D. Mass. Feb. 14, 2011) (requesting more defined standard from Supreme Judicial Court to qualify landowner’s duties). The court refused to go into detail regarding the landowner’s duty to remove snow and ice, but provided the Connecticut Rule as a reference. *Id.* at \*2.

<sup>118</sup> See *Munsill v. United States*, 14 F. Supp. 2d 214, 221-22 (D.R.I. 1998) (adopting “storm in progress” doctrine in Rhode Island); *Kraus v. Newton*, 558 A.2d 240, 243 (Conn. 1989) (accepting “storm in progress” doctrine in Connecticut); *Budzko v. One City Ctr. Assocs.*, 767 A.2d 310, 315 (Me. 2001) (rejecting “storm in progress” doctrine for business owners in Maine); *Olejniczak v. E.I. Du Pont De Nemours & Co.*, 998 F. Supp. 274, 280 (W.D.N.Y. 1997) (recognizing “storm in progress” doctrine in New York).

<sup>119</sup> See Fallon, *supra* note 45, at 617 (encouraging Massachusetts to adopt “storm in progress” doctrine). The “storm in progress” doctrine creates a “minimal level of non-liability,” that is, a landowner does not have to do anything until the storm has ended. *Id.*

<sup>120</sup> See sources cited *supra* note 38 and accompanying text (elaborating on differences in duties owed by landlords, business owners, private landowners, and municipalities).

<sup>121</sup> See Sugarman, *supra* note 9, at 2434 (discussing trend of moving away from large recoveries in personal injury litigation). Several states have abolished the collateral sources rule, “thereby awarding tort damages only for medical expenses and wage loss not covered by social insurance and health care plans.” *Id.*

personal injury against a landowner, the landowner may not necessarily be directly burdened with out-of-pocket expenses to compensate the plaintiff, because the insurance company would likely cover most of the expenses.<sup>122</sup> The future of premises liability is not certain, but what is certain is that plaintiffs who are injured on snow and ice will find they have more options for recovery under this new standard.<sup>123</sup>

## XI. CONCLUSION

Although it is a state that experiences relatively harsh winters, Massachusetts was never a safe place to bring a personal injury suit for snow and ice slip-and-fall claims until the course correction in *Papadopoulos v. Target*. Abolishing the natural accumulation rule in Massachusetts has long been overdue. Now that Massachusetts has finally rid itself of this obsolete standard, it can finally start to evolve its premises liability standards for situations that arise during the winter months. However, as a newcomer to this standard, Massachusetts will have a long road ahead in determining how far to interpret the reasonable care standard and whether some exceptions to it are practical and realistic. What is certain, however, is that plaintiffs who have suffered due to landowners negligently maintaining their property will now have an easier time bringing their claims and a better chance of receiving compensation for their injuries.

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<sup>122</sup> See *id.* at 2434-35.

<sup>123</sup> See *Papadopoulos v. Target Corp.*, 930 N.E.2d 142, 152 (Mass. 2010) (asserting more practical standard).