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Budzko v. One City Center Associates Limited Partnership: Maine's Unique Approach to Business Owners' Duty to Remove Ice and Snow

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BUDZKO V. ONE CITY CENTER ASSOCIATES LIMITED PARTNERSHIP: MAINE'S UNIQUE APPROACH TO BUSINESS OWNERS' DUTY TO REMOVE ICE AND SNOW

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BUDZKO V. ONE CITY CENTER ASSOCIATES LIMITED PARTNERSHIP: MAINE'S UNIQUE APPROACH TO BUSINESS OWNERS' DUTY TO REMOVEICE AND SNOW

I. INTRODUCTION

In February 2001, the Maine Supreme Judicial Court, sitting as the Law Court, decided for the first time in Budzko v. One City Center Associates Limited Partnership, what duty of care a business landowner owes to business invitees regarding the accumulation of ice and snow during a storm. Terry Budzko slipped and fell as she was exiting One City Center, the building in which her employer leased office space. The steps had not been shoveled or sanded and a snowstorm had been progressing throughout the day. The Law Court, placing heavy reliance on the factor of foreseeability, held that "business 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." Without saying what measures would have satisfied this duty, the Law Court held that One City Center's failure to treat the steps with salt or sand, shovel any of the accumulation, or warn any of the invitees of the condition of the premises did not satisfy the duty placed on a business owner during a storm.

The Law Court's decision joins a small number of jurisdictions that impose a duty on business owners to clear ice and snow accumulation during a storm. The majority of jurisdictions have adopted the "storm in progress" doctrine, which provides that a business owner "is afforded a reasonable time after the cessation of the storm or temperature fluctuations . . . to correct the situation." The jurisdictions that adopt this doctrine do so on the premise that requiring a business owner to clear precipitation as it is falling is unreasonable, inexpedient, impractical, and has the potential of erroneously turning the business owner into an insurer of invitee safety.

This Note focuses on the disparity between the duty imposed on business owners in Maine and the duty placed on business owners in the jurisdictions that adopt the "storm in progress" doctrine. The question is: In declining to adopt the "storm in progress" doctrine, has the Law Court adopted a rule that forces business owners to insure the safety of their invitees during a winter storm? It is clear from

1. 2001 ME 37, 767 A.2d 310.
2. Id. ¶ 16, 767 A.2d at 315.
3. Id. ¶ 2, 767 A.2d at 312.
4. Id. ¶ 4, 767 A.2d at 312-13.
5. Id. ¶ 16, 767 A.2d at 315.
6. Id. ¶ 15, 767 A.2d at 315.
the Budzko opinion that the Law Court based its decision in part on the number of invitees that traversed the steps of One City Center on February 27, 1995.\textsuperscript{10} Several other jurisdictions have held that it is improper to place an enhanced duty on a business owner solely because of his or her status as a business owner—duties are determined based on the status of the plaintiff, whether trespasser, licensee, or invitee.\textsuperscript{11} Therefore, two other questions are raised: (1) did the Law Court impermissibly base One City Center’s duty on its status as a large business owner; and (2) what ramifications result from the Budzko decision?

In order to address these questions, this Note first examines the general duty of care a business owner owes to a business invitee. Part II.A first addresses the general duty of care in the states that have adopted the “storm in progress” doctrine, namely, Rhode Island, West Virginia, Virginia, New York, Connecticut, Minnesota, Iowa, and Pennsylvania.\textsuperscript{12} Part II.A then addresses the general duty of care in Massachusetts and Ohio, which are states that have adopted the “natural accumulation rule.”\textsuperscript{13} This rule provides that absent a defect, a business owner has no duty to remove the natural accumulation of ice or snow, during or after a storm.\textsuperscript{14} Finally, Part II.A addresses the general duty of care in Michigan, the District of Columbia, and Maine, which are states that have carved out unique duties regarding the duty of care to clear snow and ice.\textsuperscript{15} In Part II.B, this Note examines how the preceding states apply their general duties of care to the unique situation of a business owner’s duty to clear ice and snow as it is accumulating. Finally, this Note takes an in-depth look at Maine, including the case law preceding Budzko, the decision itself, and an analysis of the questions raised by the decision.

II. GENERAL DUTIES OF CARE AND THEIR APPLICATION TO ICE AND SNOW/SLIP AND FALL CASES

A. Defining the General Duty of Care Owed by a Business Owner to a Business Invitee

Duties of care for business owners and how those duties are interpreted vary from state to state. Each jurisdiction uses essentially the same principles: (1) duty is fashioned on the status of the plaintiff;\textsuperscript{16} (2) reasonable or ordinary care is ex-
pected in keeping premises reasonably safe; 17 (3) business owners are not insurers of safety; 18 and (4) foreseeability, both in terms of the invitor and invitee’s ability to foresee, is a factor when determining duty. 19 Differences in how the above principles are weighed can have a significant impact on whether or not a state chooses to adopt the “storm in progress” doctrine or chooses to adopt a different rule. For example, in New York, “a landowner [has] a duty to business invitees to keep [the] premises in a reasonably safe condition.” 20 Furthermore, in ice and snow/slip and fall cases, “the plaintiff must . . . show that the defendant had actual or constructive notice of the . . . condition” and “thereafter failed to use reasonable care to remedy [it].” 21 A landowner in Connecticut owes virtually the same duty to business invitees. 22 What Connecticut also makes clear is that a landowner’s duty of care is determined by the status of the entrant, i.e., trespasser, licensee, or invitee, and not whether the landowner maintains the property for commercial or private use. 23 This is a common thread among a number of jurisdictions—when deciding what duty to impose, the duty is applied based on the status of the plaintiff, not whether the landowner uses the premises for business purposes. 24 Another common thread among the jurisdictions is the principle that a landowner is not an insurer of an invitee’s safety. 25 This is generally interpreted to mean that unreasonable efforts are not expected of the landowner and that an invitee has no right to expect absolute safety. 26

17. See cases cited infra notes 27, 30.
18. See cases cited infra note 25.
19. See cases cited infra notes 29, 32.
21. Id. at 277-78. In order to prove constructive notice, the plaintiff must show that the condition existed for such a period of time prior to the accident that the defendant should have discovered and remedied it. Id. at 278. This “snow and ice/slip and fall” burden is in addition to the plaintiff’s normal burden of showing: (1) the existence of a duty on the defendant’s part; (2) a breach; and (3) an injury suffered as a result of that breach. Id. at 277.
24. See, e.g., Reuter v. Iowa Trust & Sav. Bank, 57 N.W.2d 225, 226 (Iowa 1953) (stating that a landlord, in this case a business landlord, will be treated as a general owner of land, and that his or her duty is based upon the plaintiff’s invitation or permission to use the premises); Walker v. Mem’l Hosp., 45 S.E.2d 899, 909, 902 (Va. 1948) (making no distinction between a “business establishment, landlord, carrier, or other inviter” and imposing the duty chosen because “as a visitor [the plaintiff] occupied the legal status of an invitee”).
In Rhode Island, a jurisdiction that applies the “storm in progress” doctrine, a business owner is bound only to use “ordinary care and diligence to keep the premises in a safe condition for the access of persons who come thereon by his invitation, express or implied, for the transaction of business, or for any other purpose beneficial to him.”27 In determining whether or not a duty exists in a particular situation, Rhode Island considers factors such as the “relationship of the parties, the scope and burden of the obligation to be imposed upon the defendant, public policy considerations, and notions of fairness.”28 While foreseeability of the harm to the plaintiff is key to determining whether or not there is a duty, foreseeability, in and of itself, does not give rise to that duty.29

Similarly, in West Virginia, a landowner, business or otherwise, “owes to an invitee the duty to exercise ordinary care in keeping and maintaining his premises in a reasonably safe condition.”30 An important limitation on this duty is the distinction West Virginia places on dangers that are “obvious, reasonably apparent, or as well known to the person injured as they are to the owner or occupant.”31 The risk of dangers that are known and obvious, or would be observed by the invitee if he or she exercised ordinary care, is a risk that the invitee assumes.32

The other jurisdictions that have adopted the “storm in progress” doctrine hold business owners to essentially the same duty as do the above jurisdictions.33 In Massachusetts, which has adopted the “natural accumulation” rule,34 the general duty imposed requires that “a landowner must maintain his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk.”35 In Michigan, where exactly the opposite approach is taken and the “natural accumulation” rule has been expressly rejected (and the “storm in progress” doctrine implicitly rejected),36 the duty imposed is such that invitees must maintain the

33. Reuter v. Iowa Trust & Sav. Bank, 57 N.W.2d 225, 226 (Iowa 1953) (holding that the defendant owed “a duty of reasonable care to keep the property in a reasonably safe condition”); Goodman v. Corn Exch. Nat’l Bank & Trust Co., 200 A. 642, 643 (Pa. 1938) (stating that the plaintiff-invitee was to maintain the stairway in a reasonably safe condition); Walker v. Mem’l Hosp., 45 S.E.2d 898, 899 (Va. 1948) (holding that the defendant owed the plaintiff “the duty to exercise ordinary care to have its premises in a reasonably safe condition” and that “it was incumbent upon the plaintiff to exercise reasonable care for her own safety”).
34. The “natural accumulation” rule states that there must be some other causal defect besides the natural accumulation of water, ice, or snow in order to establish negligence. Athas v. United States, 904 F.2d 79, 81 (1st Cir. 1990).
35. Id. (quoting Mounsey v. Ellard, 297 N.E.2d 43, 52 (Mass. 1973)).

[T]he invitee has a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation. As [the general duty of care imposed on a landowner] pertains to ice and snow accumulations, it will require that reasonable measures be taken within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee.

Id.
property in a reasonably safe condition and must exercise due care to prevent and obviate the existence of a condition, be it known or reasonably known, that might result in injury.\textsuperscript{37}

The District of Columbia takes a similar approach to that taken by Michigan.\textsuperscript{38} The District of Columbia imposes a general duty on landowners for the benefit of invitees. This duty requires landowners to exercise ordinary care so that the property will be reasonably safe. After notice of conditions, whether permanent or temporary, that make the property dangerous to invitees, the landowner must take ordinary care to free the property from those conditions.\textsuperscript{39}

Finally, Maine, a jurisdiction that has explicitly rejected the “storm in progress” doctrine and in doing so implicitly rejected the “natural accumulation” rule,\textsuperscript{40} imposes a general duty of care on the landowner to exercise “reasonable care in providing reasonably safe premises . . . when it knows or should have known of a risk to customers on its premises.”\textsuperscript{41} Additionally, a business owner who is aware of the existence of a potentially dangerous recurrent condition may not ignore that knowledge and must reasonably respond to “the foreseeable danger of the likelihood of a recurrence of the condition.”\textsuperscript{42}

\section*{B. Interpreting and Applying the General Duty of Care to Ice and Snow Removal}

\subsection*{1. The “Storm in Progress” Doctrine}

The majority of the jurisdictions that have considered what duty a business owner owes to an invitee to clear accumulating ice and snow have adopted the “storm in progress” doctrine—affording a business owner a reasonable time after the cessation of a storm or temperature fluctuations to remedy the situation.\textsuperscript{43} There are two principle reasons behind the adoption of the “storm in progress” doctrine. The first is that requiring business owners to clear ice and snow before a storm has ceased would improperly make them insurers of their invitees’ safety.\textsuperscript{44} It is a well-settled principle that although a business owner generally owes a reasonable duty of care to keep property reasonably safe, he or she is not an insurer.\textsuperscript{45} In other
words, standards of care should not be formulated so as to require that the business owner insure that the invitee is safe on the property at all times. The Supreme Court of Iowa explained that keeping property safe is quite different from taking reasonable steps to keep property safe and that business owners are only required to do the latter.\footnote{Id. at 226-27.}

The second principle reason for adopting the “storm in progress” doctrine is that requiring a business owner to remove snow or ice before a storm has ended would hold him or her to a standard of care that is not reasonable or ordinary.\footnote{E.g., Walker v. Mem'l Hosp., 45 S.E.2d at 902; Phillips v. SuperAmerica Group, Inc., 852 F. Supp. at 506.} In Phillips v. SuperAmerica Group, Inc.,\footnote{852 F. Supp. 504 (N.D.W. Va. 1994).} the plaintiff slipped and fell while purchasing gasoline at the defendant’s gasoline station during a severe snowstorm.\footnote{Id. at 504.} In response to the plaintiff’s argument that the defendant had a duty to keep its premises free from snow and ice,\footnote{Id.} the United States District Court for the Northern District of West Virginia, applying existing West Virginia and Virginia common law,\footnote{Id. at 505-06. Virginia law was used because no state court in West Virginia has addressed this specific issue as yet.} held that the changing weather conditions due to the storm rendered it “inexpedient and impractical” to take action before the cessation of the storm, and that ordinary care did not require it.\footnote{Id. at 506.}

In Walker v. Memorial Hospital,\footnote{45 S.E.2d 898 (Va. 1948).} the plaintiff, Mrs. Walker, fell down the steps of the defendant hospital as she was leaving after visiting her husband.\footnote{Id. at 899.} Freezing rain had been falling fairly continuously for about two hours previous to her fall.\footnote{Id. at 900.} Mrs. Walker had been the second person to fall on the steps that night and the hospital had made no efforts, either through a sign or via the employee seated at the desk near the doors, to notify patrons that the conditions were icy on the steps.\footnote{Id. at 902.} The Supreme Court of Virginia held that even if the hospital had been able to remove all of the ice from its premises, the effect of the removal would merely have reduced the distance Mrs. Walker would have had to walk on a slippery surface by less than twenty feet because in order to get to her destination she had to traverse on the icy city sidewalks.\footnote{Id. at 907.} In adopting the “storm in progress” doctrine, the court stated that the general controlling principle is that ordinary care does not require taking action before the end of the storm; the changing conditions would render it “inexpedient and impractical” to do so.\footnote{Id.} In the court’s view, the hazardous condition was caused solely by the “usual and natural action of the elements” and every pedestrian who ventures out into those conditions knows that there is a risk that he or she may fall.\footnote{Id. at 907.} It would be unreasonable, in the eyes of the
court, to require a business owner to repeatedly enter into the storm and risk injury
to him or herself, just to relieve the invitee of that risk.60

In Munsill v. United States,61 the plaintiff fell outside of a post office during a
snowstorm.62 The United States District Court in Rhode Island concluded that
given the opportunity, the Rhode Island Supreme Court would adopt the “storm in
progress” doctrine,63 and stated that, “[s]hoveling against a snowstorm is like shov-
eling sand against the tide. . . . Thus, the reasonable rule is that an occupier of
business premises has until the end of a snowstorm to remove accumulations of
snow and ice.”64 Finally, in Mattson v. St. Luke’s Hospital of St. Paul,65 the Su-
preme Court of Minnesota held that “[r]easonable care for the safety of an invitee
does not require an inviter to engage in an unending and impractical, if not useless,
contest with the uncontrollable forces of nature while a storm is in progress.”66

The court stated that these weather conditions were “normal hazards of life” over
which the defendant had no control and which affected not only the defendant’s
property, but all the other exposed property in the city.67

In applying the “storm in progress” doctrine, several courts have had to ad-
dress the issue of “unusual circumstances.” These courts have adopted the “storm
in progress” doctrine with the caveat that business owners have until a reasonable
time after the cessation of a storm to clear the storm’s effects absent unusual cir-
cumstances.68 Although none of the case law has specified what unusual circum-
stances might entail, the case law does shed light on what they do not entail. For
example, in Connecticut, taking into consideration the location of the premises,
the use of the premises, the day of the week, and the time of the day in determining
liability is improper because those factors take into consideration the defendant’s
status as an owner of a business establishment.69 Therefore, these factors do not
constitute unusual circumstances. In Iowa, heavy snowfall and snow packed steps
are not unusual circumstances.70 Nor are those unusual circumstances in Minne-
sota.71 Unusual circumstances did not exist in any of the cases analyzed here,
even though injuries occurred at hospitals where one might assume that people

60. Id.
62. Id. at 216.
63. Id. at 221. No state court in Rhode Island has addressed the issue as yet.
64. Id. at 221-22.
65. 89 N.W.2d 743 (Minn. 1958).
66. Id. at 746.
67. Id. A New York court summed up the matter well:

The presence of snow or ice upon exposed places . . . is an accident of the hour, and no
ordinary diligence could, during the prevalence of a storm, wholly remove its effects
from the places exposed to its action, so as to prevent accidents to heedless and inat-
tentive [invitees]. A[n] [invitee] has no right to assume that the effects of a continu-
ous storm of snow, sleet, rain or hail will be immediately and effectually removed
from the exposed [area] . . . .

70. See Reuter v. Iowa Trust & Sav. Bank, 57 N.W.2d at 226.

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who are already injured may be traveling,\textsuperscript{72} fast food restaurants where one might expect a high traffic flow,\textsuperscript{73} post offices where one might expect the same,\textsuperscript{74} and gasoline stations on Christmas Eve, one of the busiest travel days of the year.\textsuperscript{75}

The “storm in progress” doctrine is applied in the above jurisdictions in accordance with the theory that requiring business owners to clear accumulation as it is falling requires business owners to insure their invitees’ safety and does not comport with a reasonable standard of care. Requiring landowners to clear ice and snow as it falls is “inexpedient and impracticable” and is not a reasonable reaction to a usual and natural action of the elements that pedestrians knowingly encounter whenever they step outside. Therefore, while the door remains open to the argument that unusual circumstances justify an exception to the rule, snowfall in heavily traveled business areas will not constitute unusual circumstances.

\textit{2. The “Natural Accumulation” Rule}

Taking an even stricter approach than the majority of jurisdictions do, Massachusetts applies the “natural accumulation” rule when deciding cases involving a business owner’s duty to clear ice and snow resulting from the natural accumulation of precipitation.\textsuperscript{76} Under this rule, there must be some defect other than the natural accumulation of ice and snow in order to hold the defendant liable.\textsuperscript{77} One of the reasons for this rule is that

\begin{quote}

in this climate [one with stormy winters] . . . a number of conditions might exist which within a very short time could cause the formation of ice . . . without fault of the owner and without reasonable opportunity on his part to remove it or to warn against it or even to ascertain its presence.\textsuperscript{78}
\end{quote}

If, however, the ice and/or snow remains on the property for an extended period of time, human activity can create conditions that would render the accumulation unnaturally hazardous.\textsuperscript{79} In these types of situations, the business owner may be found negligent.\textsuperscript{80}

Ohio also follows the “natural accumulation” rule.\textsuperscript{81} In a case where the plaintiff slipped and fell on an accumulation of ice in the parking lot of a retail estab-

\textsuperscript{72} Id.; Walker v. Mem’l Hosp., 45 S.E.2d at 899.


\textsuperscript{76} Athas v. United States, 904 F.2d 79, 81 (1st Cir. 1990).

\textsuperscript{77} Id.

\textsuperscript{78} Collins v. Collins, 16 N.E.2d 665, 665 (Mass. 1938).

\textsuperscript{79} Phipps v. Aptuxet Post #5988 V.F.W. Bldg. Ass’n, 389 N.E.2d 1042, 1043 (Mass. App. Ct. 1979); Jakobsen v. Mass. Port Auth., 520 F.2d 810, 817 (1st Cir. 1975). In Phipps, cars that had traveled over snow left in the parking lot created icy ruts that were the cause of the plaintiff’s fall. Phipps v. Aptuxet Post #5988 V.F.W. Bldg. Ass’n, 389 N.E.2d at 1042. The defendant was found liable due to the fact that the dangerous condition was no longer solely the result of natural accumulation. Id. at 1043. In Jakobsen, the plodding from a constant stream of people outside the entrance to an air terminal transformed a natural accumulation of precipitation into a slick condition for which the defendant was found liable. Jakobsen v. Mass. Port Auth., 520 F.2d at 817.

\textsuperscript{80} See cases cited supra note 79.

lishment, the Court of Appeals of Ohio stated, "[t]he law is clear in Ohio that an owner of land ordinarily owes no duty to business invitees to remove natural accumulations of ice and snow . . . or to warn the invitee of the dangers associated therewith." The Ohio court used similar reasoning to that used in Massachusetts: it is often impossible and ordinarily impracticable to hold that liability exists from the actions of elements in a climate where winter brings frequent snowstorms and sudden and extreme changes in temperature and conditions. Therefore, as long as the accumulation of ice and snow is in all respects natural, no liability exists. However, the longer the accumulation stays on the premises, the greater the likelihood that some man-made condition will alter its natural state and create the opportunity for liability on the part of the business owner. The major difference between this rule and the "storm in progress" doctrine is that under this theory, snow and ice may remain untouched on a property indefinitely and as long as it remains in its natural condition, someone who falls and injures themselves will not have a cause of action. In a "storm in progress" jurisdiction, the business owner must clear the accumulation within a reasonable time after the storm has ceased in order to avoid liability.

3. Michigan and the District of Columbia's Standard

Michigan approaches this matter altogether differently. In Quinlivan v. Great Atlantic & Pacific Tea Co., the plaintiff parked his automobile in the parking lot of the defendant grocery store and after leaving his automobile he fell in the snow-covered, icy lot. Snow had not fallen for several days. The Supreme Court of Michigan started its analysis by defining the general duty of care that an invitor owes an invitee. Following a discussion of the history of slip and fall cases in Michigan, the court noted that although the "thrust" of Michigan case law supports the application of the "natural accumulation" rule, none of the cases reconcile the rule with the rigorous duty owed to invitees. The court bypassed any discussion of the "storm in progress" doctrine and resolved the case with the rule that the invitor must take "reasonable measures... within a reasonable time after an accumulation of ice or snow to diminish the hazard of injury to the invitee." The court did not answer the question of how much precipitation must accumulate before the invitor must take action to diminish any risk to the invitee.

Ten years later in Lundy v. Groty, the Court of Appeals of Michigan demonstrated how seriously it viewed the invitor's duty to an invitee. Lundy, a seventy-
year-old woman, worked for the defendant as housekeeper and a babysitter.\footnote{Id. at 449.} A
snowstorm had started the night before the plaintiff’s injury and snow was still falling when the plaintiff arrived at the defendant’s house at noon the next day.\footnote{Id.} The defendant had not shoveled or salted her driveway, and when the plaintiff stepped out of her car she slipped and fell.\footnote{Id.} The trial court examined the rule set out in Quinlivan and held that the defendant was not liable to remove snow as it was falling.\footnote{Id.} The Court of Appeals of Michigan reversed, holding that the trial court’s approach (essentially the “storm in progress” doctrine) was not compatible with existing Michigan law.\footnote{Id. at 449-50.} The court considered the fact that the defendant knew that the snow was falling on her property and would create a dangerous situation for the plaintiff—therefore, the applicable duty of care required the defendant “to shovel, salt, sand or otherwise remove the snow.”\footnote{Id. at 450.} The fact that Michigan imposed a duty on a private homeowner who was expecting a single invitee is evidence that Michigan bases its duty of care solely on the status of the plaintiff, and not on whether the defendant is a business owner expecting a high volume of invitees.

The approach taken in the District of Columbia is similar to that taken in Michigan. In Pessagno v. Euclid Inv. Co.,\footnote{112 F.2d 577 (D.C. Cir. 1940).} the plaintiff was injured in the driveway of an apartment house.\footnote{Id. at 578.} The plaintiff was a guest of one of the tenants and was leaving the building to take a cab.\footnote{Id.} The weather was cold and rainy and the driveway was slippery from ice forming as the rain fell.\footnote{Id.} Nothing had been spread on the steps or the driveway to counter any of the risk caused by the ice.\footnote{Id.} The trial court relied on a New York case that held that the failure to remove ice during a storm or immediately after the storm’s abatement was not actionable negligence and entered judgment not withstanding the verdict for the defendant.\footnote{Id. at 579.} The D.C. Circuit reversed, stating that a landlord owed a duty to invitees to exercise ordinary care in keeping the premises free from permanent or temporary risks that are known to the landlord.\footnote{Id. at 579.} In this case the landlord knew of the conditions and had sanded four times prior to the plaintiff’s fall.\footnote{Id.} However, the last sanding, four hours before the plaintiff fell, had been washed away by the time the plaintiff was leaving the building.\footnote{Id.} The D.C. Circuit held that the question of
whether or not the defendant had acted reasonably was a question for the jury and reinstated the original jury verdict. 107

Both the courts in Michigan and in the District of Columbia stated that they were not imposing a duty that turned the invitor into a guarantor of safety or an insurer of invitees. 108 The D.C. Circuit also stated that if spreading sand or some other preventative substance would have been impossible or useless, then it would not have been reasonable to expect the defendant to do so. 109 In addition, if spreading sand every two or three hours would have provided reasonable safety, then the defendant had satisfied its burden. 110 However, that was a question left for the jury, leaving open the possibility that “reasonable” could be interpreted as requiring that the invitor spread sand at more frequent time intervals. 111 The approach taken in these two jurisdictions reflects the policy that every invitee, regardless of at what point during the storm they enter the defendant’s property, should be able to benefit from the results of the invitor having taken reasonable care to provide for their safety.

C. Maine’s Treatment of Ice and Snow/Slip and Fall Cases

In 1917, the Law Court first addressed the duty owed to a business invitee in Davis v. Waterville, Fairfield & Oakland Street Railway Co. 112 The plaintiff had slipped and fallen as she was alighting from the defendant’s car. 113 The Law Court held that:

[The railroad company should not be held responsible, under ordinary circumstances, for the existence of snow or ice upon the steps accumulating through natural causes, during the journey, until it has had a reasonably sufficient time and opportunity, consistently with its duty to transport its passengers, to remove such accumulations. To require the immediate and continuous removal of all snow from the steps during the journey would be impracticable. 114]

The Law Court declined to disrupt the jury’s verdict for the plaintiff. 115 In doing so, the Law Court stated that based on the facts of the case, the jury could have discredited the conductor’s testimony that he had cleared the steps only twenty minutes before the accident. 116

The Law Court did not mention the “storm in progress” doctrine until 1972. In Isaacson v. Husson College, 117 Lawrence Isaacson was a resident of Husson

107. Id. at 579-80.
110. Id.
111. Id. The Pessagno case has not been without critique. In Walker v. Memorial Hospital, the Supreme Court of Virginia emphasized that in all of the case law that the Pessagno court relied on in making its decision, the slippery conditions were due to causes which existed before the storms began (i.e. failure to remove ice that had existed long before snow had begun to fall). Walker v. Mem’l Hosp., 45 S.E.2d 898, 903 (Va. 1948). Therefore, the cases cited by the Pessagno court stood only for the principle that a property owner is allowed a reasonable time after a storm has ended to take action. Id.
112. 117 Me. 32, 102 A. 374 (1917).
113. Id. at 375.
114. Id.
115. Id. at 375-76.
116. Id.
117. 297 A.2d 98 (Me. 1972).
College when, on February 27, 1969, as he was returning from the dining commons to his dorm room, he slipped and fell on an icy patch on the walkway provided by the college. Isaacson sustained personal injuries and sued Husson College for compensatory damages. Husson College rested its case without presenting any evidence and made a motion for a directed verdict, which was granted. The trial court had two underlying reasons for granting Husson College’s motion for a directed verdict:

- (1) there was no duty under the law of Maine resting upon the defendant towards the plaintiff to remove a natural accumulation of ice and snow under any circumstances, and (2), even if there were such a duty, the plaintiff, by undertaking, in the face of the obvious hazard of lack of illumination, to walk the pathway in a shuffling manner though wearing ripple-sole shoes, manifested such an awareness of latent potential dangers due to weather conditions that he would be barred from recovery of any damages for his resultant injury.

The Law Court disagreed with the trial court’s reasoning and reversed the trial court’s decision. The Law Court stated that Isaacson’s relationship with the defendant was as a business visitor or invitee and that the defendant owed him, as a business invitee, the “positive duty of exercising reasonable care to provide him with walkways which he was invited to use, or which he would be reasonably expected to use, which were reasonably safe for his use.” The Law Court also stated that, “[e]ven though the owner or occupier of land does not insure safety to business invitees, nevertheless he is under legal obligation to use ordinary care to ensure that the premises are reasonably safe for invitees in the light of the totality of the existing circumstances.”

The Law Court then explained that the business invitee had a right to assume that the premises were reasonably safe for his use. “The mere fact that snow and ice conditions are prevalent” during Maine winters does not, by itself, excuse the landowner from exercising the duty owed to the invitee. Although the plaintiff must at all times exercise ordinary care for his own safety, the Law Court explained that the plaintiff had the right to expect that the defendant’s employees would exercise reasonable care in inspecting the campus and in taking such corrective measure or giving such warning as may be reasonably necessary for the plaintiff’s protection.

118. Id. at 100.
119. Id. at 100-01.
120. Id. at 101.
121. Id.
122. Id.
123. Id. at 103.
124. Id.
125. Id. The Law Court was referring to its decisions in Ouellette v. Miller, 134 Me. 162, 183 A. 341 (1936) and Rosenberg v. Chapman Nat’l Bank, 126 Me. 403, 139 A. 82 (1927).
127. Id.
128. Id.
129. Id.
The Law Court then explicitly reserved the issue of what would constitute reasonable care during a storm in progress and recognized that the general rule is that the business owner has a reasonable time after the storm has abated before remediying the condition. In Isaacson's case, the storm had abated the afternoon preceding the day of the accident. Although there was evidence that the ice patch may have been caused by the accumulation of water from thawed snow near the walkway, and the subsequent freezing of such water, the Law Court stated that this thawing/freezing process is such an integral part of Maine winters that landowners should know that falls on ice are readily foreseeable unless reasonable steps are taken to inspect the areas or otherwise protect invitees from harm.

Finally, the Law Court rejected the doctrine that provides that there is no obligation to protect the invitee from known or obvious dangers. Instead, the Law Court explained that there are some cases in which the landowner can anticipate that the dangerous condition will cause physical harm to the invitee regardless of its obvious danger. In these cases the landowner will not be relieved of the duty of reasonable care and may be required to warn the invitee or take other steps to protect him or her from the obvious danger. The Law Court concluded that the

130. Id. at 103-04. The Law Court stated:

We need not determine in the instant case what steps reasonable care would have required the corporate defendant to take while the storm was in progress. This was not the freezing rain or sleetstorm during which, under the general rule, the invitor is not required to remove the freezing precipitation as it falls, but is only duty bound to take appropriate corrective action within a reasonable time after the storm has abated.

131. Id. at 104.

132. Id.

133. Id. This doctrine is presented in the Restatement (Second) of Torts §§ 343, 343A(1) (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.

Section 343A(1) states that, "[a] possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness."

134. Isaacson v. Husson Coll., 297 A.2d at 105. This position is summarized in comment f of the Restatement (Second) of Torts § 343A (1965). Comment f reads:

There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. This duty may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.

Examples include times when it is reasonable to expect that the invitee’s attention may be distracted or when it is reasonable to expect that the invitee will proceed to encounter the danger because for a reasonable person in his or her position the advantages would outweigh the risk.

Id.

discharge of the landowner’s duty carries with it the implication that the landowner “shall have reasonable notice of the need for, and a reasonable opportunity to take, corrective [measures] for the safety of his invitees.” Proving reasonable notice and reasonable opportunity is the plaintiff’s burden, and Isaacson satisfied that burden.

Two other ice and snow/slip and fall cases preceded Budzko. In 1998, the Law Court decided Denman v. Peoples Heritage Bank Inc., and held that the defendants did not owe a duty to the plaintiff because they were not in possession of the sidewalk on which she fell. In light of the fact that the defendants owed no duty to the plaintiff, the Law Court did not decide what the appropriate degree of care would have been had there been a duty.

In the second case, Mixer v. Tarratine Market, the plaintiff fell outside the entry door to the defendant’s market. It had been snowing for several hours before her fall and there was conflicting evidence regarding whether steps had been taken to clear any of the snow. The Law Court only addressed whether the trial court erred in (1) not giving the plaintiff’s requested jury instructions; and in (2) admitting evidence of the plaintiff’s balance problems, and did not actually reach the issue raised in Budzko. The trial court’s jury instructions charged the jury in general terms regarding the duty of a landowner in keeping his or her premises reasonably safe but did not address any specific issues related to the removal of snow and ice. The Law Court affirmed the trial court’s instructions and the

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136. Id.
137. Id. at 105-06.
139. Id. ¶¶ 7, 9, 704 A.2d at 414, 415. Peoples Heritage Bank was required under a Portland city ordinance to maintain the public sidewalk in front of the bank. Id. ¶ 2, 704 A.2d at 413. It entered into a contract with Fox Enterprises to clear the ice and snow as required by the ordinance. Id. The ordinance required that “in the business-pedestrian district, the owner, manager or any person having responsibility for any building or lot of land which abuts any street where there is a sidewalk shall remove snow from the entire sidewalk within twelve (12) hours after snow has ceased to fall.” Id. n.1 (quoting Portland, Me, Code of Ordinances § 25-173 (1993)). The ordinance further required that:

In the business-pedestrian district, whenever the sidewalk or any part thereof adjoining any building or lot of land on any street shall be encumbered with ice for six (6) hours or more during the daytime, it shall be the duty of the owner and any person having the responsibility for such building or lot to cause such sidewalk to be made safe and convenient by removing the ice therefrom or by covering the same with sand or some other suitable substance.

Id. n.1 (quoting Portland, Me, Code of Ordinances § 25-174 (1993)). Thus, the duty imposed by the City of Portland more closely resembles the “storm in progress” doctrine than any of the other doctrines.
140. Id. ¶ 12, 704 A.2d at 415.
141. 1999 ME 27, 724 A.2d 614.
142. Id. ¶ 2, 724 A.2d at 615.
143. Id.
144. Id. ¶ 1, 724 A.2d at 614-15.
145. Id. ¶ 4, 724 A.2d 614. Portions of the jury instructions read:

Any person has a duty to take reasonable care for their own safety. That duty includes the duty to see that which is to be seen and to exercise reasonable caution regarding risks which are apparent to be seen. . . . [T]he owner of the premises has a duty to warn of or take other reasonable actions to correct or avoid the condition if the owner should anticipate that persons using the premises will nevertheless encounter the condition or because the person is likely to be distracted.

Id.
admission of the challenged evidence and upheld the verdict for the defendant.\textsuperscript{146}

The case law preceding \textit{Budzko} set forth several important principles. \textit{Isaacson} established that a landowner must exercise reasonable care and provide reasonably safe premises. In addition, the duty of reasonable care does not fade if the danger is obvious, as long as the landowner can reasonably expect that the invitee will traverse the property regardless of the obvious danger. \textit{Isaacson} also established that landowners are not insurers and must have reasonable notice of the need to take steps to clear accumulation. \textit{Davis} held the door open to the possibility that even while precipitation is still falling, a “reasonable time” may pass before the landowner may be required to clear his or her property. No case, however, directly addressed the issue presented in \textit{Budzko}, and for the first time in 2001, the Law Court decided whether a landowner owes a duty to business invitees to clear ice and snow as it is falling.

\section*{III. The \textit{Budzko} Decision—The Facts and Holding}

On February 27, 1995, Terry Budzko, a UNUM employee working in One City Center,\textsuperscript{147} was leaving work around 5:30 p.m. when she slipped and fell on the stairway landing outside the Monument Square entrance to the building.\textsuperscript{148} A storm had progressed throughout the day,\textsuperscript{149} resulting in icy, snow packed surfaces.\textsuperscript{150} The record indicated that One City Center, and not its tenants or its tenants’ employees, was responsible for snow and ice treatment around the building.\textsuperscript{151} One City Center had implemented a monthly maintenance procedure for February, requiring maintenance personnel to “monitor weather reports to be prepared for winter snowfall or ice storms” and “inspect property on a constant basis for ice build-up on walkways and take whatever measures necessary to keep them clear.”\textsuperscript{152} The One City Center maintenance contractor testified that it was necessary to remove snow and ice as it fell during a storm, and that the Monument Square entrance received first priority.\textsuperscript{153}

Budzko brought a suit against One City Center, alleging negligence,\textsuperscript{154} and her husband brought a lack of consortium claim.\textsuperscript{155} At the close of trial, One City Center filed a motion requesting judgment as a matter of law, arguing that it was not under a duty to remove ice or snow as it fell.\textsuperscript{156} The court denied the motion.

\begin{itemize}
\item \textsuperscript{146} \textit{Id.} ¶¶ 8, 10, 724 A.2d at 616. The Law Court reviewed the trial court’s refusal to give amplifying instructions for abuse of discretion. \textit{Id.} ¶¶ 6-7, 724 A.2d 615-16.
\item \textsuperscript{147} \textit{Budzko} v. One City Ctr. Assocs. Ltd. P’ship, 2001 ME 37, ¶ 2, 767 A.2d 310, 312.
\item \textsuperscript{148} \textit{UNUM} corporation was one of the variety of business tenants in the One City Center building. \textit{Id.} Approximately 500 to 1000 people entered or exited the building daily. \textit{Id.}
\item \textsuperscript{149} \textit{Id.} ¶ 5, 767 A.2d at 313.
\item \textsuperscript{150} \textit{Id.} ¶ 4, 767 A.2d at 312.
\item \textsuperscript{151} \textit{Id.}
\item \textsuperscript{152} \textit{Id.}
\item \textsuperscript{153} \textit{Id.} ¶ 4, 767 A.2d at 312-13.
\item \textsuperscript{154} \textit{Id.} ¶ 5, 767 A.2d at 313.
\item \textsuperscript{155} \textit{Id.} ¶ 1, n.1 767 A.2d at 312.
\item \textsuperscript{156} \textit{Id.} ¶ 8, 767 A.2d at 313. Prior to the trial, One City Center had filed a motion in limine to exclude evidence that other people slipped or fell around the building on the same day, but at different times and in different places. \textit{Id.} ¶ 6, 767 A.2d at 313. The trial court never ruled on the motion. \textit{Id.} Budzko’s counsel referred to one such fall during his opening statement, prompt-
and the jury returned a verdict for Budzko in the amount of $20,000 and a verdict for her husband in the amount of $3500. One City Center renewed its motion requesting judgment as a matter of law and also filed a motion for a new trial, both of which were denied.

On appeal, One City Center argued that a business owner does not owe a duty to business invitees to clear ice and snow as it falls during a storm. Instead, argued One City Center, business owners may wait until a reasonable time after the storm has abated to remedy the condition. The Law Court disagreed. While acknowledging that it had never addressed this specific issue, the Law Court cited Currier v. Toys 'R' Us, Inc., for the proposition that “a business owner owes a ‘positive duty of exercising reasonable care in providing reasonably safe premises . . . when it knows or should have known of a risk to customers on its premises.'”

The Law Court also cited Dumont v. Shaw's Supermarkets, Inc., for the rule that “a business owner 'who is aware of the existence of a recurrent condition that poses a potential danger to invitees may not ignore that knowledge and fail reasonably to respond to the foreseeable danger of the likelihood of a recurrence of the condition.'” Coupling these two principles, the Law Court concluded that it was “evident that a business owner who anticipates that 500 to 1000 invitees may enter and leave its premises during a snow or ice storm has a duty to reasonably respond to a foreseeable danger posed to the invitees by a continuing snow or ice storm.” That duty would not be satisfied, the Law Court noted, through One City Center to object and move for a mistrial. The motion was rejected; however, the objection was sustained due to the irrelevant nature of the fall because it occurred in a different place than Budzko’s fall.

At several points in the trial both parties questioned witnesses about the circumstances surrounding the other fall, and Budzko’s counsel again mentioned it in closing arguments, referring to “missing witnesses.” One City Center again moved for a mistrial and was denied.

The curative instructions provided by the trial court adequately addressed any prejudice and affirmed the trial court’s decision. Budzko v. One City Ctr. Assocs. Ltd. P'ship, 2001 ME 37, ¶ 18, 767 A.2d at 316.

157. Id. ¶ 1, 767 A.2d at 312 n.1.
158. Id. ¶ 8, 767 A.2d at 313.
159. Id. ¶ 11, 767 A.2d at 314.
160. Id. ¶ 13 n.3, 767 A.2d at 314 n.3.
161. Id. ¶ 11, 767 A.2d at 314.
162. 680 A.2d 453 (Me. 1996).
164. 664 A.2d 846 (Me. 1995).
165. Budzko v. One City Ctr. Assocs. Ltd. P'ship, 2001 ME 37, ¶ 12, 767 A.2d at 314 (quoting Dumont v. Shaw's Supermarkets, Inc., 664 A.2d at 849). Dumont recognized a duty in four specific situations: (1) where the business owner caused a foreign substance to be on its floor; (2) where the business owner had actual knowledge of the existence of the foreign substance; (3) where the business owner was aware of a recurrent condition from a foreign substance that posed a potential risk to invitees; or (4) where the business owner allowed the foreign substance to remain on the floor for a period of time such that the owner should have known about it. Dumont v. Shaw's Supermarkets, Inc., 664 A.2d at 848-49.
City Center’s argument that it could wait until the cessation of the storm to take action, regardless of the risk posed to invitees during the storm. The Law Court expressly left open the question of whether a small number of anticipated invitees would alter the business owner’s duty.

In determining whether or not One City Center fulfilled its duty to “reasonably respond to a foreseeable danger posed to the invitees by a continuing snow or ice storm,” the Law Court considered evidence that One City Center knew of the weather conditions, had maintenance personnel available, had knowledge that 500 to 1000 invitees would enter or exit the building that day, and had failed to treat the ice with sand or salt, shovel any of the accumulated snow or ice, or warn invitees of the icy conditions. The Law Court also took into consideration the jury instruction, which stated that “[a] defendant is not required to remove snow or ice as it falls but is required to take appropriate corrective action to remove ice and snow within a reasonable time after the storm has abated.” The Law Court stated that this instruction may have been more than One City Center was entitled to because the instruction was based on dictum in Isaacson v. Husson College, and that dictum had never been established as law in Maine. In affirming the judgment against One City Center, the Law Court stated that the jury had found One City Center liable despite the beneficial erroneous instruction, and that One City Center failed to establish that the verdict was “clearly and manifestly” wrong. The resulting rule requires 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.”

167. Id. If this was truly One City Center’s position, it may have been bargaining for more than some states that have adopted the “storm in progress” doctrine would allow for. See Mattson v. St. Luke’s Hosp. of St. Paul, 89 N.W.2d 743, 745-46 (Minn. 1958) (holding that absent extraordinary circumstances the hospital could wait until after the cessation of the storm); Sinert v. Olympia & York Dev. Co., 664 A.2d 791, 794 (Conn. App. Ct. 1995) (holding a defendant may wait for the cessation of the storm absent unusual circumstances).


169. Id. ¶ 14, 767 A.2d at 315.

170. Id. ¶ 14, 767 A.2d at 315.

171. 297 A.2d 98 (Me. 1995). The following dictum was relied on by the Budzko trial court: We need not determine in the instant case what steps reasonable care would have required the corporate defendant to take while the storm was in progress. This was not the freezing rain or sleetstorm during which, under the general rule, the invitor is only duty bound to take appropriate corrective action within a reasonable time after the storm has abated. Id. at 103-04.


173. Id. ¶ 14, 767 A.2d at 315.

174. Id. ¶ 14, 767 A.2d at 315.

175. Id. ¶ 16, 767 A.2d at 315 (quoting Saucier v. Allstate Ins. Co., 1999 ME 197, ¶ 18, 742 A.2d 482, 488).

176. Id.
A. The Holding in Budzko Comports with Existing Maine Case Law

The Law Court departed from the majority of jurisdictions when it held in Budzko 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."177 The Law Court did not, however, depart from the principles established in existing Maine case law. For instance, in Isaacson, the Law Court explained that although some jurisdictions would relieve the business owner of his or her duty of care when the dangerous condition was known and obvious,178 Maine would not adopt a doctrine that would "automatically relieve[ ] the owner or occupier of land from any duty of care to his business invitee by reason of the invitee’s knowledge of the generally dangerous condition . . . ."179 Instead, if the owner or occupier of land could anticipate that the condition would cause physical harm regardless of the obvious nature of the condition, then the owner or occupier of land would not be relieved of his duty of reasonable care.180 The Law Court applied this principle in Budzko when it found the defendant liable notwithstanding the obvious and apparent danger to the plaintiff of snow and ice on the Monument Square stairway landing.181

In contrast, several of the jurisdictions that have adopted the "storm in progress" doctrine have stated that one of the reasons for adopting the doctrine is the known and obvious danger of snow and ice.182 As the Supreme Court in Virginia stated, "[e]very pedestrian who ventures out at such times knows he is risking the chance of a fall and of a possible serious injury."183 Considering the significant disparity between how Maine and jurisdictions that have adopted the "storm in progress" doctrine have stated that one of the reasons for adopting the doctrine is the known and obvious danger of snow and ice.182 As the Supreme Court in Virginia stated, "[e]very pedestrian who ventures out at such times knows he is risking the chance of a fall and of a possible serious injury."183 Considering the significant disparity between how Maine and jurisdictions that have adopted the "storm in progress"

177. Id.; see cases cited supra note 43.
178. Isaacson v. Husson Coll., 297 A.2d 98, 104 (Me. 1995). The Law Court cited the following authorities in order to describe the rationale behind the "obvious and apparent" doctrine:

"In the usual case, there is no obligation to protect the invitee against dangers which are known to him, or which are so obvious and apparent to him that he may reasonably be expected to discover them. Against such conditions it may normally be expected that the visitor will protect himself."

Id. (quoting PROSSER, LAW OF TORTS 403 (3d ed. 1964)). In addition:

"The knowledge of the condition removes the sting of unreasonableness from any danger that lies in it, and obviousness may be relied on to supply knowledge. Hence the obvious character of the condition is incompatible with negligence in maintaining it. If plaintiff happens to be hurt by the condition, he is barred from recovery by lack of defendant’s negligence towards him, no matter how careful plaintiff himself may have been."

Id. (quoting 2 HARPER & JAMES, LAW OF TORTS 1491 (1956)).
180. Id. at 105.
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doctrine treat the known and obvious nature of snowy and icy conditions, it is not surprising that Maine declined to adopt the “storm in progress” doctrine. If Maine had adopted the “storm in progress” doctrine, it would have been inconsistent with its treatment of known and obvious conditions.

An additional reason that Maine did not adopt the “storm in progress” doctrine is that the doctrine is wholly inconsistent with Maine’s treatment of foreseeability. For example, in Currier v. Toys ‘R’ Us, Inc.,184 the Law Court stated that “[a] duty of reasonable care is conferred upon a defendant . . . when it knows or should have known of a risk to [invitees] . . . .”185 In Dumont v. Shaw’s Supermarkets, Inc.,186 the Law Court explained that “a [business] owner who is aware of the existence of a recurrent condition that poses a potential danger to invitees may not ignore that knowledge and fail reasonably to respond to the foreseeable danger of the likelihood of a recurrence of the condition.”187 These decisions were central to the holding in Budzko.188 In fact, foreseeability is mentioned in the rule fashioned for winter storms: “Business owners have a duty to reasonably respond to foreseeable dangers . . . .”189

It is precisely because winter storms are expected in Maine, and are therefore recurring conditions that create foreseeable dangers, that business owners have a duty to reasonably respond to the danger created by them. It is no answer, as the Law Court stated in Isaacson, that snow and ice conditions are prevalent during Maine winter storms190—the prevalence of these conditions only supports the rule in Budzko. However, although Maine has remained consistent in its treatment of “foreseeability,” it is important to note that what may be the linchpin of the rule in Budzko is the exact reason for adopting the “natural accumulation” rule in other states.191 For example, the Court of Appeals of Ohio states, “In a climate where the winter brings frequently recurring storms of snow and rain and sudden and extreme changes in temperature, these dangerous conditions appear with a frequency and suddenness which defy prevention and, usually, correction.”192

184. 680 A.2d 453 (Me. 1996).
185. Id. at 455. Melissa Currier had entered the Bangor Toys ‘R’ Us branch on a rainy afternoon in August, 1992 when she slipped and fell on a four-foot-long and a couple-of-feet-wide “watery mud” film on the ceramic tile floor. Id. at 454. It was known to the store employees that it was raining outside and that store customers tracked water into the store during such weather and caused the tile floor to be slippery. Id. Although the floor was mopped at 10 a.m. that day, no further mopping had taken place when Melissa fell at 2 p.m. Id. The Law Court held that Toys ‘R’ Us had constructive notice of a safety hazard and therefore had a duty of reasonable care to provide a reasonably safe store. Id. at 455.
186. 664 A.2d 846 (Me. 1995).
187. Id. at 849. Dumont slipped and fell on a chocolate-covered peanut while shopping at the defendant’s store. Id. at 847. Shaw’s was aware that self-serve, small, loose items create a risk to customers of slipping and falling and had placed mats next to the grapes, cherries, any area with ice, the salad bar, and the bouquet racks. Id. No mats were placed near the candy bins. Id. The Law Court held that the trial court erred in not instructing the jury as to the reasonable foreseeability of a recurring condition and vacated the judgment for the defendant. Id. at 849.
189. Id. ¶ 16, 767 A.2d at 315 (emphasis added).
other words, although in Maine, the frequent nature of storms leads to the conclusion that business owners have been put on notice and have a duty to remedy icy or snowy conditions, in Ohio, the frequent nature of storms leads to the conclusion that requiring a business owner to remedy icy or snowy conditions is unreasonable.

Therefore, the Law Court remained quite consistent with precedent when it chose the rule it adopted in Budzko and declined to adopt either the “storm in progress” doctrine or the “natural accumulation” rule. The rule, however, exposes Maine business owners to two serious disadvantages over business owners in jurisdictions that adopt the “storm in progress doctrine.” First, Maine business owners run the risk of having to insure their invitees’ safety under the Budzko rule, and second, Maine business owners are subject to varying degrees of duties of care depending on how many invitees they expect during a winter storm.

B. Are Maine Business Owners Required to Insure Invitees’ Safety?

Whether imposing a duty on business owners to clear ice and snow makes such business owners insurers of invitees’ safety is an issue that is mentioned frequently among the jurisdictions that adopt the “storm in progress” doctrine, in Michigan, and in the District of Columbia, but is not mentioned anywhere in Budzko. In the jurisdictions that have mentioned it, discussion has been sparse. For example, in Minnesota, which has adopted the “storm in progress” doctrine, the discussion was limited to the following language, “[a]ny rule to the contrary would impose upon the hospital, as an inviter, a duty of extraordinary care which it does not have, or erroneously constitute it an insurer of the safety of invitees.” Likewise, in Rhode Island, which has also adopted the “storm in progress” doctrine, the following language constituted the extent of the “insurer” discussion: “[r]equiring a business owner to remove snow before a storm ends would hold him to an extraordinary standard of care, forcing him, in effect, to become an insurer of the safety of business invitees.”

The two jurisdictions that have rejected the “storm in progress” doctrine give the topic scarcely any more treatment. In Michigan, the Supreme Court stated, “[w]hile the invitor is not an absolute insurer of the safety of the invitee, the invitor has a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation.” In the District of Columbia, the United States Court of Appeals provided the most discussion:

In adopting this rule, we are not, as counsel say, imposing on the owner of the premises a burden physically impossible to discharge or one which makes the owner the guarantor of the safety of his tenants and their guests. We do not hold there was an absolute duty to provide a safe entrance or to keep it safe by extraordinary or unusual means. If the storm made the spreading of sand or ashes or

197. Munsill v. United States, 14 F. Supp. 2d at 221.
some other preventative impossible or even useless, no reasonable person would expect it to be done . . . . All that we hold is that there was a duty in the circumstances to be reasonably alert that persons lawfully using the property should be safeguarded against the danger which could, in the exercise of ordinary care, be foreseen and prevented. 199

The Law Court in *Budzko* remained silent on the issue.

However, in *Isaacson*, the Law Court was clear that “the owner or occupier of land does not insure safety to business invitees . . . .”200 In addition, in *Orr v. First National Stores, Inc.*, 201 the Law Court stated that “[i]t is undoubtedly correct that a storeowner is without duty to insure safety to a business invitee.”202

Therefore, although the question of whether the business owner must insure his or her invitees’ safety is a serious one, the *Budzko* rule will not likely have that effect. However, the language in *Budzko* that intimates that the Law Court would not require business owners to become insurers raises another issue. The language that states that business owners who do not expect significant numbers of invitees may be subject to a lesser duty of care203 raises the issue of whether the Law Court is imposing duties based not on the status of the plaintiff, as other jurisdictions do,204 but on the status of the defendant.

### C. How Maine Determines the Appropriate Duty of Care

As stated previously, several states fashion the duty the defendant owes on the status of the plaintiff205 and not on other factors, such as whether the defendant maintains his or her premises for business purposes.206 In fact, the majority of states distinguish between invitee and licensee and impose duties accordingly.207 Maine abolished the distinction between invitees and licensees in 1972 in *Poulin v.*

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201. 280 A.2d 785 (Me. 1971).
202. *Id.* at 792.
204. *See, e.g.*, Reuter v. Iowa Trust & Sav. Bank, 57 N.W.2d 225, 226 (Iowa 1953) (stating that a business landlord will be treated as a general owner of land, and that the duty imposed is based upon the plaintiff being invited or permitted to use the premises); Walker v. Mem’l Hosp., 45 S.E.2d 899, 899, 902 (Va. 1948) (making no distinction between a “business establishment, landlord, carrier, or other inviter” and imposing the duty chosen because “as a visitor [the plaintiff] occupied the legal status of an invitee”).
207. Little v. Bell, 719 So.2d 757, 762-63 (Miss. 1998). The Supreme Court of Mississippi cites cases from Missouri, Ohio, New Jersey, Connecticut, Pennsylvania, Indiana, Oklahoma, Kentucky, Arkansas, Idaho, Washington, Maryland, Arizona, Florida, Alabama, North Carolina, Montana, Nebraska, Utah, Oregon, Georgia, Texas, and Colorado. *Id.* The dissent cites cases from the following states that have abandoned the common-law standard owed to invitees and licensees, yet retain the common law standard for trespassers: Kansas, Maine, Massachusetts, Minnesota, New Mexico, Nebraska, North Dakota, Oregon, Rhode Island, Tennessee, Wisconsin, and Wyoming. *Id.* at 766-67 (McRae, J., dissenting). Interestingly, both the majority and the dissent cite to Oregon and Nebraska for opposing positions.
In Poulin, the Law Court stated that up to that point, the duty owed by a landowner to a person lawfully on the land was determined by the legal status of the latter. To "those persons present on the land through the owner's express or implied invitation, either for a purpose connected with the owner's business, or for a social visit the landowner owed the positive duty of exercising reasonable care in providing reasonably safe premises for their use." People using the landowner's property in the above manner were labeled "invitees." The court labeled as "licensees":

persons who are neither passengers, servants, nor trespassers, and do not stand in any contractual relation with the owner of the premises, and are permitted to come upon the premises for their own interest, convenience or gratification, . . . the landowner owed only the duty of refraining from willfully, wantonly or recklessly causing him harm.

The Law Court took Poulin as an opportunity to abandon the common law distinctions between invitees and licensees. The recognition that our culture has changed from one centered around land to one centered in an urban, industrialized setting justified this action. A further justification for abolishing the categories was that, "[a] man's life or limb does not become less worthy of protection by the law . . . because he has come upon the land of another without permission or with permission but without a business purpose." Accordingly, the Law Court held "that an owner or occupier of land owes the same duty of reasonable care in all the circumstances to all persons lawfully on the land."

208. 402 A.2d 846, 851 (Me. 1972). In Poulin, the plaintiff had accepted a ride to work with Mr. and Mrs. Tulley. Id. at 848. Mr. Tulley and the plaintiff both worked at Scott Paper Company and the plan was to drop Mrs. Tulley off at her place of employment, Colby College, and then travel to Scott Paper Company. Id. Due to icy road conditions, Mr. Tulley was unable to drive up the hill to the dormitory where Mrs. Tulley worked. Id. The plaintiff exited the vehicle and walked Mrs. Tulley to the dormitory. Id. When he attempted to re-cross the icy road he fell and slid down the hill, incurring the injuries that gave rise to the action. Id.

209. Id.
210. Id.
211. Id.
212. Id. (internal citations omitted).
213. Id. at 849.
214. Id. at 850. The United States Supreme Court recognized this change when it refused to incorporate the invitee-licensee distinction into admiralty law:

The distinctions which the common law draws between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism. In an effort to do justice in an industrialized urban society, with its complex economic and individual relationships, modern common-law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine gradations in the standards of care which the landowner owes to each. Yet even within a single jurisdiction, the classifications and subclassifications bred by the common law have produced confusion and conflict. . . . Through this semantic morass the common law has moved, unevenly and with hesitation, towards "imposing on owners and occupiers a single duty of reasonable care in all the circumstances."


Therefore, the fact that the Law Court expressly reserved the question of what duty would exist to remove ice and snow if a smaller number of invitees were expected\textsuperscript{217} may run in opposition to the law in several other jurisdictions,\textsuperscript{218} but is patently consistent with the law in Maine. In other jurisdictions, the number of people would not be a factor—only those people’s status would be. In Maine, the number of people goes directly to whether it is reasonable to expect a business owner to clear ice and snow.

V. CONCLUSION

This Note first asked: In declining to adopt “the storm in progress” doctrine, has the Law Court adopted a rule that forces business owners to insure the safety of their invitees during a winter storm? The Budzko court did not expressly address the issue of whether business owners now assume the duty of insurers. However, one can surmise that in its interpretation of “reasonable” the Law Court will not require that business owners shovel every flake of snow or spread sand over every inch of ice. In addition, by reserving the issue of what standard of care is reasonable in the situation where a smaller number of invitees are expected, the Law Court intimated that it may not require the business owner who expects a smaller number of invitees to clear snow before a storm has abated.

The next questions this Note asked were: Did the Law Court impermissibly base the imposed duty on the defendant’s status as a large business owner, and what ramifications result from the Budzko decision? The conclusion is that the Law Court did not impermissibly base the imposed duty on One City Center’s status as a large business owner. Instead, the Law Court properly considered the defendant’s status as a large business owner in determining that it was foreseeable that a large number of people would be encountering the danger of the accumulated snow on the One City Center property even though the danger was obvious. Thus, it was reasonable that some remedial action be taken. Because Maine does not determine duty based solely on the consideration of whether the plaintiff is an invitee or a licensee, it is appropriate to take into consideration the size of the business in determining what is reasonable.

Unfortunately, the ramifications of the Budzko decision are not entirely clear. Business owners in Maine have received little guidance on how long they have before they must take remedial measures, how often they must take them, or whether posting a sign indicating that the walkway is slippery will suffice. If the Law Court had adopted the “storm in progress” doctrine, the ramifications would be more obvious and Maine business owners would have had a plethora of examples to guide them in determining what steps would satisfy their duty of care. Determining duty based on reasonableness leaves room for ambiguity regarding “how much” and “how often.” At the same time, Maine’s precedent of taking size into consideration instead of fashioning the duty according to the plaintiff’s status leaves open questions regarding how large a business must be before the Budzko duty applies. In short, in the process of answering what must have seemed to the Law Court to be an obvious call for a remedy for Terry Budzko, the Law Court muddled

\textsuperscript{217} Budzko v. One City Ctr. Assocs. Ltd. P’ship, 2001 ME 37, ¶ 13, 767 A.2d 310, 314 n.2.

\textsuperscript{218} See cases cited supra note 205.
the waters for Maine business owners by sculpting a rule that provides little guidance and leaves open many questions that at one point already appeared answered.

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