

Step on a Crack; Break your Mother's Back

Amundsen Davis Transportation Alert
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Most of us know the old rhyme, "Step on a crack, you'll break your mother's back." It also means you might just break your leg, hurt your back, or worse. We all know that transportation companies are more than just about moving something from point A to point B. They own facilities in addition to vehicles, employ people who come to work each day, and store reams of data to name a few. In today's case, we discuss one of the common problem areas raised in everyday operations – the parking lot.

In *Rhonda Barrett v. FA Group, LLC*, 2017 IL App (1st) 170168, the First District of the Illinois Appellate Court considered what is a *de minimis* pothole that allegedly caused the plaintiff to fall and injure herself in a parking lot. In Illinois, it has been common practice for courts to dismiss cases via summary judgment when a fall was caused by a defect with a height difference of less than two inches on the offending land absent aggravating factors. It is a rule that essentially forgives a landowner from having to be ever vigilant for every condition upon a sidewalk, driveway, lot or paved or developed area. Here the trial court forgave the landowner and granted a motion for summary judgment, relying upon an expert's affidavit and finding no such aggravating factors.

On appeal, the appellate court disagreed and reversed the trial court's decision. Traditionally, the *de minimis* doctrine has been applied in cases which almost uniformly involve the plaintiff tripping as a result of a height deviation. The court determined that the pothole was more than a simple height deviation. The incident occurred on asphalt rather than concrete, at night, and in an area with dim lighting. Moreover, the plaintiff alleged that the fall happened because her shoe got stuck in loose asphalt inside the pothole. These circumstances should have been taken into consideration to determine whether the defect was *de minimis*. The trial court also improperly disregarded that the plaintiff challenged the expert's affidavit in multiple ways, perhaps even questioning the paper it was written on.

Unfortunately, sometimes a crack in the pavement becomes a lot more. Transportation companies not only need to take care of their vehicles, they need to take care of their property and do what they can to ensure that those they do business with do so as well. Transportation contracts, leases and other usage agreements often shift risk amongst those involved in a variety of ways, and can be used to help protect against the crack that might do more than simply trigger

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a childhood memory. One bad step may result in a worker's compensation claim, personal injury lawsuit or contractual dispute (or all three!) over not only the injury but who actually controlled and had responsibility for the property.

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