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SPORTS FACILITIES

How the law affects the sports facilities industry and the LAW

Governmental Immunity & College Basketball

By John E. Tyrrell and Alisha S. Rodriguez

As the country has gone without collegiate sports for the past few months, many are feeling the loss. Some might say sports are significant to daily life but is it a stretch to call collegiate sports events an integral state function? A recent opinion out of Kentucky examines immunity when a state university hosts a college basketball game. In *Saunier v. Lexington Ctr. Corp.*, No. 2018-CA-001290-MR, 2020 Ky. App. Unpub. LEXIS 265 (Ct. App. Apr. 17, 2020), the Court of Appeals of Kentucky held the University of Kentucky ("UK") and its employees could claim immunity when faced with negligence claims by a spectator injured at a UK basketball game. Plaintiff Mark Saunier fell on a electrical cable cover after descending a flight of steps at the school's basketball arena. The university leased the arena for basketball games and agreed to provide "institutional control" of the arena, as noted in the lease. Plaintiff brought negligence claims against the lessor, the university and two (2) university fire marshals for a knee injury he claimed was caused by negligence. His wife initially brought a loss of consortium claim and the couple later amended the complaint to bring business and economic claims related to a family owned business. The university asserted sovereign immunity and university employees claimed governmental immunity as a defense to the tort claims.

The court noted that governmental immunity flows from sovereign immunity but is limited; whereas sovereign immunity is absolute. See *Furtula v. University of Kentucky*, 438 S.W.3d 303 (Ky. 2014). Governmental

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Case Suggests Track Owners and Lessees Must Provide Security Measures to Prevent Post-Race Injuries

By Mailise Marks, of Segal McCambridge Singer & Mahoney, Ltd.

A recent matter filed in Connecticut state court poses the somewhat novel question, what security and safety precautions should a racetrack owner put in place to prevent participants and their crews from harming each other after a race?

On May 30, 2018, Raymond Reed (#87) started the Super X-car race at the New London-Waterford Speedbowl, in the pole position. Jason Larivee, Jr. (#70) began the race in the tenth spot. Reed would dominate the race on the inside with Larivee immediately behind and Marc Shafer in #58 on the outside. The three vehicles would battle for the top spot, before Reed would appear to lose control in the final turn, either following a well-placed bump from Larivee or for other reasons. The race finished with Raymond Reed in eleventh place and Jason Larivee in ninth place. According to the Complaint, filed on March 10, 2020, after the race Reed sustained a broken nose and lost consciousness when a member of Larivee's team, allegedly Scott Harrington, knocked him to the ground. As a result of these injuries, Reed claims that he suffers such infirmities as post-concussion syndrome and cervical sprain, Reed also alleges lost past and future wages.

The Complaint alleges that the Defendants: Whitney Farm Racing, LLC, lessee of the Speedbowl, New London-Waterford

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SPORTS FACILITIES and the LAW

Providing Masks to Fans Entering Sports Facilities Could Raise Liability Issues

By Timothy Liam Epstein, Esq., of Duggan Bertsch, LLC

Professional sports leagues who were forced to halt their seasons due to COVID-19 are slowly announcing when play will resume. Moreover, leagues that have been forced to delay the start of their seasons are currently considering options of how their respective seasons will proceed. Although these leagues will resume play at some point, fans will likely need to wait even longer before observing sporting events in-person.

When fans are eventually allowed to enter stadiums again, it will not be business as usual. Specifically, limited admission, social distancing practices, and facial mask requirements likely will be implemented within these stadiums. Of these practices, requiring fans to wear masks will pose a difficult challenge as fans will either not have their own mask or will not wear the masks correctly for the entirety of the game. Regarding the former, stadium owners and teams (collectively "owners") may elect to provide masks for fans who do not have their own. Although this proactive approach mitigates the risk of spreading COVID-19, owners may be exposing themselves to liability.

The Centers for Disease Control and Prevention ("CDC") has recommended that all people wear cloth face coverings in public settings where other social distancing measures are difficult to maintain. Although owners can implement procedures to make social distancing possible, the activities that occur within a sports stadium certainly make social distancing a challenge. Accordingly, the CDC's recommendation likely applies to patrons in sports arenas. Certainly, owners have the ability to provide disposable masks, but the optics of the excess waste created by such masks as well as the ongoing demand for proper disposable masks to be provided to healthcare workers and first responders may push owners to the CDC-recommended

Timothy Epstein

cloth face coverings. Additionally, cloth face coverings provide sponsor opportunities to help subsidize the cost.

The CDC has established what these facial coverings should include. These are as follows: (1) fit snugly, but comfortably, against the side of the face; (2) are secured with ties or ear loops; (3) include multiple layers of fabric; (4) allow for breathing without restriction; and (5) are able to be laundered and machine dried without damage or change to its shape. This list of features appears to be manageable for an individual, however, if stadiums intend to distribute masks for all fans who do not have their own, it will be both a difficult and costly task to provide masks that incorporate all the aforementioned characteristics for each mask.

One difficulty will be the ability to provide masks that fit correctly for each and every fan. If the only mask distributed is one of average size, fans that fall out of this range will be given a mask that is either too loose or restrictive. In both scenarios, fans will be provided, and subsequently wear, masks that are not within the guidelines of the CDC. Owners can mitigate this risk by distributing a wide variety of sizes, but this will come at an increase of cost, and only mitigate, and not completely eliminate the risk of improperly fitting masks.

Another consideration is whether or not fans will keep the masks after the game. Owners may prefer to retain all masks after each sporting event, launder them, and redistribute them at the next game. This will reduce the costs associated with purchasing masks, however, this comes with an increased risk of redistributing masks that may not be completely free of the virus. While what we currently understand of COVID-19 is that surface transmission is not a primary source of virus spread, the possibility remains that an owner may unknowingly increase fans' exposure to COVID-19 by redistributing used masks that were not properly laundered.

If these or any related situations result in a fan contracting COVID-19, in theory, owners could be found liable under a premises liability theory. Although states vary as to when and how a property owner can be found negligent under this theory, there are three general elements that must be established for a fan to succeed on a negligence claim under premises liability: (1) the owner must owe a duty of care to the fan; (2) the owner or agent of the owner breached that duty of care to the fan; and (3) the breach of duty of care caused the injury to the fan.

Generally, jurisdictions hold property owners to the highest standard for duty of care when the guest brings financial benefit to the property owner. Therefore, owners owe a duty to the fans to take reasonable steps to protect and/or prevent fans from foreseeable injuries. The only exception to this rule is the "limited duty rule." This rule requires baseball, hockey, and some other owners to provide a reasonable amount of protective seating and netting to protect fans from projectiles leaving the field of

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Providing Masks to Fans at Sports Facilities Could Raise Liability Issues

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play. *Benejam v. Detroit Tigers, Inc.*, 246 Mich. App. 645, 654 (2001). However, because this limited duty only applies for protection regarding projectiles, all sports stadiums may be subject to providing a reasonable standard of care to mitigate the risk of fans contracting COVID-19 absent any new legislation to the contrary.

Although establishing a duty may not come with significant challenge, the other two elements may pose an issue for fans alleging they contracted COVID-19 at a sporting event due to the stadium's distribution of inferior masks. First, fans will need establish that the masks distributed breached the owner's duty of care. Here, evidence that the masks distributed did not meet the standard established by the CDC's guidelines may satisfy this element. Specifically, distributing improperly fitting masks (disposable or not) or masks that have not been effectively laundered (if re-used by owners) are two of many potential factors that can establish this element.

Nonetheless, the causation element will undoubtedly be most difficult to establish. This strict causation element is known as proximate cause. By its definition, proximate cause is some direct relation between the injury asserted and the injurious conduct alleged. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 269 (1992). As COVID-19 cases continues to grow, the places in which an individual can contract the virus are increasing as well. Therefore, not only will fans need to establish that infection took place at the stadium, but they will also need to show that they were infected because they were given faulty, defected, or contaminated masks. Accordingly, every public interaction a fan has shortly before and after attending the sporting event continually decreases the possibility that the virus was contracted at the stadium.

Owners will likely raise a variety of defenses to a negligence claim brought by a fan. One example is that the stadium

exercised reasonable care with mask distribution. Here, owners can contend that it would be unreasonable to provide the perfect mask for thousands of fans. Thus, the fact that the owner provided protection that the fan would otherwise not have may support the finding that the owner exercised reasonable care, and thus, did not breach their duty of care.

Another example is the concept of assumed liability. Here, owners would need to establish that the fan actively knew the risk associated with attending a large group gathering and voluntarily assumed this risk. Given that these risks are arguably common knowledge with constant governmental action, the fan voluntarily purchasing a ticket and subsequently entering the stadium may make this defense viable.

One final defense that owners may use is waiver. Many fans are unaware that the reverse side of a ticket stub usually contains a liability waiver. By accepting and/or using the ticket, fans are releasing the stadium owner and teams from liability resulting from negligence. Nonetheless, some jurisdictions have found such waivers unenforceable due to fans not reading the waiver. See Yates v. Chicago Nat'l League Ball Club, Inc., 230 Ill. App. 3d 472, 487 (1st Dist. 1992). To avoid any enforceability issues, owners may take a proactive approach and require fans to sign a short waiver to receive a mask and/or enter the stadium.

Although there are a variety of defenses owners can raise if litigation arises, state and federal lawmakers have enacted or have introduced legislation that would make these defenses unnecessary. This legislation would provide businesses and organizations with immunity from COVID-19 lawsuits. Although professional sports leagues have not yet obtained this immunity, it has been gaining traction at the state and federal level.

Regardless of these potential defenses and the difficulty fans may have in establishing negligence, owners will be exposing themselves to liability when they decide to allow spectators inside their stadiums. Consequently, these owners likely will engage in lengthy and comprehensive planning to limit this liability. Of this planning, the resulting mask policies will be pertinent in establishing a safe environment for fans that will also limit future litigation for owners. ●

A Review of the Legal Duty Owed People Attending Events

By John Wolohan, Syracuse University

Perhaps the most basic legal duty sports facilities have is to protect the people coming into the facility (invitees), whether participating in some activity or just watching an event, by providing a safe environment. The Restatement (Second) of Torts § 343 defines this duty by stating that:

> "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 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." [1]

It is important to note, however, that facility owners are not the insurers of an invitee's safety. They are only liable for those dangers that are known or should have been discovered through reasonable inspections. As a result, facility operators need to constantly be inspecting their facilities and update security depending on events or circumstances.

Legal Duty of Sports Facilities

The following two cases are good illustrations of the duty facility owners owe their invitees. In the first case, *Townsley et al., v. Cincinnati Gardens, Inc.,* 39 Ohio App. 2d 5 (1974), Harry Townsley, a minor, went to the Cincinnati Gardens with some friends to watch the Harlem Globetrotters. During the game, Townsley was assaulted in the restroom by a group of boys seeking money. At trial, the court held that with approximately 5,000 people at the event; the facility either knew, or, in the exercise of ordinary care, should have known of the danger present and had more than five security guards working the event.[2]

On appeal, the Court of Appeals of Ohio, First Appellate District, held that in order to be liable for Townsley injuries, the facility had to have some prior knowledge of the risk to the plaintiff or should reasonably have known of or anticipated the type of danger or acts of third persons which resulted in the injuries sustained by the plaintiff.[3] In looking at whether the facility had satisfied its duty to Townsley, the court noted that it needed to take into consideration the type of protection provided and the nature of the event, which would determine the probability of any trouble as well as the anticipated attendance. Since the event was a family event and there was no history of fights or disturbances, the court held that there was no evidence that the Cincinnati Gardens knew of, or could reasonably have anticipated, the danger to this plaintiff. As a result, the Court of Appeals overturned the trial court's decision and found in favor of the Cincinnati Gardens.[4]

In the second case, *Patrick Pearson v. Philadelphia Eagles LLC,* 2019 Pa. Super. LEXIS 1016, the court was asked what was reasonable care when the facilities should have anticipated a danger. Patrick Pearson, a Dallas Cowboys fan, attended a game between the Philadelphia Eagles and the Dallas Cowboys at Lincoln Financial Field in Philadelphia wearing a Cowboys jersey. The Eagles fans, who are not especially well known for their good behavior, especially to fans of rival teams, jeered him throughout the first half of the game.[5] At halftime, Pearson went to the restroom. While there he was assaulted by a group of Eagles fans. As a result of the attack, Pearson was taken to the hospital and subsequently underwent two surgeries and had two rods and 10 pins placed in his right leg.

Pearson sued the Eagles for negligence in failing to provide a safe environment and for failing to properly ensure the safety of game attendees. In particular, Pearson argued that as an invitee the property owner had a duty to protect him from unreasonable risks. The Eagles argued that they did not breach their duty to Pearson because they had plenty of security on the day of the attack and had even deployed undercover operatives wearing Cowboy jerseys to identify disruptive fans who might present an unreasonable risk. The jury, however, agreed with Pearson and found that it was foreseeable that at a sporting event where fans are drinking and engaging in enthusiastic banter that tensions may run high and awarded Pearson $700,000 in damages.

On appeal to the Superior Court of Pennsylvania, the facility operators argued that the trial court erred in concluding that foreseeable altercations could take place in the bathrooms.[6] In particular, the facility operators contend that Pearson "cannot meet his burden of proving negligence by claiming that he would not have been injured if a different program of security was provided, *i.e.*, an extra security guard stationed inside the bathroom."[7] In support of this argument, the facility operators noted

1 Restatement (Second) of Torts § 343

2 Townsley et al., v. Cincinnati Gardens, Inc., 39 Ohio App. 2d 5, 7 (1974).

3 Id., at 7.

4 Id., at 10.

5 Patrick Pearson v. Philadelphia Eagles LLC, 2019 Pa. Super. LEXIS 1016.

6 Id.

7 Id.

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that the "threshold question is whether a landlord has any duty to protect tenants from the foreseeable criminal acts of third persons, and if so, under what circumstances."[8] Recognizing that there is a general rule against holding a person liable for the criminal conduct of another absent a preexisting duty, the Superior Court explained that "there is also an exception to that rule, *i.e.*, where a party assumes a duty, whether gratuitously or for consideration, and so negligently performs that duty that another suffers damage."[9]

In the current case, the court found that the duty to protect business invitees against third party conduct arises only if the owner has reason to anticipate such conduct. Thus, the appropriate question for the jury was whether the facility operators had notice of prior incidents in the stadium bathrooms. If no such notice existed, then Pearson had to demonstrate that facility otherwise lacked reasonable care in conducting their security program.[10] In finding for the Eagles, the court held that there was no evidence that the facility operators knew or had reason to know, from past experience, that violent assaults were likely to occur in the restrooms.[11] As a result, the court concluded that the security program the facility had in place was reasonable and vacated the judgment entered in favor of Pearson.

Conclusion

As the two cases above illustrate, property owners and facility operators are not liable for every injury that happens on their premises. As the courts noted, facility operators are only liable for protecting guests/business invitees from those dangers that are known or should have been discovered though reasonable inspections. Therefore, in order to protect themselves from negligent claims owners and operators need to not only protect visitors from dangers that are known or should have been discovered though reasonable inspections but they also need to protect visitors from dangers that they could have discovered if they had reasonably inspected the facility. As a result, facility operators need to constantly be inspecting their facilities and update security depending on events or circumstances. ●

8 Id.
9 Id.
10 Id.
11 Id.

Known Dangers Mean No Liability Under Michigan's Open and Obvious Doctrine

By Eric P. Conn and Thomas N. Lurie, of Segal McCambridge Singer & Mahoney

In recent years, premises owners, especially those in the sports and recreation industry, have enjoyed unique protection from premises liability cases in Michigan. While popular support to lessen the protections within the Michigan Bar may work to stem that tide, there has thus far been no reflection within the Michigan appellate courts to suggest that will happen anytime soon. In fact, the recent Michigan Court of Appeals unpublished decision in *Cappell v Willow Creek Golf Dome*, reveals that the defense of "open and obvious" in Michigan continues to be applied in favor of defendants and businesses engaged in recreational activities.

In *Cappell*, a sympathetic plaintiff claimed injury after missing a step she did not see on a miniature golf course. The plaintiff claimed that she could not see the step on July 4, 2014 because it was becoming dark at the wooded mini-golf course at approximately 6:00 pm. Further, a photograph of the step (used at the depositions of various witnesses) was taken at an angle to create an "optical illusion" that made seeing the step difficult. That evidence was contradicted by two witnesses from the defendant that testified that the golf course closed before it became dark because the course was not lit and that the photograph was misleading as the step was clearly observable to the reasonable person. The defendant also provided undisputed evidence that the Sun did not set on July 4, 2014 until 9:15 pm.

In an interesting strategy, the plaintiff filed the Michigan equivalent of a motion for summary judgment seeking to establish liability. The defendant filed a countermotion for summary judgment seeking to extinguish liability, and specifically relied upon Michigan's adherence to the open and obvious doctrine as adopted pursuant to the Restatement Second of Torts within the State. *See*, *Lugo v Ameritech*, 464 Mich 512 (2001).

In Michigan, a premises condition that causes injury is open and obvious if the danger from the condition is known or is so obvious that the claimant is reasonably expected to discover it. *Id.* (citing, *Riddle v McLouth Steel Products, Corp.*, 440 Mich 85 (1992)). However, the otherwise known or obvious condition will still give rise to liability if it contains *special aspects*. "Special aspects" has been defined as something that creates an unreasonable risk of harm despite the known or obvious nature of the condition. To date, only two types of "special aspects" have been accepted in Michigan: 1) a condition that is effectively unavoidable; or 2) a condition that presents a substantial risk of severe injury or death. *Lugo*, *supra*. Both of these special aspects present objective tests that must be viewed *a priori*, or, before the injury occurred. *Id.* Failure to demonstrate that a known or obvious condition presents special aspects is fatal to a premises liability claim in Michigan.

The Michigan Supreme Court provided two examples to assist with understanding what special aspects can create liability for open and obvious conditions. The first was a situation where the only exit to a department store was covered in water. In that situation, in order to leave the store, a claimant would have to traverse the water even though it may be dangerous to do so. The second was a situation where there was a thirty-foot deep, unguarded pit on a landowner's premises. In that situation, even though it would likely be relatively easy to avoid the pit, in the happenstance that someone did not, it would most certainly lead to serious injury or death.

In the recent *Cappell* decision, the defendant argued in its countermotion that the steps at issue were open and obvious. In support of that motion, the defendant provided testimony from the plaintiff and its witnesses regarding the nature of the step she missed. The defendant also provided well established case law that stands for the proposition that standard stairs are generally open and obvious and do not present a substantial risk of severe harm or death. *See*, *e.g.*, *Corey v Davenport College of Business*, 251 Mich App 1 (2002). Further, the defense witnesses' testimony established that the photograph of the step was "misleading" and the step was very clear and did not need to be marked for patrons to see and avoid falling on it. Not surprisingly, the plaintiff argued to the contrary, and relied upon the photograph and her self-serving testimony in support of her position.

The trial court, sitting in the conservative venue of Oakland County, Michigan, heard oral argument and granted the defendant's countermotion for summary judgment. In its reasoned ruling, the trial court "held that the undisputed evidence established that the step in question was an 'open and obvious condition that was not unreasonably dangerous.'" The plaintiff appealed the trial court's order dismissing the case as of right to the Michigan Court of Appeals, the intermediary appellate court in Michigan.

After briefing on the issue, the Michigan Court of Appeals held oral argument on March 4, 2020. One month later, the Court released its opinion and order affirming the trial court's grant of summary judgment. The reinforcement of the open and obvious doctrine in Michigan is no small feat, especially because there are cases currently pending on application to the Michigan Supreme Court that suggest there may soon be a change in how the doctrine is applied.

In its analysis, the Court of Appeals took note of the evidence and described it as follows:

Here, although the photograph of the stairs may have captured an optical illusion at one particular angle, testimony established that it would not have appeared so in person at other angles. Moreover, the step did

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Spectator Who Suffered Concussion at Hockey Event Sues

A Virginia woman, who claimed she suffered a concussion after a sponsorship sign fell on her while she was attending a junior hockey tournament, has sued the City of Richmond, which operates the facility; the Richmond Jets Minor Hockey Association, which managed the tournament and was a building tenant; and the Richmond Ravens Female Hockey Association, the sponsor.

Plaintiff Carmen Disiewich alleges she suffered the injuries while attending the Ice Breaker Atom-Peewee Rep Tournament at Richmond Ice Centre last October.

Specifically, Disiewich claimed that "suddenly, and without warning, she was struck on the head by a falling sponsorship sign which had not been properly affixed to the wall at the Premises, resulting in injury to the plaintiff."

This, she alleged, was caused by the defendants' negligence and/or a breach of duty.

As a result of the accident, Disiewich claims she has suffered several injuries, including concussion and related post-concussion syndrome; headaches; pain and injury to neck; pain and injury to shoulders; pain and injury to upper back; pain and injury to mid-back; pain and injury to lower back; sleep disruption and psychological injury.

She is seeking general damages, special damages, loss of past income and past earning income opportunity and future loss of income earning capacity, as well as the past and future costs of health care services. ●

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not have a black strip of tape on it, but the photograph of the steps show that the top step did have a black mark where a strip once was; this mark was dark enough to appear in the photograph. In addition, the photograph also shows the handrail next to the steps where plaintiff fell. The handrail drops in elevation along with the steps, going downward, which indicates a differential in the steps at that point. Given these factors, an average person of ordinary intelligence would discover the risk presented upon a casual inspection. The fact that plaintiff did not discover the risk is immaterial given that the test is an objective one.

Id. On the basis of the above findings, the Court determined that the step at issue was not only open and obvious, but that it contained no special aspects to warrant the implication of a duty where the plaintiff was on notice of the potential for injury.

As for cases that pertain to sports and recreation law in general, this case's holding is consistent with prior results. *See, e.g.*, *Singerman v Municpal Service Bureau*, 455 Mich 135 (1997). However, there are a special subset of sports to which the open and obvious doctrine does not apply, e.g., skiing and snowboarding, *Rhoda v O'Dovero*, unpublished Michigan Court of Appeals opinion, decided March 24, 2016 (docket number 321363), and therefore prudence is necessary before painting all recreational activities as open and obvious hazards. However, at present, only those sports or recreational activities in Michigan that are governed or regulated by statute can avoid application of open and obvious conditions that do not contain special aspects. *Id.*

Michigan has long been pro-defense in premises liability claims, and that trend has not been stymied when it comes to recreation and sports activities. The recent *Cappell* decision reveals that trend is likely to continue, as Michigan appellate courts refuse to implement liability where an injury occurs due to a known or objectively obvious premises condition. Consequently, Michigan is a pro-business jurisdiction when injuries occur because of allegedly defective premises in what appears to be an effort to protect its tourism and recreation industries. Michigan's pro-business trend seems likely to continue for the foreseeable future with a Supreme Court comprised of a contingent of Justices who either participated in the prior decisions or have shown their pro-business tendencies in other situations. ●

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Thomas N. Lurie is an associate attorney in the firm's Michigan office focusing his practice on transportation, premises liability, negligence, and employment litigation. He has considerable litigation experience including drafting and arguing complex dispositive motions, deposing parties and witnesses, and managing litigation to achieve successful results. He also advises clients in transactional matters and drafts strategic contracts to effectuate his client's needs. He endeavors to efficiently resolve matters for his clients by utilizing aggressive and well-reasoned legal strategies. Thomas also welcomes comments, questions, and discussion via email at tlurie@smsm.com.

Landmark Brings Successful Formula to COVID 19 Environment

Founded by Peter Kranske (President/COO) and Mike Harrison (Executive Vice President/CEO), Landmark Event Staffing Services, Inc. burst on to the scene 15 years ago as a nimble partner for sports facilities looking to efficiently manage their staffing needs.

Landmark's successful launch was attributable in part to Kranske's 53 years of experience directing and creating crowd management programs and Harrison's legal background and experience as a venue manager.

The compatibility of the two executives has continued since then, serving as a strong foundation for the Company. Kranske directs the field operation, while Harrison oversees the business and legal affairs of the company. Both men directly oversee and support branch and field operations at events. We sought out Kranske to learn more about Landmark's success as well as how it has adapted in a COVID 19 environment. A short interview follows:

Question: *Who were your first clients, and who are your typical clients today?*

Answer: Our first clients were the University of California Berkeley and the Oakland Raiders at the Oakland Coliseum. We now serve numerous NFL and collegiate stadiums, arenas, and other venues in 11 regional markets as well as special events, including the Super Bowl and NFL Draft.

Q: *What has been the secret to Landmark's success thru the years?*

A: The key to Landmark's success is that we always work for the Good of the Cause. We are always available to our clients. We work to be a part of their team and part of their long-term success, not our short-term gain.

Q: *In what ways has Landmark adapted its business to the COVID – 19 Pandemic?*

A: We are presently working with our clients to prepare for the re-opening of public events. Because there are many unknowns, we are working on different scenarios from no fans to a full house. We are discussing the challenges of temperature checks, paths of travel through the venues, social distancing, and many other issues.

We are also working to ensure that are staff is confident that we are doing everything possible to keep them safe and healthy during the pandemic.

Q: *Will there still be security threats even if stadiums are modestly full?*

A: Yes, we can never let our guard down. In spite of the pandemic, safety must be as high a priority as COVID-19.

Q: *What do you see as the biggest threats to stadium security in the coming years and why?*

A: Becoming overconfident. Letting down our guard. Giving public safety a lower priority as time goes on and nothing bad occurs. We know that our adversaries act differently when they know we are paying attention. ●

Will Youth Sports Megacomplexes Survive COVID-19?

By Jon Solomon, Editorial Director, Sports & Society Program

For 47 weekends a year, the Rocky Top Sports World is normally bustling with kids playing tournaments in the heart of the Great Smoky Mountains in Gatlinburg, Tennessee. The $20 million sports complex, which opened in 2014, can configure 14 soccer fields, 12 volleyball courts, six basketball courts, one championship stadium and a cafe over 80 acres.

Like most large youth sports facilities, Rocky Top Sports World is designed for tourism. Gatlinburg's community of 4,100 people can swell to hundreds of thousands on weekends with youth sports tourists.

With games now stopped during the pandemic, no one knows when the teams will start traveling again or what tournaments will even look like.

"We consider ourselves the driver of the community to get heads in beds and people in restaurants because that's the nature of the business," said Jim Downs, Rocky Top Sports World CEO. "We're a tourist town, so it would be great for us to schedule a 100-team volleyball tournament. But we have to make sure our chamber of commerce and our business community is prepared (to handle large crowds due to COVID-19). We're talking to the chamber daily."

If this sounds like planning associated with the return of major college or professional sports, well, it sort of is. Travel teams are a major business that can generate tens of millions of dollars in economic impact reports issued by cities and states.

Over the past decade, the growth of travel teams and regional and national events fueled the popularity of sprawling complexes for youth sports, which is an estimated $19 billion industry. These megacomplexes, often built in small communities, became staples of the phenomenon known as the "tournacation" – the hybrid sports/vacation destinations where parents share their child's dreams of sports glory and have the money to pursue it through travel.

Across the country, megacomplexes are attempting to figure out what's next, especially after losing key sports months of March, April and likely beyond.

"For some facilities, because of the way their revenue is not evenly distributed over the course of a year, it's going to be really difficult to survive," said Bruce Rector, general counsel for Sports Facilities Management (SFM), which manages 23 facilities in 20 states. "Federal relief just covers some expenses, but not lost revenue. The bigger the facility, the more at risk you are."

For the second quarter alone, SFM anticipates a displacement of 330 events from its 20 facilities, representing $2.4 million in revenue. The events would have brought

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in more than $80 million in direct spending into communities, according to SFM.

Is This the End of the Megacomplex Arms Race?

In Blaine, Minnesota, the National Sports Center dubs itself the "world's largest amateur sports facility." The 30-year-old facility has eight sheets of ice and 60 soccer fields on its 700-acre campus. And it's losing $12,000 a day from a $15 million annual operation with 58 full-time staff, said Todd Johnson, the center's executive director.

The Minnesota Amateur Sports Commission has operated the center since it opened in 1990. The Minnesota United soccer team trains at the center, which also hosts qualifying golf tournaments for a PGA Tour event. According to Johnson, 90% of the center's operational revenue comes from youth leagues and tournaments, and the other 10% from sponsorships.

The looming question for the center: Can it host the USA Cup soccer tournament in July? It's the third-largest youth soccer tournament in the world, with 1,200 teams from 20 states and 20 countries, and accounts for about 18% of the center's annual revenue.

Johnson said the National Sports Center luckily has $2 million in reserves. Still, it's searching for money, such as through state financial assistance and asking for donations. The front page of the center's website says, "If the National Sports Center does not get a bailout from the state government, the City of Blaine and State of Minnesota will lose out on millions of dollars of economic impact generated by thousands of visitors who would be traveling to the campus."

The National Sports Center was once the cutting edge of large youth sports facilities. Today, there are communities across the country banking on youth sports tourism. Johnson isn't sure all of these facilities make sense without better planning. After becoming executive director in 2014, Johnson said he partnered with a local school district looking for green space so it could receive state funding to build on the National Sports Center's footprint.

"My hope is we have rigorous analysis and contemplation about the arms race going on in this amateur sports business," Johnson said. "Maybe we can take this pandemic and step back and say, 'What makes the most sense for shared facilities, especially when these are public entities, so we're more cooperative and not overbuilding?'"

In Westfield, Indiana, the Grand Park Sports Campus sits empty with 400 acres of fields, baseball diamonds and indoor facilities built with more than $80 million in public funding. The Hamilton County tourism department said if the park stays closed, the loss in direct spending could exceed $85 million in central Indiana, according to the Associated Press. A spokeswoman for the city of Westfield told the AP that Grand Park itself is in good shape financially.

Experts who work in the youth sports facility industry say whether a megacomplex survives depends on how it's financially structured, with those dependent on a lot of municipality support (such as Grand Park) facing greater challenges since budget cuts are inevitable. But experts also point to the resiliency of the travel sports industry after other major catastrophes, such as hurricanes, wildfires and economic challenges.

St. Louis is still betting on the travel industry. On April 10, during the heart of the pandemic, the Convention and Visitors Commission approved $6 million in hotel tax money up front for a plan to turn a nearly-dead mall into a youth sports complex, according to STLToday.com.

The board had originally pledged the money to the project in 2018, though it was to be paid out over 10 years. In recent weeks, the backers of the project – which plans to build 12 fields and 20 courts – sought the $6 million up front. STLToday.com reported the money will only be paid out if all other financing is secured. The city of Hazlewood is contributing millions to the financing. Area philanthropist and other developers are contributing $3.3 million in equity and $18.4 million in private loans for the project, according to STLToday.com.

The youth sports industry fared well in the last economic recession, even as participation rates among kids in team sports overall fell from 45% in 2008 to 38% in 2014. As municipalities cut funding for park and rec programs that serve lower-income populations, recreation became increasingly privatized, underwritten by families with means. This time, however, there are health considerations that come into play. How much parents will want to travel, both due to safety concerns and money? Will "tournacations" still resonate in a post-coronavirus world?

How to Reopen Safely

When local governments and public health experts say it's OK to reopen, megacomplexes must think about how to safely return in a society that likely will have new social distancing guidelines. Pro sports leagues and colleges, with far more resources than youth sports, are well into their planning for how to possibly return under different scenarios.

Youth sports facilities will need do to the same. But in Aspen Institute conversations with about a half dozen operators of large facilities, there doesn't seem to be much focus yet on how to safely return. Several operators said that safety hasn't been discussed given other more pressing needs; one operator said he will continue to clean and staff the facility the same way because he's always sanitized it well.

"There's going to be a period where parents are concerned about letting their kids come back and play at all, so anything you can do to make parents feel safe is going

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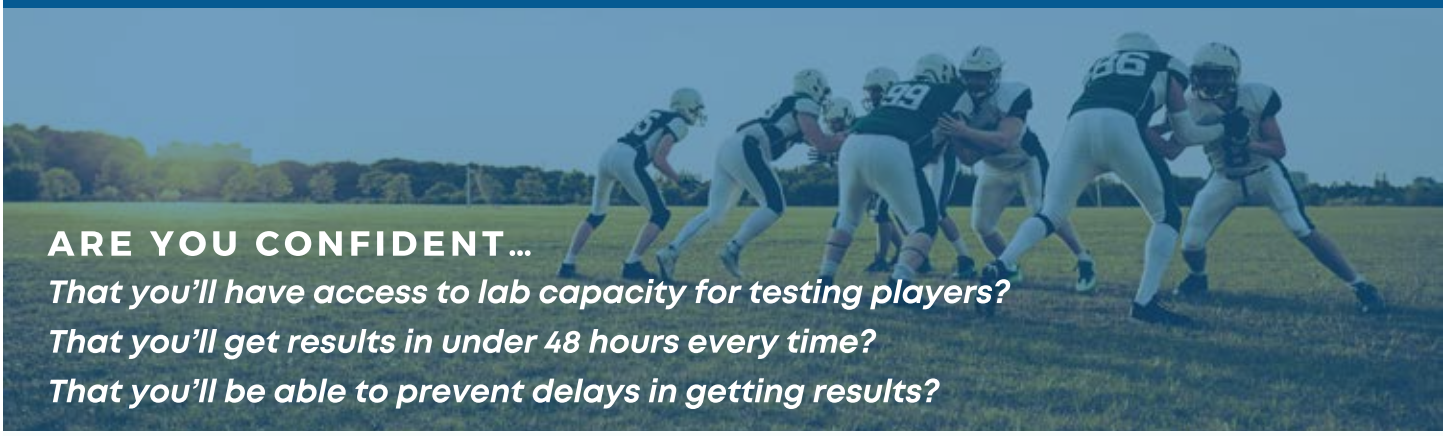
480,000 STUDENT ATHLETES COMPETE IN THE NCAA



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Will Youth Sports Megacomplexes Survive COVID-19?

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to be critical," said Jason Clement, CEO of Sports Facilities Management.

Clement's job these days is thinking through what the comeback looks like for his industry. Among the areas that he says facilities will need to consider:

- Allowing spectators at games. Should spectators be allowed into youth sports games at first, or should facilities create live feeds for parents and family members to watch? If spectators can come in, should seating be spaced out differently in small clusters, such as putting tables and chairs scattered around a court?
- Checking people's health. Do youth sports facilities have participants, coaches and spectators get their temperature checked as they arrive? (Some medical experts say checking for fevers is unreliable and, on its own, could even be deceiving as a way to determine who is infected. The coronavirus can spread with absence of a fever.) If the capability of mass COVID-19 testing eventually comes to the U.S. and the results can be determined quickly, do facilities go to that extreme with testing on site?
- New sanitization policies. How frequently is trash picked up and bathrooms cleaned? Where does the trash go within the facility's design to get it off the property as quickly as possible? Should multiple hand sanitizer stations be placed around the complex? Should the turnover time between games be lengthened in order to clean areas?
- Staffing to help sanitization. Is there an attendant at the front door to greet customers and let them know about sanitization stations and policies? Are bathroom attendants needed to constantly clean them?
- Selecting participants based on hotspots. As venues open, who's allowed to sign up for tournaments or events? Since hotspots of COVID-19 occur at different times around the country, does programming begin with local teams and expand out later? Are teams from hotspots allowed to attend? And how does an organizer know where the hotspots will be at the time of the tournament, with teams registering months or weeks in advance?

These are the questions Clement is starting to ask himself, though some of the ideas may not be affordable or practical for youth sports. Rector, the general counsel at SFM, has one more question on his mind lately.

"Think about waiver of liability where you could be injured playing a sport and that injury could include paralysis and death," Rector said. "We may have to add communicable diseases after this just to spell it out to folks and say, 'We can't ultimately be responsible for folks if you choose to comingle with people in this facility.'"

Challenges to Reschedule

Megacomplexes also must go through the pain-staking challenge of rebooking events. Many traditional spring and summer events are trying to reschedule for the fall, creating conflicts with the traditional fall season at sites where fields and courts are already booked through the end of 2020.

"It's one by one, hand by hand combat," Clement said of rescheduling.

SFM is partnering with event providers to think of new and innovative ways to schedule when activities are allowed to return. That includes focusing on local programs to serve families who are ready for healthy activities. In a Project Play webinar on how leaders can manage the crisis, Lisa Frates, executive director of the Bethesda (Maryland) Soccer Club, said she is exploring how to create for her clubs more weekend events that do not require travel to other states.

As of now, Rocky Top Sports World's next scheduled event is a 7-on-7 football regional qualifying event on May 30-31 in Gatlinburg, Tennessee. But really, they're just rolling dates at this point given the fluidity of the situation.

"The big thing is not knowing an end date," Downs said. "What happens when New Yorkers are no longer needed to be quarantined and they start moving South and a lot of those Southern states haven't peaked yet? Do you recruit New York teams as an organizer knowing we're probably not going to be open when New York is open because of different peak rates? You just have to pick a date for planning purposes and move that accordingly."

Downs picked July 1 since it's the start of Rocky Top Sports World's fiscal year. He's hoping for May or June and hypothetically eyes the "wonderful" possibility of staging weekday local tournaments if kids are out of school due to the virus – a new revenue source to make up for lost "tournacation" weekends.

"We're looking at all sorts of options to accommodate our event organizers and their clients," Downs said. "There are no easy answers. Most event planners can roll with the punches. I don't care how many events you've done over your life. This is an environment nobody has ever had to deal with." ●

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Governmental Immunity & College Basketball

Continued From Page 1

immunity also turns on the specific functions and duties of the state actor opposed to sovereign immunity which makes no such distinction. As a general matter, governmental immunity often turns on whether the state actor was engaged in discretionary or ministerial functions. The *Saunier* Court found the UK employees were engaged in discretionary functions because they were general supervisors who gave orders to subordinate employees to carry out their supervisory decisions. In Plaintiff's case, any specific tasks related to the electrical cable cover (e.g. moving it, placing a warning, etc.) would have been assigned to those subordinate employees and are therefore considered ministerial tasks. The court held the UK employees were entitled to qualified immunity based on their discretionary tasks related to plaintiff's claims. Regarding the university, the majority found it was immune because of its status as a state agency and a long-standing history of immunity in tort matters.

The concurrence, on the other hand, engaged in a deeper analysis to consider whether UK was engaging in an integral state government function or a proprietary function outside its role as an educational and research facility. Considering proprietary functions are "non-integral undertaking[s] of a sort private persons or businesses might engage in for profit," state entities do not enjoy immunity for these proprietary functions. *Saunier*, 2020 Ky. App. Unpub. LEXIS 265 at *24. The concurrence considered the basketball game required paid admission, concessions were sold and amenities were offered to fans when evaluating whether collegiate sporting events were a governmental or proprietary function. Relying on a 2008 case (*Schwindel v. Meade County*, 113 S.W.3d 159 (Ky. 2008)) and noting the important and essential role that collegiate sports play in the higher education space, and arguably greater community, the concurrence found there was governmental immunity but requested additional guidance from the high court on collegiate sporting events considering the large fan base for university sports.

Just a month prior, a different panel of judges on the Court of Appeals of Kentucky engaged in a similar multi-step analysis in *Ky. State Univ. & Christopher Cribbs v. Mucker*, No. 2018-CA-001817-MR, 2020 Ky. App. Unpub. LEXIS 192 (Ct. App. Mar. 20, 2020). In *Cribbs*, a Kentucky State University student lived in campus housing and parked his car in a nearby campus parking lot. The student went to the parking lot and saw a campus police officer looking into his vehicle. The student consented to a search of his vehicle which contained marijuana cigarettes, small bags of marijuana and a small scale. Pursuant to a student housing acknowledgment form, the student was

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Company Focused on Sports Industry Set to Meet Demand for Critical Testing Capacity

In response to surging demand for critical COVID-19 testing capacity among collegiate and professional sports teams as well as sports facilities, the Campus Health Project (CHP) has launched its national initiative dedicated to helping such clients secure the COVID-19 testing capacity and logistical support they need to resume activities.

CHP is a first-of-its-kind resource tapping the expertise of healthcare professionals, higher education advisors and certified independent clinical lab owners. CHP offers COVID-19 testing solutions that enables its partners to execute a smooth process for their clinical testing needs, including receiving collection kits, sending specimens, and getting quick test results within 24 to 48 hours via dashboards, real-time alerts, and custom reporting. For time-sensitive and critical needs, CHP can provide test results within 24 hours.

"While our immediate focus is collegiate athletics, sports facilities must also secure testing capacity so that they can give participants and attendees piece of mind that their employees are being tested in a timely manner," said Chuck Brady, CHP's CEO. "Having to wait four or five days for a result about whether an employee has tested positive is not an option."

Brady added that if facilities already have contracts lined up, they should seek a guarantee about testing timeframes.

"Many labs will not provide those guarantees because their capacity could be siphoned away in the fall to nursing homes, hospitals and the general public," said Brady. "We are focused exclusively on the sports industry and are prepared to provide guarantees."

Dodgers Fan Sues over Parking Lot Beating

A Los Angeles Dodgers fan, Rafael Reyna, who was hospitalized after he was attacked in the parking lot of Dodger Stadium on March 29, 2019, has sued the team. Reyna was allegedly on the phone with his wife, telling her that he was on his way home, when unknown attackers "punched him repeatedly, causing him to collapse onto the asphalt, strike his head, and lose consciousness." Reyna, who allegedly suffered brain damage in the incident, has sued the Dodgers for negligence. Specifically, he alleged the parking lot lacked adequate lighting and security guards. With regard to the latter, it took personnel at least 10 minutes to discover Reyna and longer for him to receive emergency medical care, according to the lawsuit.

Fried Named to National Council

The University of New Haven and the Pompea College of Business has announced the appointment of Sports Law Professor Gil Fried to the Board of Directors of the National Council of Youth Sports (NCYS). The NCYS is the umbrella organization for numerous youth sport organizations throughout the United States. There are approximately 60 million youth sport participants in the United States whose organizations are involved with the NCYS. This includes such organizations as Little League Baseball, Pop Warner Little Scholars, park and recreation departments, YMCAs, JCC's, and national governing bodies for almost every Olympic sport. NCYS is dedicated to identifying safety solutions and promoting healthy and fun participation in sports. Professor Fried, an expert on legal issues involving sports facilities, is also the Editor in Chief of Sports Facilities and the Law.

Governmental Immunity & College Basketball

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suspended from the university for a month and a half. He later brought suit against the university and the university official who issued the suspension, the Assistant Vice-Present for Student Affairs. The university and the Assistant Vice President moved for summary judgment asserting governmental and qualified immunity respectively. On appeal from denial of the summary judgment motions, the court found the university was a state agency as a matter of statute. The court further analyzed whether education, student safety and law enforcement were integral aspects of state government. The *Cribbs* court ultimately concluded that running an official residence hall for students is a function unique to a university and not a proprietary function. Lastly, the *Cribbs* court determined whether the function at issue was a matter of statewide concern and also held education was a traditional and necessary state function. The court reversed and remanded the matter, ordering the university and the Assistant Vice-President were entitled to immunity.

It seems that in Kentucky at least, conducting a college basketball game can be considered as much an integral state function as operating a residence hall. While *Saunier* turned on the specifics of Kentucky law, it justifies full exploration of any potential immunity defense everywhere whenever a governmental entity is involved in the operation of a spectator event. ●

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Case Suggests Track Owners Must Provide Security to Prevent Injuries

Continued From Page 1

Speedbowl, and Bruce Berner, the owner of the track itself, were negligent. Succinctly, Reed asserts that the Speedbowl failed to provide adequate security measures to prevent the altercation, which resulted in Reed's injuries.

Post-race scuffles are not uncommon between racers. Indeed, the "greatest fight in NASCAR history," occurred at the end of the 1979 Daytona 500 and allegedly made NASCAR a national sport.[1] As ESPN Senior Writer, Ryan McGee observed, post-race fight in NASCAR are so memorable because they are scarce. *See id.* Fights are often separated by months or years. *See id.* Indeed, a quick search of the NASCAR YouTube channel reveals 6 minutes of fights from 1979 to 2019 showing glimpses of approximately a dozen fights often inspired by on track conduct including rear taps.[2] A review of those fights reveal that pit crews, with some assistance from race officials are more often than not the parties deescalating the battle, but that is not always true.

The Connecticut Courts, like many nationwide, utilize the "reasonable foreseeability" rule to determine if a duty was owed. The Supreme Court of Connecticut summarized "the test as whether or not the ordinary man in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?" *Id.* at 47 (emphasis added); see also § 344 *Restatement 2d of Torts*. However, the cases to which this test is applied to sports venue owners typically involve claims made by a casual observer and not a race participant. The relationship between a race participant and a racetrack owner is different in that a participant's liability can be modified by a contract between the racetrack owner and the participants including the crew members.

Indeed, in the instant matter, the Speedbowl itself has terms of agreement in the Driver Information form which includes the following clause: "…[b]y submitting this form I agree to abide by all rules, regulations and agreements contained in the current official rules and regulations of the… Speedbowl and/or NASCAR, and/or INEX, including any amendments thereto. I agree that I am bound by the following of the rules…" Therefore, with the back drop of the reasonably foreseeable standard adopted by the courts and the deference paid to the terms of agreement by other courts, we can look to NASCAR for insight as to the industry standard on how such tousles should be handled by race officials and race track owners, particularly as such rules are adopted by the Speedbowl.

The rules and regulations of NASCAR are not public, but articles from last seasons races reveal that NASCAR implemented rules which not only impact the drivers participating in fights but also their crews. During the Monster Energy NASCAR Cup Series on or about October 27, 2019, a brief tousle occurred between the tire specialist from Joey Logano's crew and driver Hamlin was slammed to the ground.[3] According to reports of the event, Denny Hamlin quickly popped up from the ground sustaining no injury as a result of his fall. *See id.* NASCAR rules permit fines to the tire technician of up to $100,000 or banning the individuals from a number of races depending on the severity of the fight. *See id.*

As the USA Today piece observes, incidents involving driver injuries from pit-crew involvement have increased- notably since the 2014 brawl between Jeff Gordon and Brad Keselowski. While that altercation resulted in the punishment of three crew members, fights are still an issue that NASCAR officials are working to address. This in turn would provide clear guidance as to how other tracks, including the Speedbowl would handle crew/driver incidents. *See id.* Therefore, the industry standard seems to be to permit pit crews and a few race officials, at most, to resolve any physical altercations between teams.

The article posits that a possible new standard to prevent race driver brawls and protect participants would be by implementing an automatic suspension policy against any crew member who gets involved in a fight. *See id.* However, as the article reflects creating such a policy would involve hiring "triple the number of officials on pit road following a race, [as] it doesn't have enough officials to break up a fight…" *Id.* If such an expense is beyond the capabilities of NASCAR it seems improbable that a local track in Connecticut would be able to take on such an expense. Which leaves racetracks and racetrack owners with the same question pose above, what protections should racetrack owners put in place if tradition holds that pit crews are generally the ones in the best position to prevent driver injury? Particularly where the injury is caused by a member of the pit crew?

The court will likely focus its attention to the standards adopted by the racing community, including NASCAR, in evaluating what duty if any the Speedbowl owed to Reed in preventing his injuries from Harrington. ●

1 McGee, Ryan "The Kyle Busch-Joey Logano scrap was fun; now stop it!" March 14, 2017, (https://www.espn.com/racing/nascar/story/_/id/18907511/nascar-fighting-part-nascar-overdone) (last accessed on June 12, 2020)

2 NASCAR, "Best of NASCAR: Most Memorable Fights," October 25, 2019 (https://youtu.be/WvabpyErNNY) (last accessed on June 14, 2020)

3 Pockrass, Bob, "Opinion: Driver fights bring buzz to NASCAR but also judgment calls from crew members, officials" Originally published October 31, 2019; updated November 1, 2019 (https://www.usatoday.com/story/sports/nascar/2019/10/31/nascar-driver-fights-crew-members-officials-judgments/4104104002/) (last accessed on June 14, 2020)

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