IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

VICKIE GILMORE and LA 'VONTE FLOWERS, individually and as co-personal representatives of the wrongful death estate of NAHJE FLOWERS, deceased,

Plaintiffs,

vs. No. CIV 20-0853 JB/LF

BOARD OF REGENTS OF THE UNIVERSITY OF NEW MEXICO, a body corporate of the state of New Mexico, for itself and its public operations, ROBERT DAVIE, in his individual capacity, and NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Defendants.

ORDER[1]

THIS MATTER comes before the court on (i) National Collegiate Athletic Association's Motion to Dismiss and/or to Strike Allegations in Plaintiffs' Second Amended Complaint and Brief in Support, filed December 11, 2020 (Doc. 33)("NCAA MTD"); (ii) Board of Regents of the University of New Mexico's Motion to Dismiss and Memorandum of Law in Support of Motion, filed December 11, 2020 (Doc. 34)("UNM Board of Regents MTD"); (iii) Defendant Robert Davie's Motion and Memorandum to Dismiss Count IV of Plaintiff's Second Amended

[1]This Order disposes of (i) the National Collegiate Athletic Association's Motion to Dismiss and/or to Strike Allegations in Plaintiffs' Second Amended Complaint and Brief in Support, filed December 11, 2020 (Doc. 33); (ii) the Board of Regents of the University of New Mexico's Motion to Dismiss and Memorandum of Law in Support of Motion, filed December 11, 2020 (Doc. 34); (iii) the Defendant Robert Davie's Motion and Memorandum to Dismiss Count IV of Plaintiff's Second Amended Complaint, filed December 11, 2020 (Doc. 36); and, (iv) the Defendant Robert Davie's Motion to Dismiss Counts I, II, III, V-VIII, filed December 18, 2020 (Doc. 37). The Court will issue at a later date, however, a Memorandum Opinion more fully detailing its rationale for this decision.

Complaint, filed December 11, 2020 (Doc. 36)("Davie MTD Count IV"); and (iv) Defendant Robert Davie's Motion to Dismiss Counts I, II, III, V-VIII, filed December 18, 2020 (Doc. 37)("Davie MTD Counts I-III, V-VIII"). The Court held a hearing on August 19, 2021. See Clerk's Minutes, filed August 19, 2021 (Doc. 60). For the reasons discussed below, the Court will: (i) grant in part and deny in part the NCAA MTD; (ii) grant in part and deny in part the UNM Board of Regents MTD; (iii) grant the Davie MTD Count IV; and (iv) grant in part and deny in part the Davie MTD Counts I-III, V-VIII.

I. THE COURT WILL GRANT IN PART AND DENY IN PART THE NCAA MTD.

The Court concludes that it has personal jurisdiction over the NCAA. Further, the Court concludes that the NCAA did not act under the color of state law and dismisses the 42 U.S.C. § 1983 claim. The Court also concludes that the Plaintiffs do not allege sufficiently that the NCAA receives federal funding, so the Court dismisses the Title VI claim. Finally, the Court concludes that the Plaintiffs sufficiently allege that the NCAA owed N. Flowers a duty, and thus, the Court does not dismiss the Plaintiffs' wrongful death, loss-of-consortium, and punitive damages claims against the NCAA.

A. THE COURT HAS PERSONAL JURISDICTION OVER THE NCAA.

At the outset, NCAA contends that the Court does not have personal jurisdiction over it. See NCAA MTD at 7. The Supreme Court of the United States of America recently decided Ford Motor Co. v. Montana Eighth Judicial District ("Ford Motor Co."), 141 S.Ct. 1017 (2021), and Justice Kagan for the Court held that Ford Motor has sufficient contacts with Montana and Minnesota for the States to exercise specific personal jurisdiction, because Ford Motor regularly conducts business in the States, uses numerous advertising methods to encourage residents to purchase Ford Motor cars, sells cars in Montana and Minnesota, and operates dealerships,

maintenance, and repair shops in Montana and Minnesota. Ford Motor Co., 141 S.Ct at 1028. In Ford Motor Co., Justice Kagan emphasized that the "'essential foundation'" of specific jurisdiction is the existence of a "strong 'relationship among the defendant, the forum, and the litigation.'" 141 S.Ct. at 1028 (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984)).

The Plaintiffs contend:

> The NCAA has contacts with the State of New Mexico and has business relationships with UNM, as well as other member institutions in New Mexico. The NCAA requires its member schools to follow the NCAA rules and regulations in order to be a part of the NCAA, including UNM.
>
> . . .
>
> The NCAA purposefully contracted with UNM in order for UNM to become a member institution in the NCAA. UNM was required to follow all of the NCAA's rules and regulations with respect to player health, however, when UNM failed to follow the NCAA's policies, the NCAA's very own constitution requires the NCAA to step in and exert control over the situation and enforce the NCAA legislation when member institutions have failed to do so.

Plaintiffs' Response in Opposition to the National Collegiate Athletic Association's Motion to Dismiss and/or Motion to Strike Allegations in Plaintiffs' Second Amended Complaint, and Brief in Support at 4, filed March 12, 2021 (Doc.43)("Response to NCAA MTD").

The Court concludes that the Plaintiffs allege sufficient contacts between NCAA and New Mexico to make the Court's exercise of personal jurisdiction proper. Consequently, the Court will deny the NCAA MTD with respect to the personal jurisdiction argument.

B. THE COURT WILL GRANT THE NCAA MTD WITH RESPECT TO THE 42 U.S.C. 1983 CLAIM.

NCAA contends that the Court should dismiss the Plaintiffs' 42 U.S.C. § 1983 claims, because the NCAA did not act under the color of state law. See NCAA MTD at 9. "As a general matter the protections of the Fourteenth Amendment do not extend to 'private conduct abridging

individual rights.'" Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988)("Tarkanian")(quoting Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961)).

> When Congress enacted § 1983 as the statutory remedy for violations of the Constitution, it specified that the conduct at issue must have occurred "under color of" state law; thus, liability attaches only to those wrongdoers "who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it."

Tarkanian, 488 U.S. at 191 (quoting Monroe v. Pape, 365 U.S. 167, 172 (1961)). "[I]n the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor." Tarkanian, 488 U.S. at 192. The Supreme Court concludes in Tarkanian that the NCAA is not a state actor, and instead, it is fair to conclude "that [the University] has conducted its athletic program under color of the policies adopted by the NCAA, rather than that those policies were developed and enforced under color of Nevada law." 488 U.S. at 199. See Duran v. New Mexico Monitored Treatment Program, 2000-NMCA-023, 128 N.M. 659, 664, 996 P.2d 922, 927 ("We based our holding on the well-settled rule that a private party may be characterized as a state actor for the purposes of constitutional analysis if the private party jointly participated with the state in depriving a person of his constitutional rights."). Consequently, to determine whether the NCAA is acting under the color of state law in this case, the proper inquiry is whether the NCAA operated jointly with New Mexico, or under New Mexico's laws and policies.

The Court concludes that the Plaintiffs do not allege sufficiently that NCAA operates jointly with the state of New Mexico, or that NCAA operates under New Mexico's laws and policies. Rather, UNM operates "under color of the policies adopted by the NCAA, rather than that those policies were developed and enforced under color of [New Mexico] law." Tarkanian,

488 U.S. at 199. Accordingly, the Court will grant the NCAA MTD with respect to the 42 U.S.C. § 1983 claim.

C. THE COURT WILL GRANT THE NCAA MTD WITH RESPECT TO THE TITLE VI CLAIM.

The NCAA contends that the Court should dismiss the Plaintiffs' Title VI Claim, because the NCAA does not receive federal funding. See NCAA MTD at 17. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." In National Collegiate Athletic Association v. Smith, 525 U.S. 459 (1999)("Smith"), the Supreme Court considered whether the NCAA receives federal funding so as to subject it to liability under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681. Smith, 525 U.S. at 468. Justice Ginsburg held for the Supreme Court: "Entities that receive federal assistance, whether directly or through an intermediary, are recipients within the meaning of Title IX; entities that only benefit economically from federal assistance are not." Smith, 525 U.S. at 468. The Supreme Court concludes in Smith that dues payments from recipients of federal funds are not sufficient to subject the NCAA to suit as a program that receives federal funding. See 525 U.S. at 470. Here, the Plaintiffs do not allege sufficiently any facts that demonstrate the NCAA receives federal funds which would subject it to suit under Title VI. In the Plaintiffs' Second Amended Complaint for Violations of 42 U.S.C. § 1983; Title VI; Negligence Resulting in Wrongful Death Under the New Mexico Tort Claims Act and New Mexico Common Law ¶ 182, at 47, filed October 16, 2020 (Doc. 29)("Second Amended Complaint"), the Plaintiffs allege generally that the "Defendants' entities and programs received federal financial assistance." ¶ 175, at 47. Because the Plaintiffs

do not allege sufficient facts that NCAA receives federal funding, the Court grants NCAA MTD with respect to the Title VI claim.

D. THE COURT WILL DENY THE NCAA MTD WITH RESPECT TO THE WRONGFUL DEATH CLAIM.

The NCAA contends that the Plaintiffs do not plead sufficiently facts to allege a wrongful death claim against the NCAA. See NCAA MTD at 18. New Mexico's Wrongful Death Statute, N.M.S.A. § 41-2-1, is a survival statute providing that "whenever the death of a person shall be caused by the wrongful act, neglect, or default of another," then the personal representative is allowed to maintain a cause of action against a party which would have been liable if death had not ensued. N.M.S.A. § 41-2-1. The Plaintiffs contend that they sufficiently plead a claim for common law negligence as necessary to maintain the wrongful death claim. See Response to NCAA MTD at 12-13.

"Negligence is generally a question of fact for the jury. A finding of negligence, however, is dependent upon the existence of a duty on the part of the defendant. Whether a duty exists is a question of law for the courts to decide." Herrera v. Quality Pontiac, 2003-NMSC-018, ¶ 6, 134 N.M. 43, 48, 73 P.3d 181, 186 (quoting Schear v. Bd. of County Comm'rs, 101 N.M. 671, 672, 687 P.2d 728, 729 (1984)). "Foreseeability considerations should not be used by a judge to determine the scope of duty, because not even the most experienced judge is capable of anticipating all possible facts that might affect future foreseeability determinations in similar cases." Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P., 2014-NMSC-014, ¶ 9, 326 P.3d 465, 470. "The question of the existence and scope of a defendant's duty of care is a legal question that depends on the nature of the sport or activity in question, the parties' general relationship to the activity, and public policy considerations." Edward C. v. City of Albuquerque, 2010-NMSC-043, ¶ 14, 148 N.M. 646, 650, 241 P.3d 1086, 1090. "Policy is the principal factor in determining whether a

duty is owed and the scope of that duty." Edward C. v. City of Albuquerque, 2010-NMSC-043, ¶ 14, 148 N.M. at 650, 241 P.3d at 1090.

The Plaintiffs allege that the "NCAA owed a duty to Nahje Flowers ('Flowers'), and other similarly situated to him (i.e. college football players suffering from concussions) to keep them safe from harm and to exercise ordinary care for their safety." Response to NCAA MTD at 14. Moreover, the Plaintiffs contend that the NCAA owed N. Flowers a duty of reasonable care to take precautions against the known "dangers and risks of concussions and brain injuries, including death and suicidal ideations, to college football players," and to take "the steps for treatment for those injuries from players sustaining concussions." Second Amended Complaint ¶¶ 72-77, at 199. Further, the Plaintiffs allege that the NCAA breached its duty by failing to "implement, promulgate, or require appropriate and up-to date guidelines regarding the evaluation and treatment of" N. Flowers. Second Amended Complaint ¶199, at 52-53. The Court concludes that the Plaintiffs sufficiently allege that the NCAA owed N. Flowers a duty to exercise ordinary care for his safety and breached that duty by not taking the proper precautions in the treatment of his concussion.

Additionally, the NCAA contends that Nahje Flowers' suicide is an intervening cause that severs the causal connection between the NCAA's actions and N. Flowers' death. See NCAA MTD at 19. "Wrongful death liability for deaths occurring by suicide is controversial." Naranjo for Naranjo v. Herrera, No. CV 12-0898 RB/SCY, 2014 WL 12787953, at *8 (D.N.M. Sept. 17, 2014)(Brack, J.)(discussing New Mexico State tort law on suicide as an intervening cause). New Mexico courts have recognized that "it cannot be said that in every case suicide is an independent intervening cause as a matter of law." City of Belen v. Harrell, 1979-NMSC-081, ¶ 18, 93 N.M. 601, 604, 603 P.2d 711, 714. "Courts are more willing to impose wrongful death liability when

the tortfeasor's intentional actions were a substantial factor in the suicide." Naranjo for Naranjo v. Herrera, 2014 WL 12787953, at *9. "In particular, when a decedent acts under an irresistible impulse because the tortfeasor's conduct 'depriv[ed] another of his capacity to reason,' courts have imposed liability for deaths by suicide." Naranjo for Naranjo v. Herrera, 2014 WL 12787953, at *9 (quoting Restatement (First) of Torts § 280 (1934)). Moreover, New Mexico courts recognize "liability where the actor's tortious conduct induces a mental illness in the decedent from which the death results." Johnstone v. City of Albuquerque, 2006-NMCA-119, ¶ 11, 140 N.M. 596, 601, 145 P.3d 76, 81, as revised (Sept. 25, 2006). See Rimbert v. Eli Lilly & Co., 577 F. Supp. 2d 1174, 1200 (D.N.M. 2008)(Browning, J.). The Court concludes that, here, the Plaintiffs plead sufficiently that the NCAA's conduct -- namely, its failure to implement protocols to treat N. Flowers' concussion -- induced the suicidal ideations that led to N. Flowers' death. Accordingly, the Court denies the NCAA MTD with respect to the wrongful death claim.

E. THE COURT WILL DENY THE NCAA MTD WITH RESPECT TO THE LOSS-OF-CONSORTIUM CLAIM.

The NCAA further contends that the Court should dismiss the Plaintiffs' loss-of-consortium claim, because the Plaintiffs do not plead that they have a sufficiently close relationship with the Decedent, N. Flowers, or that the NCAA owed the Plaintiffs a duty of care. See NCAA MTD at 24. "A loss-of-consortium claimant must demonstrate two elements in order to recover damages." Wachocki v. Bernalillo Cty. Sheriff's Dep't, 2011-NMSC-039, ¶ 5, 150 N.M. 650, 265 P.3d 701, 702. "The first element is that the claimant and the injured party shared a sufficiently close relationship. . . . The second element is a duty of care." Wachocki v. Bernalillo Cty. Sheriff's Dep't, 2011-NMSC-039, ¶ 5, 150 N.M. at 265, 265 P.3d at 702.

To determine whether the claimant and injured party have a sufficiently close relationship, the court should consider

> "the duration of the relationship, the degree of mutual dependence, the extent of common contributions to a life together, the extent and quality of shared experience, and . . . whether the plaintiff and the injured person were members of the same household, their emotional reliance on each other, the particulars of their day to day relationship, and the manner in which they related to each other in attending to life's mundane requirements."

Wachocki v. Bernalillo Cty. Sheriff's Dep't, 2011-NMSC-039, ¶ 5, 150 N.M. at 265, 265 P.3d at 702 (quoting Lozoya v. Sanchez, 2003-NMSC-009, ¶ 27, 133 N.M. 579, 588, 66 P.3d 948, 957). As discussed *supra*, p. 7, the Court concludes that the NCAA owed the Plaintiffs a duty of care. The Court also concludes that Plaintiffs plead a sufficiently close relationship with N. Flowers. Consequently, the Court will deny the NCAA MTD with respect to the loss-of-consortium claim.

F. THE COURT WILL DENY THE NCAA MTD WITH RESPECT TO THE CLAIM FOR PUNITIVE DAMAGES.

Finally, the NCAA contends that the Court should dismiss the Plaintiffs' claim for punitive damages, because the Court should dismiss all of the Plaintiffs' claims against the NCAA. See NCAA MTD at 25. Because the Court does not dismiss all of the claims against the NCAA, accordingly, the Court denies the NCAA MTD with respect to the claim for punitive damages.

II. THE COURT WILL GRANT IN PART AND DENY IN PART THE UNM BOARD OF REGENTS MTD.

The Court concludes that the UNM Board of Regents is not a person under 42 U.S.C. § 1983 and dismisses the Plaintiffs' claims against the UNM Board of Regents pursuant to § 1983. The Court further concludes that the Plaintiffs do not need to exhaust their administrative remedies for a Title VI claim, and thus, the Court denies the UNM Board of Regents MTD with respect to the Title VI claim. Finally, the Court concludes that the NMTCA does not waive sovereign

immunity with respect to the UNM Board of Regents and dismisses the state law tort claims with respect to the UNM Board of Regents.

A. THE COURT WILL GRANT THE UNM BOARD OF REGENTS MTD WITH RESPECT TO THE 42 U.S.C. § 1983 CLAIMS.

The UNM Board of Regents contends that the Court should dismiss the Second Amended Complaint, Counts I, II, and III, because the UNM Board of Regents is not a "person" under 42 U.S.C. § 1983 and therefore cannot be sued pursuant to § 1983. UNM Board of Regents MTD at 4. "Neither a State nor its officials acting in their official capacities are 'persons' under § 1983." Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989). In Lee v. University of New Mexico, 449 F. Supp. 3d 1071 (D.N.M. 2020)(Browning, J.), the Court concluded that the plaintiff could not "successfully sue UNM for damages, because it is not a 'person' under § 1983." Lee v. Univ. New Mexico, 449 F. Supp. 3d at 1138. Accordingly, the Court concludes that the UNM Board of Regents is not a person under § 1983, and grants the UNM Board of Regents MTD with respect to Counts I, II, and III.

B. THE COURT WILL DENY THE UNM BOARD OF REGENTS MTD WITH RESPECT TO THE TITLE VI CLAIM.

The UNM Board of Regents further contends that the Court should dismiss the Second Amended Complaint, Count IV, because the Plaintiffs do not allege that they exhausted their administrative remedies before bringing a Title VI claim. See UNM Board of Regents MTD at 5. The UNM Board of Regents concedes: "There does not appear to be binding precedent from the United States Supreme Court, the Tenth Circuit, or this Court regarding whether a plaintiff must exhaust administrative remedies prior to filing a lawsuit under Title VI." Board of Regents of the University of New Mexico's Reply in Support of Motion to Dismiss, at 5, filed April 22, 2021 (Doc. 45)("UNM Board of Regents Reply"). Several courts that have addressed this issue have

found that Title VI does not require a plaintiff to exhaust administrative remedies. See Lar v. Billings Sch. Dist., 2018 WL 4215648, at *7 (D. Mont. Aug. 10, 2018)(Cavan, M.J.)("[A] plaintiff is not required to exhaust administrative remedies prior to bringing a claim under Title VI"), report and recommendation adopted, 2018 WL 4210182 (D. Mont. Sept. 4, 2018)(Watters, J.); Neighborhood Action Coal. V. Canton, 882 F.2d 1012, 1015 (6th Cir. 1989)("Title VI litigants need not exhaust their administrative remedies before pursuing their private cause of action in federal court."). Consequently, the Court concludes that the Plaintiffs are not required to allege that they exhausted their administrative remedies for their Title VI claim, and the Court denies the UNM Board of Regents MTD with respect to Count IV.

C. THE COURT WILL GRANT THE UNM BOARD OF REGENTS MTD WITH RESPECT TO THE STATE LAW TORT CLAIMS.

The UNM Board of Regents also contends that the Court should dismiss the State law tort claims, because the NMTCA does not waive sovereign immunity with respect to the UNM Board of Regents. The NMTCA states that "[a] governmental entity and any public employee while acting within the scope of duty are granted immunity from liability for any tort" except as the NMTCA's provisions waive sovereign immunity. N.M.S.A. § 41-4-4. The NMTCA is the exclusive remedy for torts that governmental agencies and public employees commit. See N.M.S.A. § 41-4-17. No lawsuit can proceed against a New Mexico governmental entity or public employee without an explicit waiver under the NMTCA for the claims asserted. See May v. Bd. of Cty. Comm'rs of Dona Ana Cty., 426 F.Supp.3d 1013, 1019 (D.N.M. 2019)(Browning, J.). The Plaintiffs allege that

> Defendants' action and inactions described in this Complaint constitute negligence of public employees acting in the course and scope of their duties in the operation and maintenance of the buildings of UNM, which created conditions

> which posed a danger to student-athletes and for which immunity has been waived under NM Stat. § 41-4-6 (2018).

Second Amended Complaint ¶ 187, at 50.

The Court concludes that the Plaintiffs do not sufficiently allege that the UNM Board of Regents acted within the scope of their duties in the "operation and maintenance of the buildings of UNM" to fall within the NMTCA's waiver of sovereign immunity. Accordingly, the Court will grant the UNM Board of Regents MTD with respect to the State law tort claims.

III. THE COURT WILL GRANT THE DAVIE MTD COUNT IV.

Davie contends that the Court should dismiss the Second Amended Complaint, Count IV, alleging Davie, in his individual capacity, racially discriminated against Nahje Flowers, because Davie is not an entity that receives federal funding. See Davie MTD Count IV at 2-3.

> Title VI forbids discrimination only by recipients of federal funding; therefore, individual employees of such entities are not liable under Title VI. See Shotz v. City of Plantation, 344 F.3d 1161, 1171 (11th Cir. 2003)("It is beyond question . . . that individuals are not liable under Title VI."); Buchanan v. City of Bolivar, 99 F.3d 1352, 1356 (6th Cir. 1996)(rejecting plaintiff's Title VI claim, in part, because she asserted her claim against individuals, rather than the entity allegedly receiving the financial assistance); see also United States v. Baylor Univ. Med. Ctr., 736 F.2d 1039, 1044 n.9 (5th Cir. 1984)(noting that "Title VI requires that the public bodies or private entities receiving the benefits of any such loan refrain from racial discrimination" (internal quotation marks omitted))

Webb v. Swensen, 663 F. App'x 609, 613 (10th Cir. 2016)(unpublished).[2] Consequently, the Court grants Davie's MTD Count IV with respect to Davie in his individual capacity.

[2] Webb v . Swensen is an unpublished opinion, but the Court can rely on an unpublished United States Court of Appeals for the Tenth Circuit opinion to the extent its reasoned analysis is persuasive in the case before it. See 10th Cir. R. 32.1(A)("Unpublished decisions are not precedential, but may be cited for their persuasive value."). The Tenth Circuit has stated:

> In this circuit, unpublished orders are not binding precedent, . . . and we have generally determined that citation to unpublished opinions is not favored. However, if an unpublished opinion or order and judgment has persuasive value

IV. THE COURT WILL DENY IN PART AND GRANT IN PART THE DAVIE MTD COUNTS I-III, V-VIII.

The Court concludes that Davie is not entitled to qualified immunity. Consequently, the Court will deny the Davie MTD with respect to Counts I-III. The Court also concludes that the NMTCA does not waive sovereign immunity with respect to Davie, and thus, the Court dismisses the state law tort claims with respect to Davie.

A. THE COURT WILL DENY THE DAVIE MTD COUNTS I-III.

Davie contends that the Court should dismiss the Second Amended Complaint, Counts I-III, because he is "entitled to qualified immunity from the federal constitutional and statutory claims against him for damages and immunity under the New Mexico Torts Claim Act [("NMTCA")]." Davie MTD Counts I-III, V-VIII at 2. Specifically, Davie contends that he did not violate Flowers' clearly established right. Davie MTD Counts I-III, V-VIII at 3. Qualified immunity shields government officials from liability when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Pearson v. Callahan, 555 U.S. 223, 231 (2009)(quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). When a defendant asserts qualified immunity, the plaintiff must demonstrate: (i) that the defendant's actions violated his or her constitutional or statutory rights; and (ii) that the right was clearly established at the time of the alleged misconduct, such that "every reasonable officer would have understood" that he or she knew that he was violating the plaintiff's constitutional right.

> with respect to a material issue in a case and would assist the court in its disposition, we allow a citation to that decision.

United States v. Austin, 426 F.3d 1266, 1274 (10th Cir. 2005). The Court concludes that Webb v. Swensen has persuasive value with respect to a material issue and will assist the Court in its disposition of this Order.

Estate of Smart by Smart v. City of Wichita, 951 F.3d 1161, 1178 (10th Cir. 2020). See Riggins v. Goodman, 572 F.3d 1101, 1107 (10th Cir. 2009). See also Pueblo of Pojoaque v. New Mexico, 214 F. Supp. 3d 1028, 1079 (D.N.M. 2016)(Browning, J.). To determine whether the right was clearly established, the Court asks whether "the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right." Estate of Booker v. Gomez, 745 F.3d 405, 411 (10th Cir. 2014)(quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)). "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." Ashcroft v. al-Kidd, 563 U.S. at 471.

Here, Plaintiffs contend that Davie is not entitled to qualified immunity, because Plaintiffs sufficiently allege that Davie discriminated against Flowers based on his race by forcing him to play football despite his medical condition when he did not force similarly situated white players to play, and freedom from racial discrimination is a clearly established right. The freedom from racial discrimination is a clearly established right. See Ramirez v. Dep't of Corr., Colo., 222 F.3d 1238, 1243 (10th Cir. 2000)(holding that the plaintiff's right to be free from racial discrimination was clearly established). Further, the Court concludes that Plaintiffs adequately plead that Davie engaged in racially discriminatory behavior by forcing Flowers to play football while not forcing similarly situated white players to play. See Second Amended Complaint ¶ 173, at 45 ("Other white players suffering from similar ailments were protected, allowed to refrain from playing football, and were afforded the proper treatment. But Nahje was not afforded such protections on account of his race."). Consequently, the Court denies the Davie MTD Counts I-III, V-VIII with respect to Counts I-III.

B. THE COURT WILL GRANT THE DAVIE MTD COUNTS V-VIII.

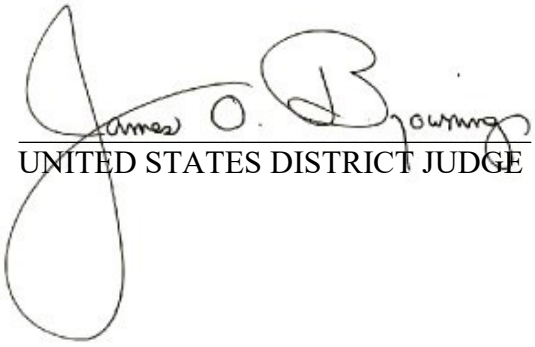
Davie also contends that the Court should dismiss the Second Amended Complaint, Counts V-VIII, because the NMTCA did not waive sovereign immunity with respect to Davie. See Davie MTD Counts I-III, V-VIII at 9. The Plaintiffs allege:

> Defendants' action and inactions described in this Complaint constitute negligence of public employees acting in the course and scope of their duties in the operation and maintenance of the buildings of UNM, which created conditions which posed a danger to student-athletes and for which immunity has been waived under NM Stat. § 41-4-6 (2018).

Second Amended Complaint ¶ 182, at 47. For the reasons discussed, supra, at 9-10, the Court concludes that the Plaintiffs do not sufficiently allege that Davie acted within the scope of his duties in the "operation and maintenance of the buildings of UNM" to fall within the waiver of sovereign immunity of the NMTCA. Accordingly, the Court will grant Davie's MTD Counts I-III, V-VIII with respect to Counts V-VIII.

IT IS ORDERED that (i) the National Collegiate Athletic Association's Motion to Dismiss and/or to Strike Allegations in Plaintiffs' Second Amended Complaint and Brief in Support, filed December 11, 2020 (Doc. 33), is granted with respect to Counts I-III, the 42 U.S.C. § 1983 claims, Count IV, the Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d claim, and loss-of-consortium claims, and denied with respect to the wrongful death and punitive damages claim; (ii) Board of Regents of the University of New Mexico's Motion to Dismiss and Memorandum of Law in Support of Motion, filed December 11, 2020 (Doc. 34), is granted with respect to Counts I-III, the 42 U.S.C. § 1983 claims, and Counts V-IX, the State law tort claims, and denied with respect to Count IV, the Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d claim; (iii) Defendant Robert Davie's Motion and Memorandum to Dismiss Count IV of Plaintiff's Second Amended Complaint, filed December 11, 2020 (Doc. 36), is granted; and

(iv) Defendant Robert Davie's Motion to Dismiss Counts I, II, III, V-VIII, filed December 18, 2020 (Doc. 37), is granted with respect to Counts V-VIII, and denied with respect to Counts I, II, and III.



UNITED STATES DISTRICT JUDGE

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