In the
Missouri Court of Appeals
Western District

KEITH WILLISTON,	)	
	)	
Appellant,	)	**WD80137**
	)	
v.	)	**OPINION FILED: October 24, 2017**
	)	
GAIL VASTERLING, ET AL.,	)	
	)	
Respondents.	)	

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Jon E. Beetem, Judge

Before Division One: Cynthia L. Martin, Presiding Judge, James E. Welsh, Judge and Karen King Mitchell, Judge

Keith Williston ("Williston") appeals from the trial court's dismissal with prejudice of his petition against numerous private and state entities and individuals. Williston's petition sought damages, and declaratory and injunctive relief, based on the alleged impact of statutes and regulations on Williston's ability to operate a birthing center. Because Williston's petition was properly dismissed, we affirm the trial court's judgment.

Factual and Procedural Background[1]

Prior to the commencement of the litigation which gives rise to this appeal, Williston owned and operated A Mother's Love Birthing Center, LLC ("AML") in Independence, Missouri. Birthing centers are required to be licensed pursuant to section 197.205[2] and pursuant to promulgated regulations, specifically 19 CSR 30-30.010 and 19 CSR 30-30.080.

In June 2009, Williston, directly or on behalf of AML, filed a petition with the Department of Health and Senior Services ("DHSS") requesting that DHSS amend its regulations concerning birthing centers. Williston objected to certain facility requirements that DHSS regulations imposed on birthing centers. Williston also objected to DHSS regulations which required a birthing center to have a physician on staff, and which required nurses and midwives working in a birthing center to provide services pursuant to a collaborative practice agreement with a physician. In March 2010, DHSS denied Williston's petition. In September 2010, the Small Business Regulatory Fairness Board requested DHSS to work with birthing centers to determine whether its birthing center regulations were compliant with state statutes. At about the same time, Williston officially

[1]Our review of the trial court's grant of a motion to dismiss a petition for failure to state a claim requires us to treat the facts contained in the petition as true and construe them liberally in favor of the plaintiff. *Ste. Genevieve Sch. Dist. R-II v. Bd. of Alderman*, 66 S.W.3d 6, 11 (Mo. banc 2002). In addition, our procedural history is drawn from prior proceedings involving Williston. "It has long been the law that courts may (and should) take judicial notice of their own records in prior proceedings which are . . . between the same parties on the same basic facts involving the same general claims for relief." *Moore v. Mo. Dental Bd.*, 311 S.W.3d 298, 305 (Mo. App. W.D. 2010). Thus, we have taken judicial notice of the case file in Williston's prior appeal to this court, *Williston v. Missouri Department of Health & Senior Services*, 461 S.W.3d 867 (Mo. App. W.D. 2015).

[2]Section 197.205 was amended by the Legislature in 2017 to include reference to abortion facilities, with that amendment taking effect on August 28, 2017. Thus, all references to section 197.205 are to the version of the statute in place before the most recent amendment.

All other statutory references are to RSMo 2016 as amended unless otherwise indicated.

filed an application with DHSS seeking a birthing center license for AML, including requests for variances from the regulatory requirements for birthing centers.

In December 2010, DHSS again advised Williston that it would not amend its birthing center regulations as requested. DHSS also advised Williston that AML remained subject to the existing licensing requirements for birthing centers, and declined to grant AML any variance from the licensing requirements. DHSS did not outright deny AML's pending license application but encouraged Williston to continue to work with DHSS to bring AML into compliance with the regulations. AML was operating without a license during this period of time.

In May 2012, Williston requested a final determination from DHSS on AML's license application. On June 11, 2012, DHSS advised Williston it no longer considered AML's license application to be active.

In August 2012, Williston appealed to the Administrative Hearing Commission ("AHC") in his own name. The AHC later changed the named petitioner in the case from Williston to AML pursuant to a joint request from the parties. Williston, and later AML, challenged DHSS's decision not to amend its regulations. However, most of the testimony and evidence presented during the AHC hearing concerned DHSS's refusal to grant AML variances from the regulatory requirements. The AHC issued a decision concluding that AML was not entitled to most of the variances Williston had requested. The AHC denied AML's application for licensure as a birthing center, finding that AML had failed to establish that it was qualified as a birthing center. The AHC further concluded that it had no authority to amend DHSS's regulations or to order DHSS to do so.

On December 2013, AML filed a petition for judicial review with the Circuit Court of Cole County, which upheld the AHC's decision in all respects. After the trial court issued its judgment, but within the thirty-day period during which the trial court maintained control over its judgment, Williston filed a motion to intervene, claiming that he retained an interest in the proceeding and should be added as a party because AML had filed a notice to wind up its affairs. More than thirty days after the trial court's judgment, the trial court denied Williston's motion to intervene. Williston (and not AML) then filed a notice of appeal, challenging both the trial court's denial of his motion to intervene and the trial court's judgment affirming the AHC's decision. We dismissed Williston's appeal in *Williston v. Missouri Department of Health & Senior Services*, 461 S.W.3d 867 (Mo. App. W.D. 2015). We found that the trial court's order denying Williston's motion to intervene was void, having been entered after the trial court lost control over its judgment. *Id.* at 870. We also found that Williston's notice of appeal challenging the merits of the judgment affirming the AHC decision was not timely, as the motion to intervene was not an authorized post-trial motion which extended the time to file an appeal.[3] *Id.*

On August 21, 2015, Williston filed a petition with the Board of Nursing. Williston asked the Board of Nursing to amend its regulations concerning the criteria necessary to practice as an advanced practice registered nurse ("APRN"),[4] and its regulations

[3]Williston did not include the petition he submitted to the AHC, the AHC's decision, AML's petition for judicial review, or the trial court's judgment in his record on appeal. However, those documents appear in the case file of *Williston*, 461 S.W.3d 867. *See supra* note 1.

[4]20 CSR 2200-4.100. All references to 20 CSR 2200-4.100 are to the version of the regulation in place in August 2015, when Williston filed his petition with the Board of Nursing seeking to amend its regulations.

concerning collaborative practice agreements.[5] Williston's petition also asked the Board of Nursing to promulgate a rule defining the scope of practice for APRNs to limit the need for collaborative practice agreements. The Board of Nursing conducted a hearing on Williston's petition in September 2015 and denied the petition on the same day.[6] Williston did not seek administrative review of the Board of Nursing's decision.

On or about November 10, 2015, Williston filed a petition in the Circuit Court of Jackson County, Missouri, which named a plethora of defendants, including DHSS, its current and former director, and its deputy director; the Board of Nursing and its appointed members; the Missouri Board of Registration for the Healing Arts and its appointed members; former Governor Jeremiah Nixon ("former Governor Nixon"); former AHC Commissioner Marvin Teer ("former Commissioner Teer"); the Missouri State Medical Association ("MSMA"); the Missouri Association of Osteopathic Physicians and Surgeons ("MAOPS"); the American College of Obstetricians and Gynecologists ("ACOG"); and physicians licensed in Missouri who are members of MSMA, MAOPS, ACOG, or any combination of those three organizations.

On February 21, 2016, Williston registered the fictitious name "A Mother's Love Birth Center" with the Missouri Secretary of State. The next day, February 22, 2016, Williston filed another application with DHSS for a license to operate a birthing center. On February 23, 2016, Williston filed an amended petition ("First Amended Petition") in

[5]20 CSR 2200-4.200. All references to 20 CSR 2200-4.200 are to the version of the regulation in place in August 2015, when Williston filed his petition with the Board of Nursing seeking to amend its regulations.

[6]Williston did not include his petition to the Board of Nursing or the Board of Nursing's decision in the record on appeal. Thus, all information regarding the proceeding before the Board of Nursing has been gleaned from Williston's first amended petition.

the Jackson County Circuit Court proceedings. Williston alleged in the First Amended Petition that he "anticipates that DHSS will deny his [pending license] application since Williston will not comply with regulations that DHSS insists are valid, and Williston insists are not." Williston's lawsuit was transferred to the Cole County Circuit Court in March 2016.[7]

In his ten-count First Amended Petition, Williston sought damages for alleged conspiracies, and declaratory and injunctive relief. Broadly stated, Williston complained that regulations promulgated by DHSS, the Board of Nursing, and the Board of Registration for the Healing Arts improperly impose limits on birthing centers and on APRNs' scope of practice, and that the defendants conspired to promulgate, enforce, and refuse to amend regulations in order to limit Williston's ability to operating a birthing center in the manner he believes appropriate. Williston believes that he should be able to operate a birthing center without hiring a physician to serve on staff and without requiring APRNs to have a collaborative practice agreement with a physician.

Specifically, Count I asserted that the Board of Nursing, the Board of Registration for the Healing Arts, MSMA, MAOPS, ACOG, and the members of MSMA, MAOPS, and ACOG engaged in a conspiracy to violate Williston's right to free speech and association. Count II alleged that DHSS, former Governor Nixon, the former director of DHSS, the

[7]Although Rule 81.12(b) requires the appellant to include "the docket sheet or case record, which contains a complete summary of all events in the case," in the legal file, Williston failed to include a docket sheet from Jackson County in the legal file so that we are unaware of the proceedings that preceded the transfer of the case to Cole County. Despite Williston's failure to comply with Rule 81.12(b), the absence of the Jackson County docket sheets does not hinder our ability to review the claims of error Williston asserts on appeal. Thus, we have elected to review Williston's appeal on the merits.

deputy director of DHSS, and former Commissioner Teer conspired to interfere with Williston's political speech before DHSS. Count III asked the trial court to declare that the Board of Nursing's and Board of Registration for the Healing Arts' policies which require an APRN to secure a collaborative practice agreement with a physician are void because the policies were not promulgated as rules. Count IV asked the trial court to declare that diagnosing and prescribing fit within the statutory definition of "professional nursing." Count V asked the trial court to declare that the Board of Nursing's and Board of Registration for the Healing Arts' policies requiring an APRN to obtain a collaborative practice agreement with a physician are void. Count VI asked the trial court to declare that the Board of Nursing and its members have a ministerial duty to license and regulate APRNs by promulgating a rule which clarifies the scope of "professional nursing." Count VII asked the trial court to declare that statutes which delegate the regulation of nurses to physicians are unconstitutional, and to enjoin the Board of Nursing and its members, the Board of Registration for the Healing Arts and its members, DHSS, the Director of DHSS, MSMA, MAOPS, and members of MSMA and MAOPS from delegating the regulation of nurses to physicians. Count VIII asked the trial court to order the Board of Nursing, DHSS, and the director of DHSS to recognize APRNs' legal authority to diagnose and prescribe. Count IX asserted that the Board of Nursing's members, the Board of Registration for the Healing Arts' members, MSMA, MAOPS, ACOG, and members of MSMA, MAOPS, and ACOG engaged in a conspiracy to deprive APRNs of their constitutional right to practice without interference by physicians. Finally, Count X named only DHSS and its director,

and asked the trial court to declare DHSS's regulations concerning birthing centers to be invalid.

The following parties moved to dismiss Williston's First Amended Petition: (1) ACOG, MSMA, and MAOPS[8] (collectively "Private Defendants"); and (2) DHSS's current director, DHSS's former director, DHSS's deputy director, the Board of Nursing's appointed members, the Board of Registration for the Healing Arts' appointed members, former Governor Nixon, and former Commissioner Teer (collectively "State Defendants"). Following briefing by the parties and a hearing, the trial court issued its judgment ("Judgment") granting the motions to dismiss.[9] The trial court concluded:

> Counts I, II, and Count IX are dismissed with prejudice for failure to state a claim, because State Defendants are protected from suit by sovereign immunity, official immunity, and the public duty doctrine, and because Plaintiff failed to properly fact-plead his conspiracy allegations.
>
> Counts III, IV, V, VI, VII, VIII and Count X are dismissed with prejudice for lack of subject matter jurisdiction, because Plaintiff lacks standing to bring his claims for declaratory relief.
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> This Court further finds Plaintiff failed to exhaust his administrative remedies as to his February 22, 2016 Application for Licensure with the Department of Health and Senior Services and his August 2015 petition to the Board of Nursing, and orders that all claims arising from those matters are dismissed with prejudice.

[8]ACOG filed its own motion to dismiss the First Amended Petition, and MSMA and MAOPS jointly moved to dismiss the same.

[9]The appendix to Williston's brief failed to include a copy of the Judgment in violation of Rule 84.04(h)(1). However, because we do not prefer to settle an appeal without reaching the merits and because the briefing is otherwise "minimally compliant with the rules," we proceed to decide Williston's appeal on its merits. *See Coon v. State*, 504 S.W.3d 888, 890 n.4 (Mo. App. W.D. 2016).

> This Court further finds that all claims arising from the Administrative Hearing Commission's November 7, 2013 decision denying A Mother's Love Birthing Center's licensure application, which was affirmed by the Cole County Circuit Court on July 21, 2014, are barred by the doctrine of res judicata and are therefore dismissed with prejudice.
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> This Court also GRANTS the Motions to Dismiss filed by ACOG, MSMA and MAOPS, and all claims against those Defendants are dismissed with prejudice.

The Judgment then provided: "Any claims or relief sought by Plaintiff which are not specifically mentioned or disposed of within this Order and Judgment are hereby dismissed with prejudice."[10]

Williston filed this timely appeal.[11]

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[10]At the hearing on the motions to dismiss, State Defendants' attorney informed the trial court that "according to CaseNet, the Department of Health and Senior Services, the Board of Nursing and the Board of Registration [for the] Healing Arts [had] not been served with a summons or with the first amended petition [so that] they are not Defendants in this case at this time." Because Williston's legal file does not include the docket sheets from Jackson County prior to the case being transferred to Cole County, *see supra* note 7, we are unable to confirm whether those agencies have been served. Nonetheless, as noted *infra*, the trial court dismissed with prejudice all claims asserted by Williston in the First Amended Petition as to all named parties. Williston has not challenged the dismissal with prejudice of claims asserted by him against named defendants who were allegedly never served with process.

[11]Private Defendants and State Defendants filed a motion to dismiss this appeal for lack of jurisdiction, arguing that Williston's notice of appeal was untimely filed. The crux of Private Defendants' argument is that Williston's "Motion to Vacate or in the Alternative Reopen and Memorandum in Support" was not an authorized post-trial motion so as to extend the time period in which the trial court retains control over the judgment pursuant to Rule 81.05(a).

"No . . . appeal shall be effective unless the notice of appeal shall be filed not later than ten days after the judgment or order appealed from becomes final." Section 512.050. "A judgment becomes final at the expiration of thirty days after its entry if no timely authorized after-trial motion is filed." Rule 81.05(a)(1); *see also* Rule 75.01 (providing that the trial court retains control over a judgment for thirty days after its entry). An authorized post-trial motion is a motion for which the rules expressly provide. *State ex rel. Eddy v. Rolf*, 145 S.W.3d 429, 433 (Mo. App. W.D. 2004). Rule 75.01 provides that within the thirty-day period following entry of judgment, a trial may "vacate, reopen, correct, amend, or modify its judgment." Merely labeling a post-trial motion as a motion to vacate is not, however, sufficient to render the pleading an authorized post-trial motion. *State ex rel. Eddy*, 145 S.W.3d at 433. Instead, we look to the substance, not the title, of a post-judgment motion to determine whether it was authorized by the rules. *Coffer v. Wasson-Hunt*, 281 S.W.3d 308, 311 (Mo. banc 2009). To constitute an authorized post-trial motion in the nature of a motion for new trial, the motion must be "directed toward errors of fact or law in the trial." *State ex rel Eddy*, 145 S.W.3d at 433 (quoting *Taylor v. United Parcel Serv., Inc.*, 854 S.W.2d 390, 392 (Mo. banc 1993)).

The substance of Williston's motion to vacate or reopen challenged the factual and legal bases on which the trial court relied to dismiss Williston's First Amended Petition, and was therefore an authorized post-trial motion

The Judgment was entered by the trial court on June 7, 2016. Thirty days later, July 7, 2016, Williston timely filed his post-judgment motion. The effect of that motion was to extend the trial court's control over the judgment ninety additional days, provided the trial court made no ruling on Williston's motion. Rule 81.05(a)(2).

Standard of Review

We review a judgment granting motions to dismiss with prejudice *de novo*. *R.M.A. v. Blue Springs R-IV Sch. Dist.*, No. WD80005, 2017 WL 3026757, at *3 (Mo. App. W.D. July 18, 2017). A motion seeking dismissal of a petition for failure to state a claim upon which relief can be granted "is solely a test of the adequacy of a plaintiff's petition." *Smith v. Humane Soc'y*, 519 S.W.3d 789, 797 (Mo. banc 2017). "The facts alleged in the petition are assumed to be true, and all reasonable inferences are liberally construed in favor of the plaintiff." *Id.* at 798. "'If the petition sets forth any set of facts that, if proven, would entitle the plaintiff[] to relief, then the petition states a claim.'" *R.M.A.*, 2017 WL 3026757, at *3 (quoting *Lynch v. Lynch*, 260 S.W.3d 834, 836 (Mo. banc 2008)). "A 'petition states a cause of action if its averments invoke principles of substantive law that may entitle the plaintiff to relief.'" *Id.* (quoting *Lynch*, 260 S.W.3d at 836). We will affirm the trial court's dismissal of a petition if it can be sustained on any ground alleged in the motion. *Id.*

Summary of Points on Appeal

Williston asserts eight points on appeal. Williston's first and second points relied on concern whether Williston has standing to seek declaratory relief as requested in Counts III, IV, V, VI, VII, and VIII of his First Amended Petition. Williston's first point on appeal argues that he has standing to pursue declaratory relief because his liberty interest in expressive association was harmed by the regulatory scheme which compels birthing

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The trial court made no ruling on Williston's motion so that it was overruled as a matter of law on October 5, 2016, and the trial court's judgment became final the same day. Williston filed his notice of appeal on Monday, October 17, 2016, rendering it timely because October 15, 2016, was a Saturday. Section 512.050; Rule 44.01(a).

Private Defendants and State Defendants' motion to dismiss this appeal is denied.

centers to employ a physician or an APRN who has a collaborative practice agreement with a physician. Williston's second point on appeal asserts that, if we conclude that the only speech affected by the regulations concerning birthing centers is commercial speech, then Williston has standing to pursue declaratory relief because the regulatory compulsion to hire a physician or an APRN who has a collaborative practice agreement with a physician compels and restricts speech concerning the economic interests of physicians, nurses, and midwives.

Williston's third point on appeal asserts that the trial court erred in dismissing his First Amended Petition because, in doing so, the trial court considered matters beyond the allegations in the First Amended Petition. Williston generally alleges that the trial court considered "counter-factual" allegations contained in the motions to dismiss that exceeded the allegations in his pleadings. And Williston argues that the trial court erroneously considered a copy of the Cole County Circuit Court judgment resolving AML's petition for judicial review of the AHC's decision denying AML a birthing center license. That judgment was attached as an exhibit to the State Defendants' motion to dismiss. Williston's point on appeal does not identify the Counts alleged in the First Amended Petition to which it applies, though the argument portion of Williston's Brief suggests that remand as to all Counts would be required should the point be granted.

Williston's fourth point on appeal argues that the trial court erred in granting MSMA and MAOPS' joint motion to dismiss on the basis of the affirmative defense of res judicata because Williston was prevented from intervening as a party to the action which sought judicial review of the AHC decision denying AML a birthing center license. According to

Williston, denial of his motion to intervene operates as a matter of law to negate the essential element of res judicata requiring identity of the persons and parties to the action. Williston's point on appeal does not identify the Counts alleged in the First Amended Petition to which it applies, though the argument portion of Williston's Brief suggests that remand as to all Counts would be required should the point be granted.

Williston's fifth point on appeal concerns whether he has standing to pursue his claims for declaratory relief challenging the collective regulations about which he complains in light of the fact that DHSS will not issue Williston a license to operate a birthing center unless he complies with the challenged regulations. Though Williston's point relied on does not identify the Counts in the First Amended Petition to which it applies, it is plain from the record that Counts III, IV, V, VI, VII, VIII, and X of the First Amended Petition seek declaratory relief, and that the trial court's Judgment dismissed these Counts based on a lack of standing.

Williston's sixth point on appeal argues that the trial court erred in dismissing the conspiracy claims set forth in Counts I, II, and IX of the First Amended Petition because the State Defendants are not protected by sovereign immunity, official immunity, or the public duty doctrine when sued in their individual capacities. Williston also claims that sovereign immunity, official immunity, and the public duty doctrine do not apply because Missouri explicitly permits claims for declaratory and injunctive relief against state agencies and explicitly permits challenges to the validity of state statutes.

Williston's seventh point on appeal argues that the trial court erred in dismissing the conspiracy claims asserted in Counts I, II, and IX of the First Amended Petition because

the First Amended Petition properly pleaded facts demonstrating: (1) that the Private Defendants in conjunction with the State Defendants had the unlawful objective or used unlawful means to delegate sovereign authority to private physicians to regulate APRNs, and interfered with the right to free speech and to associate with persons with different philosophical views; and (2) DHSS's former director, deputy director, former Governor Nixon, and former Commissioner Teer repeatedly and consistently interfered with Williston's exercise of political speech in that they shut down avenues of speech, and willfully and intentionally avoided ministerial duties like processing applications for licensure and petitions.

Williston's eighth point on appeal claims that the trial court erred in concluding that Williston failed to exhaust administrative remedies associated with the license application pending before DHSS and with the petition denied by the Board of Nursing requesting amendment of its regulations. Williston asserts that administrative remedies need not be exhausted in order to challenge the threatened application of rules, statutes, or policies that are void. Williston further argues that there are no delineated administrative remedies for many of the claims set forth in his First Amended Petition. Williston's point on appeal does not identify the Counts of the First Amended Petition to which it applies, though the argument portion of his Brief suggests remand as to all Counts would be required if the point is granted.

Summary of the Statutory and Regulatory Framework Williston Challenges

Before we consider Williston's points on appeal, it will be helpful to explain the regulatory framework challenged by the First Amended Petition.

Section 197.205 requires all "ambulatory surgical centers" to obtain a license from DHSS. An "ambulatory surgical center" is defined as "any public or private establishment operated primarily for the purpose of performing surgical procedures ***or primarily for the purpose of performing childbirths***, and which does not provide services or other accommodations for patients to stay more than twenty-three hours within the establishment." Section 197.200(2) (emphasis added).[12] Section 197.225.1[13] authorizes DHSS to promulgate "reasonable rules, regulations, and standards for the types of services provided" in ambulatory surgical centers "to assure quality patient care and patient safety." Section 197.225.1 requires DHSS to promulgate rules, regulations, and standards concerning:

> (1) Construction of the facility including, but not limited to, plumbing, heating, lighting, and ventilation which should insure the health, safety, comfort, and privacy of patients and protection from fire hazard;
>
> (2) Number, qualifications, and organization of all personnel, having responsibility for any part of the care provided to the patients;
>
> (3) Equipment essential to the health, welfare, and safety of the patients;
>
> (4) Facilities, programs, and services to be provided in connection with the care of patients in ambulatory surgical centers; and

[12]Section 197.200 was amended by the Legislature on August 28, 2017, to add reference to abortion facilities. While the amendment has no practical effect on our analysis, we refer to the prior version of the statute.

[13]Section 197.225 was amended by the Legislature on August 28, 2017 to add reference to abortion facilities. While the amendment has no practical effect on our analysis, we refer to the prior version of the statute.

> (5) Procedures for peer review and for receiving and investigating complaints regarding any ambulatory surgical center or any physician, dentist, podiatrist, nurse, assistant, manager, supervisor, or employee practicing or working in any such facility.

Pursuant to this statutory authority, DHSS promulgated rules, regulations, and standards for ambulatory surgical centers, which include, by statutory definition, establishments operating primarily for the purpose of performing childbirths.

DHSS regulation requires "any facility other than a hospital or mother's residence where births are planned to occur and where childbirth deliveries may be performed" to obtain a license to operate as a birthing center. 19 CSR 30-30.080(2)(A). DHSS defines a "birthing center" as "[a] facility, not licensed as part of a hospital, which provides maternity care away from the mother's usual residence and where low risk births are planned to occur following a normal uncomplicated pregnancy." 19 CSR 30-30.080(1)(B). According to 19 CSR 30-30.080(2)(G), DHSS will not issue a license to a birthing center until it complies with all requirements set forth in 19 CSR 30-30.090.[14]

Pursuant to 19 CSR 30-30.090(1)(B), a birthing center must employ one of the following as an administrator tasked with daily supervision and administration of the facility: (1) a physician licensed in Missouri; (2) a certified nurse-midwife ("CNM"), defined in 19 CSR 30-30.080(1)(C) as a person licensed to practice professional nursing under section 335.046 and currently certified by examination by the American College of

[14]To receive a license from DHSS, a birthing center's facility also must be in compliance with 19 CSR 30-30.100 or 19 CSR 30-30.110, depending on the number of birthing rooms in the facility. 19 CSR 30-30.080(2)(G). Williston does not challenge facility requirements in his First Amended Petition, so we do not discuss those regulations.

Nurse-Midwives[15]; (3) a registered nurse licensed in Missouri; or (4) an individual with a bachelor's degree in a related field and at least one year of administrative experience in health care. The administrator of the birthing center is responsible for assuring that all patients are under the care of ***either*** "a physician ***or*** CNM practicing pursuant to a collaborative practice agreement ***with a physician who is a member of the clinical staff***." 19 CSR 30-30.090(2)(B) (emphasis added). Further, a birthing center must have at least one physician who is responsible for the following: (1) signing collaborative practice agreements and meeting any other requirements for collaborative practice; (2) reviewing and signing clinical practice guidelines and risk assessment criteria at least annually; and (3) being available in person or by telecommunication for consultation. 19 CSR 30-30.090(3)(D). The practical effect of these regulations is that a birthing center must have a physician on staff.

Collaborative practice agreements are addressed in section 334.104. Section 334.104.1 provides:

> A physician may enter into collaborative practice arrangements with registered professional nurses. Collaborative practice arrangements shall be in the form of written agreements, jointly agreed-upon protocols, or standing orders for the delivery of health care services. Collaborative practice arrangements, which shall be in writing, may delegate to a registered professional nurse the authority to administer or dispense drugs and provide treatment as long as the delivery of such health care services is within the

[15]DHSS's reference to a "certified nurse-midwife" does not state whether a certified nurse-midwife must be an APRN. The definition adopted by DHSS is, however, identical to the definition for "certified nurse midwife" set forth in section 335.016(6). And, as we discuss *infra*, pursuant to 20 CSR 2200-4.100(3)(A) only an APRN has the right to use the title or abbreviations "nurse midwife" or "certified nurse midwife (CNM)" in clinical practice. Thus, we conclude that a certified nurse-midwife must be an APRN. The tenor of the First Amended Petition suggests that Williston agrees, as most of the Counts in his First Amended Petition challenge regulations or policies imposed on APRNs by agencies other than DHSS.

> scope of practice of the registered professional nurse and is consistent with that nurse's skill, training and competence.

The Legislature has granted the Board of Registration for the Healing Arts and the Board of Nursing joint authority to promulgate rules regarding the use of collaborative practice arrangements.[16] Section 334.104.4.

The Board of Nursing promulgated 20 CSR 2200-4.200 to regulate collaborative practice arrangements. Under that regulation, collaborative practice arrangements refers to "written agreements, jointly agreed upon protocols, or standing orders, all of which shall be in writing, for the delivery of health care services." 20 CSR 2200-4.200(1)(C). Both APRNs and registered nurses ("RNs") may enter into a collaborative practice agreement with a physician, but the scope of practice of the APRN or RN will vary, depending on the skill, training, education, competence, licensure, and certification of the professional. 20 CSR 2200-4.200(3)(A)-(B). In other words, the collaborative practice agreement will define the APRN or RN's scope of practice. It is the responsibility of the physician to ensure that "the delegated responsibilities contained in the collaborative practice arrangement are consistent with that level of skill, education, training, and competence" of the collaborating RN or APRN. 20 CSR 2200-4.200(3)(C).

APRNs and RNs are both licensed to engage in the practice of professional nursing. Section 335.016(2), (15) & (16). An APRN, though, is an RN "who has education beyond the basic nursing education and is certified by a nationally recognized professional organization as a certified nurse practitioner, certified nurse midwife, certified registered

[16]DHSS regulations for birthing centers refer to collaborative practice "agreements," and not "arrangements." The terms are synonymous and are used interchangeably in this Opinion.

nurse anesthetist, or a certified clinical nurse specialist." Section 335.016(2). The advanced education required includes "completion of a graduate degree from an accredited college or university with a concentration in an advance practice nursing clinical specialty area, which includes advanced nursing theory and clinical nursing practice."[17] 20 CSR 2200-4.100(1)(C)2. Only those nurses who are licensed as APRNs by the Board of Nursing may hold themselves out to be APRNs. 20 CSR 2200-4.100(2)(C)6. Further, only an RN meeting the requirements of 20 CSR 2200-4.100 and recognized by the Board of Nursing as an APRN has the right to use the titles "nurse midwife" or "certified nurse midwife (CNM)" in his or her clinical practice. 20 CSR 2200-4.100(3)(A).

Salient to this appeal, the simplified, collective effect of these regulations and statutes is that a birthing center must be licensed; that patient care in a birthing center must be provided by a physician on staff or by a CNM with a collaborative practice agreement with a physician on staff; and a CNM must be an APRN.

We now turn our attention to Williston's points on appeal. We are to affirm the trial court's Judgment dismissing all claims or relief sought in the First Amended Petition if it can be sustained on any basis alleged in the motions to dismiss. *R.M.A.*, 2017 WL 3026757, at *3. The trial court's Judgment identified multiple bases for dismissing the First Amended Petition. We thus elect to address Williston's points on appeal out of order and collectively

[17]Those education requirements exist for those APRNs licensed on and after July 1, 1998. Prior to that time, an APRN would was required to complete "a formal postbasic educational program from or formally affiliated with an accredited college, university, or hospital of at least one (1) academic year, which includes advanced nursing theory and clinical nursing practice, leading to a graduate degree or certificate with concentration in an advanced practice nursing clinical specialty area." 20 CSR 2200-4.100(1)(C)1.

where appropriate, categorized by a basis for dismissal which supports sustain the Judgment.

Conspiracy Claims (Counts I, II, and IX of the First Amended Petition)
(Point Seven on Appeal)

Williston's seventh point on appeal complains that it was error to dismiss his conspiracy claims because well-pleaded facts in the First Amended Petition, taken as true for purposes of a motion to dismiss, would entitle Williston to relief. The trial court's Judgment dismissed the conspiracy claims in the First Amended Petition (Counts I, II, and IX) because Williston failed to properly fact-plead the conspiracy allegations.

"A claim for civil conspiracy is not a separate and distinct cause of action but acts to hold conspirators jointly and severally liable for some underlying act." *Higgins v. Ferrari*, 474 S.W.3d 630, 642 (Mo. App. W.D. 2015). A civil conspiracy "'is an agreement or understanding between persons to do an unlawful act, or to use unlawful means to do a lawful act.'" *John Knox Vill. v. Fortis Constr. Co.*, 449 S.W.3d 68, 78 (Mo. App. W.D. 2014) (quoting *Oak Bluff Partners, Inc. v. Meyer*, 3 S.W.3d 777, 780-81 (Mo. banc 1999)). To plead a civil conspiracy successfully, the plaintiff must plead facts demonstrating: "'(1) two or more persons; (2) with an unlawful objective; (3) after a meeting of the minds; (4) committed at least one act in furtherance of the conspiracy; and (5) [the plaintiff] was thereby damaged.'" *Id.* (quoting *W. Blue Print Co. v. Roberts*, 367 S.W.3d 7, 22 (Mo. banc 2012)).

"[A] civil conspiracy 'does not give rise to a civil action unless something is done pursuant to which, absent the conspiracy, would create a right of action against one of the

defendants, if sued alone.'" *Hibbs v. Berger*, 430 S.W.3d 296, 320 (Mo. App. E.D. 2014) (quoting *Gettings v. Farr*, 41 S.W.3d 539, 541-42 (Mo. App. E.D. 2001)). Thus, "'[i]f the underlying wrongful act alleged as part of a civil conspiracy fails to state a cause of action, the civil conspiracy claim fails as well.'" *Id.* (quoting *Envirotech, Inc. v. Thomas*, 259 S.W.3d 577, 586 (Mo. App. E.D. 2008)). Thus, a trial court may dismiss a conspiracy count if the plaintiff fails to plead a cause of action for the underlying claim. *Id.*

The underlying wrongful act on which Williston relies to allege civil conspiracy in Counts I, II, and IX is a deprivation of constitutional rights under 42 U.S.C. section 1983. That statute provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. section 1983. "'Section 1983 allows a person who has had 'any rights, privileges, or immunities secured by the Constitution' violated by another, under the color of state law, to sue the violator for damages.'" *McIlvoy v. Sharp*, 485 S.W.3d 367, 372 (Mo. App. W.D. 2016) (quoting *Copeland v. Wicks*, 468 S.W.3d 886, 890 (Mo. banc 2015)). "In order to successfully bring a claim under [section] 1983, a plaintiff must plead and prove (1) that the defendant deprived the plaintiff 'of a right privilege, or immunity secured by the Constitution or the laws of the United States' and (2) that the defendant 'was acting under the color of state law at the time of the conduct constituting the deprivation.'" *Id.* at 372-73 (quoting *France v. Hunter*, 368 S.W.3d 279, 286 (Mo. App. S.D. 2012)).

The First Amended Petition identified three categories of defendants in Counts I, II, and IX: (1) state agencies and state officials acting in their official capacities; (2) state officials acting in their individual capacities; and (3) private entities and persons.[18] Our analysis regarding whether the First Amended Petition pleaded a cause of action for civil conspiracy varies, depending on the category in which the defendant belongs.

State Agencies and State Officials Acting in Their Official Capacities

"[I]t is well settled that neither states nor state agencies are 'persons' under Section 1983." *Group Health Plan, Inc. v. State Bd. of Registration for the Healing Arts*, 787 S.W.2d 745, 750 (Mo. App. E.D. 1990). Further, state officials acting in their official capacity are not "persons" under section 1983 because that suit is not a suit against an official but instead a suit against the official's office. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). Thus, a suit against a state official acting in his or her official capacity is no different than a suit against the state itself. *Id.* In *Will*, the Supreme Court of the United States held that the Michigan Department of State Police and its Director of State Police in his official capacities were not "persons" within the meaning of section 1983. *Id.*

The First Amended Petition named DHSS, the Board of Nursing, and the Board of Registration for the Healing Arts as defendants. Those state agencies are not "persons"

[18]Count I of the First Amended Petition was asserted against the Board of Nursing, the Board of Registration for the Healing Arts, and the Private Defendants. Count II of the First Amended Petition was asserted against DHSS, former Governor Nixon, the former director of DHSS, the deputy director of DHSS, and former Commissioner Teer as the named defendants. Count IX of the First Amended Petition was asserted against the Board of Nursing's members, the Board of Registration for the Healing Arts' members, MSMA, MAOPS, ACOG, and members of MSMA, MAOPS, and ACOG.

within the meaning of section 1983. The First Amended Petition also named the director of DHSS, former Governor Nixon, the members of the Board of Nursing, the members of the Board of Registration for the Healing Arts, and former Commissioner Teer as defendants in their official capacities. Thus, those defendants are not "persons" within the meaning of section 1983. Because a section 1983 action would not lie against these state agencies and state officials acting in their official capacities, it follows that claims for civil conspiracy naming these defendants would not lie as a matter of law. Dismissal of the civil conspiracy claims as to these defendants was not erroneous.

State Officials Acting in Their Individual Capacities, and Private Entities and Persons

The analysis for the second and third categories of defendants is identical because, in both instances, the plaintiff seeks to impose personal liability. "Suits against officials in their individual capacity 'seek to impose personal liability upon a government official for actions he takes under color of state law.'" *Handt v. Lynch*, 681 F.3d 939, 943 (8th Cir. 2012) (quoting *Kentucky v. Graham*, 473 U.S. 159, 165 (1985)). "'Under [section] 1983, a plaintiff must establish not only that a private actor caused a deprivation of constitutional rights, but that the private actor willfully participated with state officials and reached a mutual understanding concerning the unlawful objective of a conspiracy.'" *France*, 368 S.W.3d at 287 (quoting *Dossett v. First State Bank*, 399 F.3d 940, 951 (8th Cir. 2005)).

The civil conspiracy claims alleged in the First Amended Petition in part named private entities and persons, and state officials acting in their individual capacities, as defendants. As noted, these claims depended for their success on a well-pleaded underlying violation of section 1983. When a plaintiff asserts a section 1983 action against

an official in his or her individual capacity or against a private actor, the plaintiff must plead facts establishing the "individual defendant's personal involvement or responsibility" in depriving the plaintiff of his constitutional rights. *McIlvoy*, 485 S.W.3d at 373. Bare, conclusory allegations are not sufficient to state a claim. *Id.*

Count I of the First Amended Petition alleged that the Private Defendants conspired to violate Williston's First Amendment rights to speech and association.[19] Specifically, Count I alleged that the defendants' actions "damaged Williston's ability to associate with like-minded persons to promote the philosophies, theories, practices and associations of Nursing and Midwifery . . . by illegally depriving APRNs and Midwives of their constitutional rights." Count I alleged that the defendants "are actively chilling the speech and harming the other rights and liberties of those with whom Williston wishes to associate, reducing the number of those willing to associate with or publicly support Williston's point of view out of fear of State-sponsored oppression." Finally, Count I alleged that "[t]he State's disparate treatment of APRNs and Midwives chills their speech and Williston's by communicating that APRNs and Midwives are inferior to and less deserving of legal protection than other Professionals."

Count I of the First Amended Petition does not allege ***specific*** conduct identifying any "individual defendant's personal involvement or responsibility" in depriving Williston of his constitutional rights. *McIlvoy*, 485 S.W.3d at 373. Count I is instead composed of

[19]Count I also named the Board of Nursing and the Board of Registration for the Healing Arts as defendants. As discussed *supra*, those defendants are not "persons" within the meaning of section 1983 so that dismissal of Count I against those defendants was appropriate.

bare, conclusory allegations that are legally insufficient to state a claim for violation of section 1983, and thus, correspondingly, for civil conspiracy to violate section 1983. *Id.*

Count II of the First Amended Petition alleged that the former director and the current deputy director of DHSS[20] conspired to interfere with Williston's right to political speech before DHSS. Count II alleged that the former director and the current deputy director of DHSS "caused DHSS to breach DHSS' ministerial and well-established lawful duties to exercise discretion on the basis of evidence on the record and to consider the factors mandated by statute both when causing DHSS to arbitrarily and capriciously deny Williston's Petition to Amend DHSS' regulations and AML's license application." Count II further alleged that the former director and the current deputy director of DHSS "willfully, knowingly, and with evil intent, unlawfully presented, or caused to be presented, to the AHC legal arguments [they] knew to be specious, false, frivolous and baseless with the intent to have AML's license denied in order to defeat Williston's petition to amend DHSS' regulations." Count II's allegations are bare and conclusory in nature and fail to specifically identify each defendant's personal conduct or involvement in an alleged violation of section 1983. The allegations in Count II are insufficient to constitute a well-pleaded claim for relief under section 1983, and are thus insufficient to support a claim for civil conspiracy to violate section 1983.

Count IX of the First Amended Petition alleged that the Board of Nursing's members in their individual capacities, the Board of Registration for the Healing Arts' members in

[20]Count II also named DHSS, former Governor Nixon in his official capacity, and former Commissioner Teer in his official capacity as defendants. As discussed *supra*, those defendants are not "persons" within the meaning of section 1983 so that dismissal of Count II against those defendants was appropriate.

their individual capacities,[21] MSMA, MAOPS, ACOG, and members of MSMA, MAOPS, and ACOG "engaged in a conspiracy with each other and willfully, knowingly, and with evil intent employed a scheme to deprive APRNs of their property and liberty without due process of law." Count IX alleged that these defendants "continued a policy that stripped APRNs of their procedural protections for their property and liberty interests in pursuing the lawful profession of their own choosing." As with Count I and II of the First Amended Petition, the allegations in Count IX are bare, conclusory assertions, devoid of specificity. The allegations in Count IX are insufficient to constitute a well-pleaded claim for relief under section 1983 and are thus insufficient to support a claim for civil conspiracy to violate section 1983.

Because Counts I, II, and IX do not set forth well-pleaded facts as required to state a claim for relief under section 1983, the trial court did not err in dismissing the civil conspiracy claims which relied on section 1983 as the underlying wrongful act. *See Hibbs*, 430 S.W.3d at 320 (quoting *Envirotech, Inc.*, 259 S.W.3d at 586) ("'If the underlying wrongful act alleged as part of a civil conspiracy fails to state a cause of action, the civil conspiracy claim fails as well.'").

Counts I, II, and IX of the First Amended Petition were properly dismissed for want of well-pleaded facts. Point Seven is denied.

[21]Count IX also named the Board of Nursing's members and the Board of Registration for the Healing Arts' members in their official capacities. As discussed *supra*, those defendants are not "persons" within the meaning of section 1983 so that dismissal of Count IX against those defendants was appropriate.

Claims Seeking Declaratory Relief Involving the Rights of APRNs (Counts III, IV, V, VI, VII and VIII of the First Amended Petition)
(Points One, Two and Five on Appeal)

Williston's first, second, and fifth points on appeal each complain of error in denying his claims for declaratory relief based on a lack of standing. Counts III, IV, V, VI, VII and VIII of the First Amended Petition sought declarations involving the rights of APRNs. In particular, the First Amended Petition asked the trial court to declare: (1) that the Board of Nursing and Board of Registration for the Healing Arts' policies requiring an APRN to obtain a collaborative practice agreement with a physician are void because they are not promulgated as rules (Count III); (2) that diagnosing and prescribing fall within the statutory definition of "professional nursing" (Count IV); (3) that the Board of Nursing and Board of Registration for the Healing Arts' policies requiring an APRN to obtain a collaborative practice agreement with a physician are void because those policies deny APRNs procedural protections (Count V); (4) that the Board of Nursing and its members have a ministerial duty to license and regulate APRNs, including promulgating a rule clarifying the scope of "professional nursing" (Count VI); (5) that statutes delegating regulation of nurses to physicians are unconstitutional (Count VII); and (6) that if diagnosing and prescribing are found by the Board of Nursing to be within the scope of "professional nursing," then the same are statutorily authorized (Count VIII). The trial court's Judgment dismissed these counts with prejudice because Williston lacked standing to assert the claims.[22]

[22]The trial court's Judgment also dismissed Count X of the First Amended Petition based on a lack of standing. We address Count X separately because unlike Counts III, IV, V, VI, VII, and VIII of the First Amended

"'Standing is a necessary component of a justiciable case that must be shown to be present prior to adjudication on the merits.'" *Schweich v. Nixon*, 408 S.W.3d 769, 774 (Mo. banc 2013) (quoting *CACH, LLC v. Askew*, 358 S.W.3d 58, 61 (Mo. banc 2012)). If the plaintiff lacks standing to bring a particular claim, the court must dismiss the claim because the court lacks authority to decide its merits. *City of Slater v. State*, 494 S.W.3d 580, 586 (Mo. App. W.D. 2016). Standing is required in order "'to assure that there is a sufficient controversy between the parties that the case will be adequately presented to the court,'" and to "'prevent[] parties from creating controversies in matters in which they are not involved and which do not directly affect them.'" *Schweich*, 408 S.W.3d at 774 (quoting *CACH, LLC*, 358 S.W.3d at 61).

Standing requires a plaintiff to "have a 'legally protectable interest in the litigation so as to be directly and adversely affected by its outcome.'" *Weber v. St. Louis Cty.*, 342 S.W.3d 318, 323 (Mo. banc 2011) (quoting *Mo. State Med. Ass'n v. State*, 256 S.W.3d 85, 87 (Mo. banc 2008)). "'A legally protectable interest exists if the plaintiff is directly and adversely affected by the action in question or if the plaintiff's interest is conferred by statute.'" *Id.* (quoting *Ste. Genevieve Sch. Dist. R-II v. Bd. of Alderman of City of Ste. Genevieve*, 66 S.W.3d 6, 10 (Mo. banc 2002)). The plaintiff must "be within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question to bring an action thereunder." *Id.* We determine whether a plaintiff has standing "to challenge an agency rule or regulation under the same standards as standing to challenge a

Petition, Count X did not seek a declaration regarding the rights of APRNs, and instead sought a declaration that DHSS's birthing center regulations are invalid.

statute or municipal ordinance." *EBG Health Care III, Inc. v. Mo. Health Facilities Review Comm.*, 12 S.W.3d 354, 362 (Mo. App. W.D. 2000). "'A party has standing to challenge the constitutionality of a statute (or rule or directive as the case may be) only insofar as it has an adverse impact on his own rights.'" *Id.* (quoting *R.J.J. by Johnson v. Shineman*, 658 S.W.2d 910, 914 (Mo. App. W.D. 1983)).

Williston argues on appeal that he has standing to bring Counts III, IV, V, VI, VII, and VIII -- all of which challenge statutes, regulations, or policies promulgated or enforced by the Board of Nursing and the Board of Registration for the Healing Arts addressing APRNs. It is uncontested that Williston is neither an APRN nor a CNM (who is required to be an APRN). Nor does Williston contend in the First Amended Petition that he is in any manner subject to the jurisdiction or authority of the Board of Nursing or the Board of Registration for the Healing Arts.

Williston nonetheless contends that he is in the zone of interests to be protected or regulated by APRN statutes, regulations, or policies. He contends that because APRN statutes, regulations, and policies authorize collaborative practice agreements and physician supervision of APRNs, DHSS was empowered to require APRNs who provide patient care at birthing centers to do so pursuant to a collaborative practice agreement with a physician on staff. Williston thus claims that APRN statutes, regulations, and policies harm his liberty interest in expressive association and his commercial speech because he wants to be able to hire APRNs who are CNMs to provide patient care without being supervised by physicians who do not share his child birthing philosophies.

We are not persuaded. The First Amended Petition alleges that "Missouri does not provide Nursing equal treatment under the law in that APRNs are denied all meaningful procedural protections for their rights, while Missouri continues to provide meaningful procedural protections for Medicine and Osteopathy." The First Amended Petition alleges that "APRNs are aware of the arbitrary authority the local physicians hold over APRNs and many limit their exercise of political speech due to concerns about their jobs and do chill their own speech out of fear of arbitrary retribution." The First Amended Petition alleges that the defendants "are actively chilling the speech and harming the other rights and liberties ***of those with whom Williston wishes to associate***." (Emphasis added.) The First Amended Petition alleges that "APRNs and Midwives are not free to choose where they wish to live and work and . . . fear retribution by the State or by Private Defendants acting under implied or actual authority from the State."

Plainly, Williston's believes it is unfair to require APRNs and CNMs to have a collaborative practice agreement before they can lawfully provide certain care Williston believes to be within the scope of their professional training. Williston has no standing, however, to wage that battle on behalf of APRNs or CNMs, as he is neither an APRN nor a CNM. More to the point, though the APRN statutes, regulations and policies referenced in Williston's First Amended Complaint ***permit*** APRNs to have a collaborative practice agreement, they ***do not require*** the agreements, and certainly say nothing with respect to whether such agreements are required in order to provide patient care at a birthing center. The alleged impairment about which Williston complains--the inability to secure a birthing center license unless the APRNs or CNMs he hires have a collaborative practice agreement

with a physician on staff--does not arise out of Board of Nursing or Board of Registration for the Healing Arts regulations. Instead, the alleged impairment about which Williston complains is a direct function of DHSS regulations describing the requirements to secure a birthing center license.

Williston does not have standing to challenge APRN statutes, regulations, or policies promulgated by the Board of Nursing or the Board of Registration for the Healing Arts. Williston is not directly impacted by APRN statutes, regulations, or policies because he is not subject to the Board of Nursing's or the Board of Registration for the Healing Arts' authority. And he is not adversely impacted by APRN statutes, regulations, or policies as they are not the origin of the impairment about which he complains--the inability to hire APRNs unless they have a collaborative practice agreement with a physician on staff at a birthing center.[23] The trial court did not err in dismissing Counts III, IV, V, VI, VII, and VIII of the First Amended Petition on this basis. Points One, Two, and Five on appeal are denied insofar as they claim error in the dismissal of the aforesaid Counts of the First Amended Petition.[24]

[23]This case is thus readily distinguishable from *Missouri Ass'n of Nurse Anesthetists, Inc. v. State Board of Registration for the Healing Arts*, 343 S.W.3d 348 (Mo. banc 2011). There, our Supreme Court found that a doctor who was subject to the Board's regulatory authority plainly had a legally protectable interest supporting standing to challenge a published policy of the Board, as his violation of the policy could subject him to discipline. *Id.* at 354. The Supreme Court also found that nurse anesthetists, though not subject to the Board's regulatory authority, nonetheless had a legally protectable interest supporting standing to challenge a published policy because the policy would operate to prohibit doctors from delegating performance of procedures to them they had previously been able to perform. *Id.* Williston's circumstances do not fall within either category, a fact he admitted during oral argument in this case. Williston is not subject to the Board of Nursing's or the Board of Registration for the Healing Arts' regulatory authority. And Williston cannot establish that either Boards' policies or regulations deny him the ability to provide services he believes are within the lawful scope of his professional license.

[24]Williston's points on appeal involving standing also implicate Count X of the First Amended Petition. We separately address, *infra*, the propriety of dismissal of Count X, though on a basis other than standing.

Claim Relating to the Validity of DHSS Regulations
(Count X of the First Amended Petition)
(Points Three and Four on Appeal)

Williston's third and fourth points on appeal complain that the trial court inappropriately considered matters outside the four corners of the First Amended Petition to dismiss his claims (Point Three) and improperly dismissed his claims based on the affirmative defense of res judicata (Point Four). The trial court's Judgment concluded that "all claims" arising out of the AHC's earlier decision to deny AML a birthing center license, which decision was affirmed on judicial review by the Cole County Circuit Court, "are barred by the doctrine of res judicata." The Judgment did not identify which Counts of the First Amended Petition were so barred. However, it is plain that Count X of the First Amended Petition involves the DHSS regulations that were at issue in the earlier AHC decision, leading us to conclude that the trial court's res judicata plainly encompassed Count X. Because we have already sustained dismissal of Counts I-IX of the First Amended Petition on other grounds, it is unnecessary for us to determine whether the trial court's res judicata determination was intended to encompass any other Counts of the First Amended Petition. We therefore limit our discussion of Williston's third and fourth points to the dismissal of Count X on the basis of res judicata.

Williston's third point on appeal complains that the trial court erroneously considered an exhibit attached to the State Defendants' motion to dismiss. That exhibit was a copy of the judgment of the Cole County Circuit Court which affirmed the AHC's

decision to deny AML a birthing center license.[25] The State Defendants referenced the exhibit in connection with their argument that res judicata barred Williston's claims arising out of his prior challenge of DHSS regulations in connection with his first application for a birthing center license.

Williston's claim of error is without merit. "It has long been the law that courts may (and should) take judicial notice of their own records in prior proceedings which are . . . between the same parties on the same basic facts involving the same general claims for relief." *Moore v. Mo. Dental Bd.*, 311 S.W.3d 298, 305 (Mo. App. W.D. 2010). Moreover, although res judicata is an affirmative defense, a motion to dismiss for failure to state a claim is nonetheless an appropriate means to raise the defense which in essence alleges that the plaintiff has failed to state a claim for which relief may be granted. *Chesterfield Village, Inc. v. City of Chesterfield*, 64 S.W.3d 315, 318 n.1 (Mo. banc 2002). "This is so even though matter outside the pleadings is considered by the court taking judicial notice of the earlier judgment." *Id.* The trial court committed no error with respect to its consideration of the exhibit attached to the State Defendants' motion to dismiss in dismissing Count X of the First Amended Petition on the basis of res judicata. Point Three is denied.

Williston's fourth point on appeal claims that it was error to grant the motion to dismiss jointly filed by MSMA and MAOPS because their affirmative defense of res judicata fails as a matter of law. Williston argues that because he was denied leave to intervene in the proceedings involving AML's efforts to secure a license from DHSS, there

[25] *See supra* note 3.

was no identity of persons or parties as a matter of law, an essential element of the affirmative defense of res judicata.

We observe as a preliminary matter that Williston's fourth point on appeal does not ascribe error to the trial court's grant of the State Defendants' motion to dismiss--a motion which also alleged that the affirmative defense of res judicata required dismissal of the First Amended Petition. Thus, even if we could find merit in Williston's fourth point on appeal, (which we do not, as we discuss, *infra*), Williston would not be entitled to relief, as he failed to challenge the trial court's grant of the State Defendants' motion to dismiss based on the affirmative defense of res judicata. *STRCUE, Inc. v. Potts*, 386 S.W.3d 214, 219 (Mo. App. W.D. 2012) ("An appellant's failure to challenge a finding and ruling that would support the conclusion complained about is fatal to an appeal."); *see also City of Peculiar v. Hunt Martin Materials, LLC*, 274 S.W.3d 588, 590-91 (Mo. App. W.D. 2009) (holding that to establish grounds for reversal, an appellant must challenge all grounds on which the trial court ruled against it).

Even if we were inclined to overlook this fatal error, we would not find merit in Williston's narrow challenge to the trial court's res judicata finding. "Res judicata, or claim preclusion, prohibits a party from bringing any previously-litigated claim and any claim that, with the exercise of reasonable diligence, should have been brought in that prior suit." *Kesler v. Curators of Univ. of Mo.*, 516 S.W.3d 884, 890 (Mo. App. W.D. 2017). "For res judicata to apply, four identities must be present: '1)identity of the thing sued for; 2) identity of the cause of action; 3) identity of the persons and parties to the action; and 4) identity of the quality of the person for or against whom the claim is made.'" *Id.* (quoting *King Gen.*

Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints, 821 S.W.2d 495, 501 (Mo. banc 1991)).

Williston's fourth point on appeal challenges only whether there was an identity of persons and parties between the earlier DHSS litigation and the instant action.[26] Even then, Williston argues only that his unsuccessful attempt to intervene in the earlier proceedings involving judicial review of the AHC decision foreclosed the ability to find an identity of persons and parties as a matter of law.

Williston cites no authority for this proposition. "Failure to cite relevant authority supporting a point or to explain the failure to do so preserves nothing for our review." *Goudeaux v. Bd. of Police Comm'rs of Kansas City*, 409 S.W.3d 508, 516 (Mo. App. W.D. 2013) (internal quotations marks omitted). It is rudimentary that a motion to intervene might be denied for any number of procedural or substantive reasons wholly unrelated to whether there is an identity of interests between existing parties and a person seeking to intervene. The denial of Williston's motion to intervene in earlier DHSS proceedings does not have an automatic preclusive effect on establishing an identity of persons and parties for purposes of the defense of res judicata.

Though Williston does not otherwise challenge the trial court's res judicata finding, based on our review of the record, the finding was not erroneous. "'A party is identical, for purposes of res judicata, when it is the same party that litigated the prior suit or when the new party was in privity with the party that litigated the prior suit.'" *Commonwealth Land*

[26]Williston admitted during oral argument that the subject matter of the two proceedings at issue were identical.

Title Ins. Co. v. Miceli, 480 S.W.3d 354, 365 (Mo. App. E.D. 2015) (quoting *Lauber-Clayton, LLC v. Novus Props. Co.*, 407 S.W.3d 612, 619 (Mo. App. E.D. 2013)). "'Privity, as a basis for satisfying the identical party requirement of res judicata, is premised on the proposition that the interests of the party and non-party are so closely intertwined that the non-party can fairly be considered to have had his or her day in court.'" *Id.* (quoting *Lauber-Clayton, LLC*, 407 S.W.3d at 619).

Here, Williston was the initial applicant in the petition filed with DHSS in June 2009. Though AML was later substituted for Williston by agreement of the parties, there is little doubt that Williston was in privity with AML in those proceedings. In fact, it was Williston who filed the appeal from those proceedings to this court wherein Williston challenged the merits of the judgment affirming the AHC decision to deny AML a license.

Any doubt on this point is resolved by a review of Williston's allegations in the First Amended Petition, which establish that Williston was acting through AML to challenge DHSS birthing center regulations in the earlier DHSS proceedings:

> 74. In June, 2009 Williston petitioned DHSS to amend the regulations for Birth Centers in 19 CSR 30-30.080 through .110.
>
> . . . .
>
> 108. On or about June 26, 2009, Williston and industry stakeholders filed a petition to amend 19 CSR 30-30.080 through .110 with DHSS pursuant to [sections] 536.041 and .323 RSMo.
>
> . . . .
>
> 114. DHSS denied Williston's petition on or about March 3, 2010 because DHSS "felt" the regulations did not need to be changed.
>
> . . . .

> 115. Williston, along with other petitioners, appealed the denial to the [Small Business Regulatory Fairness Board].
>
> 116. On September 15, 2010, the [Small Business Regulatory Fairness Board] held a hearing to review Williston's Petition.
>
> . . . .
>
> 122. Williston agreed to submit a license application for his business, AML to test DHSS' exercise of discretion.
>
> . . . .
>
> 123. AML submitted an application for license on or about September 21, 2010, including requests for variances covering areas the [Small Business Regulatory Fairness Board] had found did not comply with statutory requirements.
>
> . . . .
>
> 152. On August 15, 2012, Williston filed an appeal with the Administrative Hearing Commission, ("AHC").
>
> 153. Williston's appeal included his petition to amend DHSS' regulations.

In fact, the allegations from paragraph 69 through 181 of the First Amended Petition are almost exclusively devoted to Williston's recitation of the procedural events leading to his current lawsuit, reflecting an intimacy of knowledge and involvement that is demonstrative of the intertwined relationship between AML and Williston. We comfortably conclude that AML and Williston were so closely intertwined during the earlier DHSS proceedings that Williston, as a non-party, can be fairly considered to have had his day in court.

The AHC's decision found that "there is no conflict between the [birthing center] statutes, the regulations, and their intended purpose to ensure quality patient care and patient safety. Every licensed facility must have a physician affiliated with said facility for consultation with staff, including advanced nurse practitioners." The AHC found that

AML was not entitled to variances from the DHSS birthing center regulations and was not eligible for licensure in the absence of compliance with those regulations. The allegations in Count X of the First Amended Petition regarding the validity of DHSS regulations attempt to re-litigate matters already resolved by the AHC decision affirmed by the Cole County Circuit Court. The trial court did not error in concluding that Count X of the First Amended Petition is barred by the doctrine of res judicata.

Point Four on appeal is denied.

Remaining Points on Appeal
(Points VI and VIII)

Because we are able to sustain the trial court's Judgment dismissing each of the Counts alleged in the First Amended Petition on a basis raised in the motions to dismiss granted by the trial court, we need not address alternative bases for dismissal identified by the trial court's Judgment. As a result, we need not address Point VI on appeal, claiming error in the dismissal of conspiracy claims based on sovereign immunity, official immunity, or the public duty doctrine. Nor are we required to address Point VIII on appeal, claiming error in the dismissal of all of the Counts in the First Amended Petition because Williston failed to exhaust administrative remedies. These points on appeal are denied as moot.

Conclusion

The trial court's Judgment dismissing with prejudice all claims or relief asserted or sought in Williston's First Amended Petition is affirmed.

Cynthia L. Martin

Cynthia L. Martin, Judge

All concur