MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jackie L. Haines III, Individually and as Parent of H.H., A Minor Child, Deceased, and Nicholas Dandurand, Personal Representative of the Estate of H.H.,

Appellants-Plaintiffs,

v.

Indiana Department of Child Services,

Appellee-Defendant

November 20, 2023

Court of Appeals Case No. 23A-CT-652

Appeal from the Madison Circuit Court

The Honorable Mark K. Dudley, Judge

Trial Court Cause No. 48C06-2001-CT-9

Memorandum Decision by Judge Vaidik
Judges Mathias and Pyle concur.

Vaidik, Judge.

Case Summary

[1] Following the death of his minor son, H.H., Jackie L. Haines III and the personal representative of H.H.'s estate, Nicholas Dandurand, brought a wrongful-death claim and survival claim against the Indiana Department of Child Services (DCS). The trial court dismissed the survival claim and granted summary judgment to DCS on the wrongful-death claim. Haines and Dandurand ("Plaintiffs") now appeal. We affirm.

Facts and Procedural History

[2] The facts as alleged by Plaintiffs, which we accept as true for purposes of this appeal, are as follows. H.H. was the child of Haines and Jennifer Harris. When H.H. was born in July 2016, Haines and Harris were in a relationship and lived together, but they never married. They broke up several months later, and Haines moved out, while H.H. stayed with Harris. Shortly thereafter, Harris's new boyfriend, Dylan Tate, moved in. H.H. lived with Harris and Tate until his death.

[3] In December 2017, Harris took H.H. to his pediatrician because he had bruising and swelling around his eyes and forehead. The pediatrician referred H.H. to a children's hospital for additional care, and Harris took him there the same day.

In addition to the bruising and swelling, an emergency-room physician at the hospital noticed H.H. limping and determined he had a broken leg. The physician and a DCS case manager met with the family to discuss H.H.'s injuries. H.H. was ultimately released from the hospital in Harris's care, but DCS opened an investigation into H.H.'s injuries.

[4] As part of its investigation, DCS conducted a home visit, reviewed H.H.'s medical records, and met with Harris, Tate, and several of H.H.'s medical providers. Harris provided inconsistent explanations for H.H.'s injuries to DCS and the medical providers. Nonetheless, on January 18, 2018, DCS entered a finding of unsubstantiated due to a lack of physical evidence. As a result, H.H. continued to live with Harris and Tate.

[5] About a month after DCS concluded its investigation, in February 2018, Tate molested and killed H.H. Tate was convicted on multiple charges, including murder, Level 1 felony neglect of a dependent resulting in death, and Level 1 felony child molesting. *See Tate v. State*, 161 N.E.3d 1225 (Ind. 2021). For her involvement in H.H.'s death, Harris was convicted of Level 1 felony neglect of a dependent resulting in death. *See Harris v. State,* 163 N.E.3d 938 (Ind. Ct. App. 2021), *trans. denied*.

[6] In April 2018, Haines, individually and on behalf of H.H.'s estate, sent a Notice of Tort Claim to DCS and other State parties informing them he would be pursuing a wrongful-death claim. The notice alleged:

> Approximately two (2) months [before his death], [H.H.] suffered injuries to his eye/face and a broken femur. This incident was inadequately and negligently investigated by the Department of Child Services. As a result of the inadequate and negligent investigation, [H.H.] was returned to the care and custody of his mother, Jennifer L. Harris, and Dylan T. Tate. But for the negligent actions of the Department of Child Services and its failure to follow procedures and protocol of the organization, [H.H.] would be alive.
>
> The Department of Child Services owed a duty to [H.H.] and Jackie L. Haines III to properly and thoroughly investigate allegations of abuse or neglect by Jennifer L. Harris and Dylan T. Tate. The Department of Child Services breached this duty by improperly investigating the prior allegations of abuse or neglect and not following internal agency policies and procedures to ensure [H.H.]'s safety. As a result of this breach, [H.H.] died.

Appellants' App. Vol. II p. 65.

[7] In January 2020, Haines brought a wrongful-death claim against DCS. The complaint alleged DCS proximately and negligently caused H.H.'s death because it did not perform a thorough investigation into H.H.'s December 2017 injuries or "remove [H.H.] from a situation where his physical and mental health was seriously impaired and seriously endangered." Appellants' App. Vol. IV p. 203. Plaintiffs filed an amended complaint in June 2022, which added a survival claim. The amended complaint noted that Harris was not included as a party to the action because of her involvement in causing H.H.'s death.

[8] DCS moved to dismiss the amended complaint. The trial court granted dismissal as to the survival claim on the grounds that Plaintiffs failed to state a claim for which relief could be granted and did not provide notice of the survival claim to DCS in accordance with the Indiana Tort Claims Act. Six months later, the court granted summary judgment to DCS on the wrongful-death claim on the basis that Plaintiffs failed to name Harris as a party to the claim as required by the Child Wrongful Death Act. As a result, Plaintiffs had no claims remaining, so the court entered final judgment for DCS.

[9] Plaintiffs now appeal.

Discussion and Decision

I. Dismissal of the Survival Claim

[10] Plaintiffs first argue the trial court erred in dismissing the survival claim, contending they provided notice of the claim to DCS in compliance with the Indiana Tort Claims Act (ITCA). Under the ITCA, a tort claim against a state entity is barred unless the claimant provides notice that "describe[s] in a short and plain statement the facts on which the claim is based." Ind. Code §§ 34-13-3-6(a), -10. Notice is sufficient if it substantially complies with the requirements of the ITCA, and what constitutes substantial compliance is a question of law. *Boushehry v. City of Indianapolis*, 931 N.E.2d 892, 895 (Ind. Ct. App. 2010). The crucial consideration is whether the information in the claimant's notice of intent to take legal action is sufficient for the state entity to ascertain the full nature of the claim against it so it can determine its liability and prepare a

defense. *Snyder v. Town of Yorktown*, 20 N.E.3d 545, 553 (Ind. Ct. App. 2014), *trans. denied*. A claimant's failure to comply with the ITCA's notice provisions entitles the state entity to a dismissal. *Stone v. Wright*, 133 N.E.3d 210, 217 (Ind. Ct. App. 2019).

[11] Plaintiffs brought the survival claim under Indiana Code section 34-9-3-4, which provides:

> (a) This section applies when a person:
>
> > (1) receives personal injuries caused by the wrongful act or omission of another; and
> >
> > (2) subsequently dies from causes other than those personal injuries.
>
> (b) The personal representative of the decedent who was injured may maintain an action against the wrongdoer to recover all damages resulting before the date of death from those injuries that the decedent would have been entitled to recover had the decedent lived.

Since this claim is against a state agency, Plaintiffs were required under the ITCA to provide notice describing the basis for the survival claim to allow DCS to ascertain the full nature of the claim against it.

[12] The only tort-claim notice provided to DCS was the notice of the wrongful-death claim Haines sent in April 2018. Plaintiffs contend this notice "properly provide[d] notice to DCS of the Survivorship claim" because it "discussed other

child abuse incidents that did not cause [H.H.]'s death" and "put DCS on notice of its negligence in allowing the continued abuse to [H.H.]." Appellants' Br. p. 16. The injuries not causing death described in the notice are the December 2017 injuries to H.H.'s face, eyes, and leg. Haines's sole allegation against DCS in the notice was that it inadequately and negligently investigated these injuries and failed to follow its own procedures, which ultimately resulted in H.H.'s death. *See* Appellants' App. Vol. II p. 65 ("But for the negligent actions of the Department of Child Services . . . [H.H.] would be alive."; "As a result of this breach, [H.H.] died.").

[13] The April 2018 notice does not claim that any wrongful act or omission by DCS caused H.H.'s December 2017 injuries. In fact, the lack of any alleged wrongdoing by DCS other than its investigation suggests DCS did not learn of the injuries until after they occurred and thus could not have caused them. The only injuries Haines attributes to DCS in the notice are those that resulted in H.H.'s death, which cannot serve as the basis for a survival claim.[1] The notice did not contain any facts that would have enabled DCS to determine its liability or prepare a defense as to the survival claim, so we cannot say Plaintiffs substantially complied with the ITCA's notice requirement. *See Boushehry*, 931

[1] As DCS notes, while Plaintiffs claim the April 2018 letter provided DCS with notice of the survival claim, Haines subsequently filed an initial complaint without a survival claim. *See* Appellee's Br. p. 17. We find it hard to believe the notice was meant to advise DCS of an intent to bring a survival claim when the ensuing complaint did not include any such claim. *See also* Appellants' App. Vol. II p. 17 (trial court concluding in its order dismissing the survival claim that "[o]ne cannot say notice of the survival claim was given before the complaint was filed, then file a complaint without the survival claim[.]").

N.E.2d at 897 (finding notice of claimant's initial tort claim was insufficient to inform the City it would need to defend against the claims in the amended complaint and thus did not substantially comply with the ITCA). Because Plaintiffs did not provide notice of the survival claim in accordance with the ITCA, the claim is barred. I.C. § 34-13-3-6(a). The trial court did not err in dismissing the survival claim.[2]

II. Summary Judgment on the Wrongful-Death Claim

[14] Plaintiffs also contend the trial court erred in granting summary judgment to DCS on the claim under the Child Wrongful Death Act (CWDA). We review a motion for summary judgment de novo, applying the same standard as the trial court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). That is, "The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C).

[15] The trial court granted summary judgment to DCS on the ground that Plaintiffs did not make Harris a party to the CWDA claim. The CWDA provides:

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[2] DCS also argues dismissal was proper because Plaintiffs' amended complaint failed to state a survival claim. Because we find the claim is barred under the ITCA for failure to provide notice, we need not address the sufficiency of the allegations in the amended complaint.

> (c) An action may be maintained under this section against the person whose wrongful act or omission caused the injury or death of a child. The action may be maintained by:
>
> > (1) the father and mother jointly, or either of them by naming the other parent as a codefendant to answer as to his or her interest;
> >
> > (2) in case of divorce or dissolution of marriage, the person to whom custody of the child was awarded; and
> >
> > (3) a guardian, for the injury or death of a protected person.

I.C. § 34-23-2-1. Subsections (c)(2) and (3) do not apply here, so we consider only (c)(1).

[16] We must strictly construe the CWDA because it is in derogation of the common law. *Johnson v. Harris*, 176 N.E.3d 252, 256 (Ind. Ct. App. 2021), *trans. denied*. Under a strict interpretation of the statute, "an individual parent asserting a claim under the Child Wrongful Death [A]ct . . . must join the deceased child's other parent as a party or face dismissal of the action for failure to comply with the plain requirements of the statute." *City of Terre Haute v. Simpson*, 746 N.E.2d 359, 364 (Ind. Ct. App. 2001), *trans. denied*. Applying subsection (c)(1), to maintain a claim under the CWDA, Haines was required to either bring it jointly with Harris or name her as a co-defendant to answer as to her interest. He did neither.

[17] Nevertheless, Plaintiffs argue Harris was not a proper party to the wrongful-death claim under the "Slayer Rule" because she "was a participant in the death of her son," Appellants' Br. p. 6, and thus "has no interest" in the claim, *id.* at 23. But looking at its plain language, the CWDA does not identify any circumstances under which a parent bringing a claim individually would not have to name the other parent as a co-defendant as required by subsection (c)(1). *See Hanna v. Ind. Farmers Mut. Ins. Co.*, 963 N.E.2d 72, 77 (Ind. Ct. App. 2012) ("[N]othing in the statute permits each parent to maintain a separate wrongful death claim in his or her own right."), *trans. denied*. A parent bringing a claim under the CWDA cannot decline to name the other parent as a party based on his or her own determination that the other parent has no interest. It is the role of the trial court, not a claimant, to decide whether a parent is entitled to relief and thus is a proper party to a CWDA claim. Under a strict interpretation of the statute, Haines was required to name Harris as a party to his CWDA claim. Because he failed to do so, the trial court did not err in granting summary judgment to DCS on this claim.[3]

[18] Affirmed.

Mathias, J., and Pyle, J., concur.

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[3] DCS also contends summary judgment was proper because Harris was contributorily negligent, and her negligence "is imputed to Haines" and thus "bars Haines' claim." Appellee's Br. p. 26. The trial court granted summary judgment to DCS only on the ground that Harris was not a party to the suit as required by the CWDA. Because we find the trial court correctly granted summary judgment on this ground, we do not address DCS's contributory-negligence argument.