

STATE OF MICHIGAN
COURT OF APPEALS

KAREN BARKER,

Plaintiff-Appellant,

v

DONALD E. SHELTON,

Defendant-Appellee,

and

HELEN V. GALLAGHER,

Defendant.

UNPUBLISHED
October 29, 1996

No. 175844
LC No. 93-400-NM

Before: Taylor, P.J., and Markey and N. O. Holowka,* JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant Donald E. Shelton summary disposition of the claims against him in his individual capacity and transferring to the Court of Claims her claim for damages against defendant in his official capacity. We reverse the trial court's transfer to the Court of Claims and affirm in all other respects.

Defendant Shelton presided as judge in plaintiff's divorce action against Carl Barker. During the course of the divorce proceedings, defendant ordered plaintiff to undergo a psychiatric examination, denied her access to the psychiatric report, ordered her to be represented by a next friend, and denied her motion for substitution of counsel. Plaintiff filed a complaint seeking damages and equitable relief under 42 USC 1983, alleging defendant had acted without jurisdiction.

I

* Circuit judge, sitting on the Court of Appeals by assignment.

Conceding that her requests for equitable relief are moot, plaintiff argues that the trial court erred in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) regarding her claim against defendant in his individual capacity. Specifically, plaintiff asserts that her complaint sufficiently alleges facts against defendant in his individual capacity, and establishes that defendant is not entitled to judicial immunity for the actions he took in his official capacity. We review de novo a challenge to a trial court's grant of summary disposition pursuant to MCR 2.116(C)(8). *Bommarito v Detroit Golf Club*, 210 Mich App 287, 291; 532 NW2d 923 (1995).

In her complaint, plaintiff stated that she was suing defendant both individually and in his official capacity. However, a careful examination of plaintiff's complaint reveals that the basis of her lawsuit was the aforementioned orders defendant entered while presiding as a judge in the divorce action. Plaintiff insists that, because defendant acted without subject matter jurisdiction and in a nonjudicial manner, the actions he took were not in his official capacity as a judge. We disagree. The question whether defendant's actions were outside his authority is relevant when determining whether the doctrine of judicial immunity applies but not to the issue of subject matter jurisdiction. *Mireles v Waco*, 502 US 9; 112 S Ct 286; 116 L Ed 2d 9 (1991) (a judge will not be deprived of judicial immunity because the action he took was in error or was in excess of his authority, but may be liable for judicial actions taken in the complete absence of all jurisdiction). See also *Stump v Sparkman*, 435 US 349; 98 S Ct 1099; 55 L Ed 2d 331 (1977). Entering orders is a function normally performed by a judge, and plaintiff encountered defendant in his judicial capacity. Thus, the orders were not entered in the complete absence of all jurisdiction. MCR 2.201(E). Because plaintiff's complaint, on its face, fails to allege a claim against defendant in his individual capacity upon which relief may be granted, summary disposition pursuant to MCR 2.116(C)(8) was proper. *Kell v Johnson*, 186 Mich App 562, 563-564; 465 NW2d 26 (1990); *Abbott v Secretary of State*, 67 Mich App 344, 348; 240 NW2d 800 (1976).

II

Plaintiff also claims the trial court abused its discretion when it denied her motion for leave to amend her complaint. We disagree. Although a court should freely grant leave to amend a complaint when justice so requires, a trial court does not abuse its discretion in refusing to permit an amendment where the proposed amendment would be futile. *Price v Long Realty, Inc*, 199 Mich App 461, 469; 502 NW2d 337 (1993). This is true even where, as here, there is a pending motion for summary disposition based on MCR 2.116(C)(8). MCR 2.116(I)(5); *Weymers v Khera*, 210 Mich App 231, 240; 533 NW2d 334 (1995), lv granted 451 Mich 898 (1996). An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face. *Formall, Inc v Community Nat'l Bank*, 166 Mich App 772; 421 NW2d 289 (1988).

We have reviewed plaintiff's proposed amended complaint and conclude that, although it may have added slightly more detail and deleted the "official capacity" allegations, it still failed to state a claim upon which relief could be granted such that amendment would have been futile. *Dukesherer Farms, Inc v Director of Dep't of Agriculture*, 172 Mich App 524, 530; 432 NW2d 721 (1988);

Matulewicz v Governor, 174 Mich App 295; 435 NW2d 785 (1989). Thus, the circuit court's denial of plaintiff's motion for leave to amend was not an abuse of discretion.

III

Plaintiff next challenges the trial court's order transferring her claim for damages against defendant in his official capacity to the Court of Claims. The issue of subject matter jurisdiction is a question of law that we review de novo. *W A Foote Hosp v Dep't of Public Health*, 210 Mich App 516, 522; 534 NW2d 206 (1995). As a general rule, Michigan circuit courts have original jurisdiction to hear and determine all civil claims and remedies. MCL 600.605; MSA 27A.605. An exception exists where exclusive jurisdiction is given by statute to another court. *Id.* Pursuant to MCL 600.6419(1)(a); MSA 27A.6419(1)(a), the Court of Claims' jurisdiction extends to suits against state officers where the acts complained of were performed in the officer's official capacity. *Lowery v Dep't of Corrections*, 146 Mich App 342, 348; 380 NW2d 99 (1985); *Grunow v Sanders*, 84 Mich App 578, 581; 269 NW2d 683 (1978).

There is no question that defendant, as a sitting judge of the Washtenaw County Circuit Court, is a state official. MCL 600.523; MSA 27A.523. Moreover, as stated above, plaintiff's claims for damages were based on actions defendant took while acting in his official capacity as the judge presiding over her divorce action. Thus, to the extent that plaintiff seeks damages from defendant on the basis of actions he took in his official capacity, the Court of Claims is the appropriate forum to resolve such a claim. *Silverman v U of M Board of Regents*, 445 Mich 209, 217; 516 NW2d 54 (1994).

Although transferring plaintiff's claim for money damages against defendant in his official capacity to the Court of Claims was authorized by MCR 2.227(A) and consistent with *Kell, supra*, we nevertheless reverse. Plaintiff asserts on appeal that (1) the reference to defendant acting in his "official capacity" in her complaint was erroneous, (2) this reference was deleted from her proposed amended complaint, and (3) she never intended to claim the state was responsible for defendant's actions.¹ On the basis of these representations, we reverse the trial court's transfer to the Court of Claims, MCR 7.216(A)(7), and remand for entry of an order dismissing plaintiff's claim against defendant in its entirety.

We reverse that portion of the trial court's order transferring plaintiff's claim against defendant in his official capacity to the Court of Claims and remand for entry of an order of dismissal. In all other respects, we affirm. We do not retain jurisdiction.

/s/ Clifford W. Taylor

/s/ Jane E. Markey

/s/ Nick O. Holowka

¹ We further note that any claim under 42 USC 1983 in the Court of Claims for damages against defendant for actions taken in his official capacity would not be meritorious because the actions taken by defendant that plaintiff complains about were not mandated by an official custom or policy. *Carlton v Dep't of Corrections*, 215 Mich App 490, 504-505; 546 NW2d 671 (1996).