

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 20, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP839

Cir. Ct. No. 2006CV3047

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

ROBERT C. BRAUN,

PLAINTIFF-APPELLANT,

v.

**CITY OF WAUWATOSA,
JAMES MASTROCOLA
AND JENNIFER OLSON,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN J. DIMOTTO, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 CURLEY, P.J. Robert C. Braun, *pro se*, appeals from a judgment dismissing Braun's claims against the City of Wauwatosa and Officers James Mastrocola and Jennifer Olson. Braun filed suit against Wauwatosa and Officers Mastrocola and Olson seeking a declaratory judgment interpreting WIS. STAT.

§ 943.13 (2007-08)¹ and for personal injuries stemming from his arrest on December 30, 2005. Braun contends the circuit court erred in dismissing his claim for declaratory judgment and asks this court to provide such judgment. Braun also contends the circuit court erred in precluding from trial evidence relating to an order from Mayfair Mall banning him from its premises. We affirm.

I. BACKGROUND.

¶2 Braun engaged in a public protest at the Mayfair Mall in Wauwatosa. By a letter dated December 16, 2005, Stephan W. Smith, general manager for Mayfair Properties, informed Braun that he was not permitted on the property of Mayfair Properties for a period of six months commencing December 17, 2005. On December 30, 2005, Braun drove onto the Mayfair Mall parking lot and parked his car. Mayfair Mall officials contacted the Wauwatosa police and reported that Braun was in violation of the ban order. Officers Mastrocola and Olson responded to Mayfair Mall’s trespass complaint.

¶3 When they arrived, Officers Mastrocola and Olson approached Braun near the entrance to the Mayfair Mall and identified themselves as law enforcement officers. Officer Olson testified that she and Officer Mastrocola advised Braun “a number of times” that they “wanted to talk to him,” but that “he just didn’t want to talk to [them].” She testified that: “[Braun] ignored us. He walked away from us. He yelled some things like, you know, go away. I don’t want to talk to you. Things like that.” Officer Olson further testified that at one point during her interaction with Braun, she instructed Braun to put his hands

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

behind his back, but that Braun responded that he wasn't "going to put them nowhere."

¶4 Officer Mastrocola testified that Braun "was very irritated," had "exaggerated movements," and that Braun "began to ignore [him] immediately." He testified that he asked Braun for an explanation for his presence, but was ignored by Braun. He testified that Braun kept putting his hands in his pockets, and that because of safety concerns, he advised Braun to keep his hands out of his pockets. Braun, however, did not do so. Officer Mastrocola testified that Braun "close[d] the reactionary gap that [Officer Mastrocola] had" between himself and Braun. In response, Officer Mastrocola stuck his hand up and "asked Braun to step back," which Braun refused to do. Officer Mastrocola testified that Braun told him to "[g]et lost" and again put his hands in his pockets. Officer Mastrocola further testified that Braun "told me I didn't have jurisdiction. He asked me to get a different law enforcement agency there. He—he [was] not giving me any credibility whatsoever as a police officer."

¶5 Officer Mastrocola testified that after he heard Officer Olson tell Braun to put his hands behind his back, he heard Braun say he wasn't going to and observed Braun put his hands back into his pockets. Officer Mastrocola testified that he became concerned for his and Officer Olson's safety, as well as the safety of bystanders. He testified that he was "unable to physically control [] Braun's movements" while Braun was on his feet, and that in order to control Braun, he wanted to get him to the ground. To do so, he "decentralized [Braun] to the ground" by "sweep[ing] his one foot and direct[ing] him to the ground while controlling his descent." Braun was then placed under arrest for trespassing.

¶6 Wauwatosa cited Braun with resisting arrest, in violation of WAUWATOSA ORDINANCE No. 7.02.01(18), and with criminal trespass to land, in violation of WAUWATOSA ORDINANCE No. 7.02.010(5), which adopts Wisconsin’s criminal trespass statute, WIS. STAT. § 943.13.² See No. 7.02.010(5). In the meantime, Braun commenced the present action against Wauwatosa and Officers Mastrocola and Olson. Braun asserted claims for false arrest and for personal injuries resulting from the officers’ alleged use of excessive force. He also sought declaratory judgment pursuant to WIS. STAT. § 806.04(2) to “determine the extent and parameters” of the term “occupant” as used in § 943.13.

¶7 Wauwatosa moved to dismiss the declaratory action and, following a hearing on the matter, the circuit court granted Wauwatosa’s motion. The court stated that Braun took the “position that his rights are affected by [WAUWATOSA ORDINANCE No. 7.02.010(5)], which tracks [WIS. STAT.] § 943.13.” The court interpreted Braun’s declaratory judgment action as seeking two things: “clarification with respect to conduct he engaged in and clarification for future purposes.” With respect to clarifying Braun’s past conduct, the court ruled that any issue relating to Braun’s past conduct with respect to No. 7.02.010(5) was properly venued in Braun’s pending appeal of his conviction for violating that ordinance. With respect to providing Braun clarification for future purposes, the court ruled that under WIS. STAT. § 806.04(2), it did not have the authority to “declare clarification to statutes so you’ll know or not know how to act in the future.”

² Braun states in his brief that he was convicted of both citations and that he appealed those convictions. The citations were ultimately dismissed on December 4, 2007. See Milwaukee County Case Nos. 2007FO61 and 2007FO60.

¶8 A jury trial was held on Braun’s two remaining claims—false arrest and use of excessive force. The court precluded Braun from presenting to the jury his opinion that the December 16, 2005 letter from Mayfair Properties banning him from Mayfair Mall was illegal or a sham on the basis that it was not relevant. Braun claims that the court also prevented him from presenting any evidence regarding the motivating forces behind Officers Mastrocola’s and Olson’s behavior. Following Braun’s admission that the officers had probable cause to arrest him, the circuit court dismissed, on Wauwatosa’s motion, Braun’s claim for false arrest. As to Braun’s remaining claim, the jury determined that Officers Mastrocola and Olson had not used excessive force in effectuating their arrest of Braun. Braun appeals.

II. ANALYSIS.

A. *Declaratory judgment action.*

¶9 Braun challenges the circuit court’s dismissal of his declaratory judgment action. Before a plaintiff may maintain a declaratory judgment action under WIS. STAT. § 806.04, there must first exist a justiciable controversy. *Lake Country Racquet & Athletic Club, Inc. v. Village of Hartland*, 2002 WI App 301, ¶15, 259 Wis. 2d 107, 655 N.W.2d 189. “This is so because the purpose of [§ 806.04] is to allow courts to anticipate and resolve identifiable, certain disputes between adverse parties.” *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶28, 309 Wis. 2d 365, 749 N.W.2d 211. A controversy is justiciable when the following four factors are present:

- (1) A controversy in which a claim of right is asserted against one who has an interest in contesting it.
- (2) The controversy must be between persons whose interests are adverse.

(3) The party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectable interest.

(4) The issue involved in the controversy must be ripe for judicial determination.

Id., ¶29 (citation and one set of quotation marks omitted). Although a decision to grant or deny declaratory relief falls within the discretion of the circuit court, whether a claim is justiciable is a legal conclusion subject to our *de novo* review. *See id.*, ¶32-37.

¶10 Braun sought a declaratory judgment clarifying WIS. STAT. § 943.13, which was adopted by WAUWATOSA ORDINANCE No. 7.02.010(5). *See* No. 07.02.010(5). Braun agreed with the court that he sought clarification of both his past and future conduct relating to No. 7.02.010(5).

¶11 The circuit court determined that it was not the appropriate forum to provide clarification for Braun as to his past conduct relating to WAUWATOSA ORDINANCE No. 7.02.010(5). The court determined that the clarification Braun sought for his past conduct required factual determinations that were more appropriately addressed in the proceeding adjudicating the charges brought against Braun by Wauwatosa for violating No. 7.02.010(5). Braun does not challenge those determinations. He instead takes issue with the fact that the municipal citations brought against him by Wauwatosa for resisting arrest and trespass to property were later dismissed, which he claims allowed Wauwatosa to “circumvent[] with impunity a victim’s claim of misapplication of a law by merely withdrawing the charge.”

¶12 Although we understand and are perhaps somewhat sympathetic to the procedural difficulty Braun has faced in pursuing his action for declaratory

judgment, Braun did not dispute before the court below, and does not dispute now, the court's determination that it was not the appropriate forum to address Braun's past conduct with respect to WAUWATOSA ORDINANCE No. 7.02.010(5). Furthermore, even if the circuit court in the proceeding below was the appropriate forum, there is no longer a justiciable issue to be declared with respect to Braun's prior conduct. The law is clear that a declaratory judgment action may not be maintained if the issue involved is not "ripe for judicial determination." See *Olson*, 309 Wis. 2d 365, ¶29 (citation omitted). The citation against Braun for violating No. 7.02.010(5) was dismissed. Accordingly, there no longer exists an issue ripe for judicial determination as to Braun's past conduct.

¶13 We also agree with the circuit court that it did not have the authority to provide the clarification Braun sought with respect to his potential future conduct. "A justiciable controversy requires the existence of present and fixed rights. A declaratory judgment will not determine hypothetical or future rights." *Zehner v. Village of Marshall*, 2006 WI App 6, ¶13, 288 Wis. 2d 660, 709 N.W.2d 64 (citation omitted). Because Braun sought a determination from the court regarding his hypothetical future conduct under WAUWATOSA ORDINANCE No. 7.02.010(5), the court was without authority to provide declaratory relief.³

B. Preclusion of evidence.

¶14 Braun contends the circuit court erred in precluding from trial his opinions regarding the December 16, 2005 Mayfair Mall ban and related matters.

³ Braun asks this court to provide the declaratory judgment he sought in the circuit court below. As we explained above in ¶¶7-12, declaratory judgment is not appropriate in this case because the controversy is not justiciable.

At trial, Braun attempted to present to the jury his opinion that the December 16 ban order was invalid. He also attempted to present his opinion regarding the officers' motivations. The court, however, precluded him from presenting such evidence on the basis that it lacked relevancy. We agree.

¶15 The admissibility of evidence lies within the circuit court's sound discretion. *See State v. Pepin*, 110 Wis. 2d 431, 435, 328 N.W.2d 898 (Ct. App. 1982). To be admissible, evidence must be relevant. *See* WIS. STAT. § 904.02. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01.

¶16 Following the dismissal of Braun's claim for false arrest, the sole claim tried to the jury was Braun's claim that Officers Mastrocola and Olson used excessive force on December 30, 2005, when they arrested him. Neither Braun's opinion that Mayfair Mall's December 16, 2005 ban was invalid, nor his opinion regarding underlying motivations of the officers, was relevant to the question of whether the officers employed reasonable or excessive force to overcome the resistance of Braun at the time of his arrest. *See, e.g.*, WIS JI—CIVIL 2115. We therefore conclude that the preclusion of those opinions by the circuit court was not erroneous.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

