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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KYLE CHRISTOPHER ZOELLNER,
Plaintiff,
v.
ERIC LOSEY,
Defendant.

Case No. [18-cv-04471-JSC](#)

**ORDER RE: LACK OF PROBABLE
CAUSE ELEMENT**

Re: Dkt. Nos. 372, 381

This action arises out of the stabbing death of David Josiah Lawson on April 15, 2017, in Arcata, California. Kyle Zoellner was arrested and charged with Mr. Lawson’s murder. However, following a preliminary hearing that began 10 business days after the district attorney filed the charge, a state court judge found that the district attorney had not proved probable cause to hold Mr. Zoellner for trial and dismissed the murder charge without prejudice. Mr. Zoellner thereafter initiated this action. After the district judge previously assigned to this case ruled on Defendants’ motion for summary judgment, the claim remaining for the upcoming trial was Mr. Zoellner’s malicious prosecution claim against former Arcata Police Detective Eric Losey. One element of that claim requires Mr. Zoellner to prove that no reasonable officer with Mr. Losey’s knowledge would have probable cause to believe Mr. Zoellner stabbed Mr. Lawson. After hearing the evidence at trial, considering the parties’ post-trial briefs (Dkt. Nos. 372, 381), and holding oral argument on October 13, 2022, the Court concludes that Mr. Zoellner has not proved the lack of probable cause element of his malicious prosecution claim.

DISCUSSION

I. Relevant Procedural History

To prevail on his malicious prosecution claim, Mr. Zoellner must prove “that the prior

1 action (1) was commenced by or at the direction of the defendant and was pursued to a legal
2 termination in his, plaintiff's, favor; (2) was brought without probable cause; and (3) was initiated
3 with malice." *Mills v. City of Covina*, 921 F.3d 1161, 1169 (9th Cir. 2019) (cleaned up; quoting
4 *Sheldon Appel Co. v. Albert & Oliker*, 765 P.2d 498, 501 (Cal. 1989)); *see also id.* ("Federal
5 courts rely on state common law for elements of malicious prosecution.").

6 Prior to trial, Mr. Zoellner moved in limine that issue preclusion barred Mr. Losey from
7 challenging the lack of probable cause; that is, that the state court judge's dismissal of the murder
8 charge following the preliminary hearing is binding on Mr. Losey in this action. The Court denied
9 the motion on the grounds that Mr. Zoellner had not shown that Mr. Losey was in privity with any
10 party to the preliminary hearing proceedings. (Dkt. No. 306 at 1–4; *see* Dkt. No. 299 at 2–4.) The
11 Court also ruled that whether there was probable cause for the criminal charge is an issue for the
12 Court to decide. *See Sheldon Appel*, 765 P.2d at 499; *see also Magnetar Techs. Corp. v. Intamin,*
13 *Ltd.*, 801 F.3d 1150, 1155–56 (9th Cir. 2015) ("Whether probable cause exists in a malicious
14 prosecution case is a legal question resolved by the court."). The Court explained:

15 In resolving that issue, the first question is what Detective Losey
16 knew at the time he allegedly caused the charges to be filed against
17 Mr. Zoellner. If there is a dispute as to what he knew, the jury
18 resolves those disputes of fact. Once those facts are established, the
19 Court decides whether they constitute probable cause. *See Est. of*
Tucker ex rel. Tucker v. Interscope Recs., Inc., 515 F.3d 1019, 1031
(9th Cir. 2008).

19 (Dkt. No. 306 at 3.) The Court advised the parties that it would decide the probable cause
20 question based only on the evidence admitted at trial (*id.* at 3–4), after the jury rendered its verdict
21 on the other malicious prosecution elements (Dkt. No. 337).

22 The case proceeded to jury trial on October 3, 2022. Before the parties rested, the Court
23 directed the parties to identify any disputed issues of fact relevant to probable cause that the jury
24 should decide. (Dkt. No. 362.) No party proposed any fact questions for the jury; accordingly, the
25 jury was not instructed to decide any specific disputes of fact. (*See* Dkt. No. 366 (Plaintiff's brief
26 noting that relevant facts are undisputed).) The Court instructed the jury that to establish his
27 malicious prosecution claim, Mr. Zoellner must prove all of the following by a preponderance of
28 the evidence:

- 1 1. That Mr. Losey was actively involved in causing Mr. Zoellner to be prosecuted or
- 2 in causing the continuation of the prosecution;
- 3 2. That the criminal proceeding ended in Mr. Zoellner’s favor;
- 4 3. That no reasonable person in Mr. Losey’s circumstances would have believed that
- 5 there were grounds for causing Mr. Zoellner to be prosecuted;
- 6 4. That Mr. Losey acted with malice;
- 7 5. That Mr. Zoellner was harmed; and
- 8 6. That Mr. Losey’s conduct was a substantial factor in causing Mr. Zoellner’s harm.

9 (Dkt. No. 370 at 12.) The instruction advised the jury that element 2 is met as a matter of law and
 10 does not require any proof. (*Id.*) The instruction advised further that “[t]he law requires that the
 11 trial judge, rather than the jury, decide if Mr. Zoellner has proven element 3 above, whether a
 12 reasonable person in Mr. Losey’s circumstances would have believed that there were grounds for
 13 causing Mr. Zoellner to be prosecuted.” (*Id.*) The jury rendered a verdict in Mr. Zoellner’s favor
 14 on those elements it was asked to decide and awarded damages on October 12, 2022. (Dkt. No.
 15 376.) The jury then heard evidence and argument on punitive damages and awarded punitive
 16 damages the same day. (Dkt. No. 377.)

17 Thus, the Court must now decide whether Mr. Zoellner has met his burden on element 3,
 18 lack of probable cause.

19 **II. Lack of Probable Cause Element**

20 Mr. Zoellner must prove that no reasonable officer in Mr. Losey’s circumstances would
 21 have believed there was probable cause that Mr. Zoellner had stabbed Mr. Lawson.

22 Whereas the element of malice focuses on the defendant’s state of
 23 mind at the time he initiated the underlying litigation, probable cause:
 24 “is measured by the state of the defendant’s *knowledge*, not by his
 25 *intent*. [T]he standard applied to defendant’s consciousness is external
 to it. The question is not whether *he* thought the facts to constitute
 probable cause, but whether *the court* thinks they did.”

26 *Tucker*, 515 F.3d at 1031 (quoting, with original emphasis, *Sheldon Appel*, 765 P.2d at 508); *see*
 27 *also Radocchia v. City of Los Angeles*, 479 F. App’x 44, 45 (9th Cir. 2012) (“probable cause to
 28 prosecute is . . . objective”). To put it another way, the question of probable cause is whether it

1 was objectively reasonable for an officer in Mr. Losey’s circumstances to believe Mr. Zoellner had
2 stabbed Mr. Lawson. *See Conrad v. United States*, 447 F.3d 760, 768 (9th Cir. 2006) (“When the
3 claim of malicious prosecution is based upon the initiation of a criminal prosecution, the question
4 of probable cause is whether it was objectively reasonable for the defendant to suspect the plaintiff
5 had committed a crime.” (cleaned up)).

6 “Probable cause exists when, under the totality of the circumstances known to the
7 [defendant,] a prudent person would have concluded that there was a fair probability that [the
8 plaintiff] had committed a crime.” *United States v. Buckner*, 179 F.3d 834, 837 (9th Cir. 1999)
9 (cleaned up); *see also United States v. Rosenow*, ___ F.4th___, 2022 WL 4817585 (9th Cir. Oct. 3,
10 2022) (holding, in search warrant context, that probable cause is “a fair probability that evidence
11 of a crime may be found”). Probable cause does not require a belief “to an absolute certainty, or
12 by clear and convincing evidence, or even by a preponderance of the available evidence” that Mr.
13 Zoellner committed the stabbing; instead, “what was required was a fair probability, given the
14 totality of the circumstances.” *United States v. Lopez*, 482 F.3d 1067, 1078 (9th Cir. 2007).
15 Probable cause “requires only a probability or substantial chance of criminal activity, not an actual
16 showing of such activity.” *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018) (cleaned
17 up). “Probable cause is not a high bar.” *Id.* (cleaned up).

18 **III. The Record Demonstrates Probable Cause**

19 The trial record is undisputed that Mr. Losey was aware of the following facts before the
20 preliminary hearing began.

21 In the early morning hours of April 15, 2017, the police received a call regarding a
22 stabbing at a party at 1120 Spear Avenue in Arcata, California. Arcata Police Officer Nilsen
23 arrived at the scene within a minute of having received the call from dispatch. The cul-de-sac
24 outside the house where the party took place was dark; without any street lights, the only light
25 came from houses. When Officer Nilsen arrived at the scene, witnesses immediately pointed to
26 where Mr. Zoellner was standing on or near the cul-de-sac. Officer Nilsen handcuffed him and
27 put him in the back of the police car. Mr. Zoellner did not protest or in any way resist.

28 Shortly thereafter, and within minutes of Officer Nilsen’s arrival, witness Paris Wright

1 spoke to Officer Nilsen. Mr. Wright was audio and video recorded by Officer Nilsen’s MAV
2 (“mobile audio video,” *see* Dkt. No. 233 at 2). Mr. Wright stated that he had seen Mr. Lawson
3 walking down Spear and told Mr. Lawson to “chill.” At that time Mr. Lawson was not stabbed.
4 Mr. Wright next heard a scream, and he returned toward the house and observed Mr. Lawson and
5 Mr. Zoellner in a physical fight in a grassy area. Mr. Lawson was on the ground, with his back to
6 the ground, and Mr. Zoellner was directly on top of him with his back to Mr. Lawson. Mr.
7 Lawson had one arm around Mr. Zoellner’s neck and a second arm holding Mr. Zoellner’s arms.
8 Mr. Wright said he separated Mr. Zoellner and Mr. Lawson and immediately saw that Mr. Lawson
9 had been stabbed on his chest. No one else was near Mr. Zoellner and Mr. Lawson. Mr. Wright
10 stated that he was fearful that Mr. Zoellner would stab him, so he started fighting with Mr.
11 Zoellner. Mr. Wright disclosed he did not see Mr. Zoellner with a knife, but did see him with
12 keys. Indeed, the recording reflects that when Officer Nilsen suggested that Mr. Zoellner had a
13 knife, Mr. Wright corrected him and reiterated that he did not see a knife. The recording also
14 shows Mr. Wright trying to calm people down and attempting to stop an angry party attendee from
15 opening the police car door to reach Mr. Zoellner.

16 Mr. Wright’s MAV recorded statement was consistent with his recorded interview given
17 two days later. And his statement that he fought with Mr. Zoellner was corroborated by
18 Keaundrey Clark and Elijah Chandler, two witnesses interviewed a few days after the stabbing.

19 Several witnesses reported observing Mr. Zoellner physically fight with Mr. Lawson
20 outside 1120 Spear at around the time the stabbing occurred. Mr. Zoellner was the only person
21 any witness identified as having fought with Mr. Lawson that night.

22 The MAV video shows Mr. Zoellner being walked to the police car, and shows that his
23 gray sweatpants are covered in blood. While in the police car, Mr. Zoellner told Officer Nilsen
24 that he drove alone to 1120 Spear to pick up his girlfriend from the party, and that her cell phone
25 had been stolen. Mr. Zoellner parked his car on the cul-de-sac where 1120 Spear was located. His
26 girlfriend and her friends met him at the car. He then proceeded to walk to the house at 1120
27 Spear to inquire about the stolen phone. Shortly after he arrived at the doorstep, he got into the
28 physical altercation with Mr. Lawson.

1 Later examination showed that the front and back of Mr. Zoellner's gray sweatpants had
2 large soaked-through blood stains consistent with transference, that is, blood that had been
3 transferred from another source to Mr. Zoellner's pants. His black hoodie also had blood on the
4 front and back. He was wearing a white t-shirt under the hoodie, which had large splotches of
5 blood on the front and two small spots of blood on the back, all of which were consistent with
6 blood soaking through the hoodie. The blood on Mr. Zoellner's clothes was not consistent with
7 his own injuries, mostly to his head, sustained in the physical altercation.

8 A kitchen knife was found under a red Mustang parked near 1120 Spear on the cul-de-sac.
9 The knife was longer than the depth of Mr. Lawson's stab wounds, and therefore it was possible
10 that the knife had caused the wounds. It is unusual for stabbings outside to be perpetrated with a
11 kitchen knife. Mr. Zoellner was a chef and he had a personal chef's bag in his car which
12 contained knives, although there was no evidence connecting the knife found under the red
13 Mustang to Mr. Zoellner.

14 **A. The Evidence Establishes a Fair Probability Mr. Zoellner Stabbed Mr.**
15 **Lawson**

16 A reasonable officer with Mr. Losey's knowledge would believe there was a fair
17 probability that Mr. Zoellner stabbed Mr. Lawson.

18 First, Mr. Wright's nearly contemporaneous account pointed to Mr. Zoellner as the
19 stabber. He saw Mr. Lawson and Mr. Zoellner fighting and entangled together on the ground.
20 When he managed to separate them, he observed that Mr. Lawson has been stabbed in the chest.
21 No one else was there fighting with Mr. Lawson.

22 Second, Mr. Wright's account was objectively credible. He described what he witnessed
23 within minutes of the incident and in detail. Although he was friends with Mr. Lawson, he did not
24 appear to exaggerate in order to label Mr. Zoellner as the stabber. Instead, he stated that he did not
25 see Mr. Zoellner stab Mr. Lawson and he did not see a knife. He described in detail the position
26 he found them in, explaining that Mr. Zoellner had his back to Mr. Lawson and Mr. Lawson had
27 one arm around both of Mr. Zoellner's arms and his other arm around Mr. Zoellner's neck. Mr.
28 Wright's police interview a couple of days later was consistent with the report he gave at the

1 scene. Further, his statement that he started fighting with Mr. Zoellner after seeing Mr. Lawson
2 was stabbed was corroborated by two other witnesses.

3 Third, Mr. Zoellner was the only person witnesses identified as having fought with Mr.
4 Lawson that night; indeed, several witnesses reported seeing him fight with Mr. Lawson.

5 Fourth, Mr. Zoellner, and only Mr. Zoellner, was covered in blood. His clothes were
6 soaked with blood, so much so that it leached through his hoodie to the front of his t-shirt. And
7 Mr. Zoellner's blood-soaked clothes were not consistent with his own injuries. While Mr.
8 Zoellner claimed the blood on his clothes came from his bloody nose, the evidence is that the
9 officers believed that the amount of blood on Mr. Zoellner's clothes, and its pattern, were
10 inconsistent with a bloody nose and the other injuries suffered by Mr. Zoellner. No evidence
11 offered at trial contradicted the reasonableness of that belief.¹ The officers' belief is especially
12 reasonable given that the blood stains on the *back* of Mr. Zoellner's pants and hoodie are
13 consistent with Mr. Zoellner having been entangled and fighting with a stabbed Mr. Lawson,
14 rather than his bloody nose in some unexplained way causing the back of his clothes to become
15 blood-soaked.

16 Fifth, a kitchen knife suspected to be the murder weapon was found under a car on the cul-
17 de-sac near 1120 Spear. In the officers' experience it is unusual to have a stabbing outside a house
18 with a kitchen knife. While the knife had not been connected to Mr. Zoellner, he was a chef with
19 access to many knives.

20 Sixth, Mr. Zoellner had a motive to stab Mr. Lawson. Indeed, according to Mr. Zoellner,
21 Mr. Lawson "sucker punched" him when Mr. Zoellner went to the door to inquire about the stolen
22 cell phone. Witnesses then observed Mr. Zoellner and Mr. Lawson fighting. No other person
23 with a motive to stab Mr. Lawson was identified. Mr. Zoellner's speculation at trial that Mr.

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¹ At trial Mr. Zoellner testified that his bloody nose caused the blood stains on his pants from his laying in a fetal position in the police car after being placed there by Officer Nilsen. But Officer Nilsen testified that there was already blood on Mr. Zoellner's clothes before he placed Mr. Zoellner in the police car. And the MAV video confirms Officer Nilsen's impression was objectively reasonable because it shows a large amount of blood on the front of Mr. Zoellner's pants before he got into the police car.

1 Wright or Mr. Chandler could have stabbed Mr. Lawson is pure speculation unsupported by any
2 evidence and, in any event, Mr. Zoellner did not identify any possible motive.

3 **B. Mr. Zoellner's Cited Evidence Does Not Refute Probable Cause**

4 Mr. Zoellner first claims that the forensic evidence "excluded" him as a suspect. (Dkt. No.
5 381 at 8.) Not so. Given the short time frame before the preliminary hearing, no testing of the
6 blood on his clothes had been completed. In light of the consistent witness statements that Mr.
7 Zoellner fought with Mr. Lawson, the large amount of blood on Mr. Zoellner and its pattern not
8 being consistent with his injuries, and Mr. Wright's detailed statement of Mr. Zoellner entangled
9 with Mr. Lawson, a reasonable officer with Mr. Losey's knowledge could believe that the soaked-
10 through blood on Mr. Zoellner came from Mr. Lawson. No forensic evidence disputed that
11 inference and Mr. Zoellner does not identify any evidence known to Mr. Losey that suggests
12 otherwise.

13 That no usable fingerprint was found on the knife suspected to be the murder weapon does
14 not "exclude" Mr. Zoellner as a suspect. A fingerprint did not connect him to the knife, but the
15 lack of a fingerprint did not exclude him. Similarly, that there was no evidence connecting Mr.
16 Zoellner to the knife believed to be the murder weapon may mean that it would be difficult to
17 prove beyond a reasonable doubt, or by clear and convincing evidence, that he stabbed Mr.
18 Lawson; it does not mean there was not a fair probability, a substantial chance, he stabbed Mr.
19 Lawson in light of all the other evidence. "For information to amount to probable cause, it does
20 not have to be conclusive of guilt, and it does not have to exclude the possibility of innocence."
21 *Garcia v. County of Merced*, 639 F.3d 1206, 1209 (9th Cir. 2011).

22 Next, Mr. Zoellner contends that probable cause was lacking because he did not have a
23 knife. (Dkt. No. 381 at 9.) Again, not so. Mr. Losey knew that no one saw Mr. Zoellner with a
24 knife or stated that he had a knife, but that is not the same as Mr. Losey knowing that Mr. Zoellner
25 did not have a knife. Mr. Zoellner was not searched before he encountered Mr. Lawson; he did
26 not go through a metal detector. Mr. Losey did not have knowledge suggesting Mr. Zoellner
27 could *not* have had a knife in a pocket of his clothes; instead, a reasonable officer in Mr. Losey's
28 position would have believed that Mr. Zoellner *could have had* a knife.

1 Mr. Zoellner also contends that a reasonable officer could not have relied on Mr. Wright's
2 account to believe there was a fair probability that Mr. Zoellner stabbed Mr. Lawson. He insists
3 that the stabbing occurred in the cul-de-sac rather than the grassy area where Mr. Wright said he
4 separated Mr. Lawson and Mr. Zoellner and therefore Mr. Wright could not reasonably be
5 believed. As support for this "fact" as to where the stabbing occurred, he correctly notes that no
6 officer observed any blood in the grassy area where Mr. Wright reported he pulled Mr. Lawson
7 and Mr. Zoellner apart and saw that Mr. Lawson had been stabbed. From this lack of observed
8 blood Mr. Zoellner argues that the stabbing could not have occurred in the grassy area. But he
9 does not identify any evidence about the nature of the stab wounds that dictates that blood must
10 have been found in the grassy area for the stabbing to have occurred there. Nor does he explain
11 why there must have been blood in the grass if that is where Mr. Lawson was stabbed given that
12 Mr. Wright found Mr. Lawson on his back and he was stabbed on his chest; thus, the stab wounds
13 were not facing the grass. Further, the evidence that Mr. Zoellner was on top of Mr. Lawson,
14 entangled with him, and Mr. Zoellner's clothes were soaked with blood suggests any blood might
15 have transferred from Mr. Lawson to Mr. Zoellner's clothes. In any event, there is no evidence
16 that the stab wounds would have been expected to bleed into the grass during the time Mr. Lawson
17 was lying on his back, let alone evidence that Mr. Losey must have known so.

18 Mr. Zoellner's insistence that Mr. Wright's account is "unreliable and very questionable"
19 because no blood was found on the back of Mr. Zoellner's white t-shirt (Dkt. No. 381 at 14)
20 actually highlights the existence of probable cause. Putting aside that there were two small dots of
21 blood on the back of Mr. Zoellner's t-shirt, Mr. Zoellner ignores that there was a large amount of
22 blood on the back of his hoodie; the presence of blood on the back of his hoodie is consistent with
23 Mr. Wright's description of Mr. Zoellner having his back to Mr. Lawson's chest when Mr. Wright
24 separated them and saw that Mr. Lawson had been stabbed in the chest. Significantly, Mr.
25 Zoellner offers no explanation for the blood on the back of his hoodie or the back of his pants. A
26 reasonable officer in Mr. Losey's circumstances could have believed it came from Mr. Lawson,
27 consistent with Mr. Wright's description.

28 Mr. Zoellner also emphasizes that Officer Arminio's police report says the stabbing

1 occurred in the cul-de-sac where the large pool of blood was found. True.² Indeed, Mr. Losey
2 initially believed that is where the stabbing occurred. But Officer Arminio did not observe the
3 stabbing and Mr. Zoellner does not identify any evidence as to why Officer Arminio believed the
4 stabbing occurred there. Nor does he identify any evidence that suggests at the time she wrote her
5 report she was aware of other evidence, including Mr. Wright’s account, Mr. Zoellner’s fight with
6 Mr. Lawson, and Mr. Zoellner’s blood-soaked clothes. Her report does not refute the fair
7 probability that Mr. Zoellner stabbed Mr. Lawson.

8 Mr. Zoellner relies heavily on Jason Martinez’s witness statement made two days after the
9 incident. Mr. Martinez’s account—seeing someone stab another person with his right hand, and
10 then watching the stabbed person run and fall in the bushes—was consistent with the blood stain
11 in the cul-de-sac and with the location where Mr. Lawson was found and tended to by paramedics.
12 But a reasonable officer in Mr. Losey’s position was not required to believe Mr. Martinez over
13 Mr. Wright’s contemporaneous and detailed account; a reasonable officer could have credited Mr.
14 Wright’s account over Mr. Martinez’s. Mr. Martinez’s interview was two days after the incident.
15 At the time of the stabbing it was dark and there was no lighting on the street, and Mr. Martinez
16 had been at a party where many attendees were drinking. Mr. Martinez could have been aware of
17 the blood in the cul-de-sac, as well as aware of where Mr. Lawson was found, and therefore
18 thought he had seen the stabbing as he described. That witnesses have inconsistent recollections
19 of events does not mean there is not probable cause.

20 Finally, in his written probable cause submission, Mr. Zoellner insists that the evidence
21 points to suspects other than himself and, in particular, he contends that Mr. Lawson’s girlfriend,
22 Ren Bobadilla, was injured by the knife believed to be the murder weapon. (Dkt. No. 381 at 15
23 (“[o]ne of them was injured by that knife”).) On the trial record, that statement is false. There is
24 no evidence that anyone other than Mr. Lawson was injured by a knife at the party on April 15,
25 2017, let alone the knife thought to be the murder weapon. The only evidence at trial was that Ms.
26 Bobadilla had a puncture wound that was *not* consistent with a wound caused by the knife found at

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28 ² There was testimony about Officer Arminio’s report, but Mr. Zoellner did not offer it into evidence.

1 the scene. (Tr. 547:10-548:17.)

2 **IV. Judicial Notice**

3 Mr. Zoellner asks the Court to take judicial notice of the state court judge's lack of
4 probable cause finding following the preliminary hearing. The Court does so. But it does not
5 change the Court's analysis. The question before this Court is not whether the district attorney
6 satisfied its burden to prove probable cause to the state court judge based on the witness testimony
7 and exhibits the district attorney chose to offer. The question here is different: whether a
8 reasonable officer in Mr. Losey's circumstances would have believed there was a fair probability
9 that Mr. Zoellner stabbed Mr. Lawson. Based on the evidence admitted at trial before this Court,
10 there was such a fair probability.

11 * * *

12 Mr. Zoellner bears the burden of proving by a preponderance of the evidence that no
13 reasonable officer with Mr. Losey's knowledge would have believed there was a fair probability
14 that Mr. Zoellner stabbed Mr. Lawson. Mr. Zoellner has not met that burden. A reasonable
15 officer could believe there was a fair probability Mr. Zoellner stabbed Mr. Lawson based on the
16 undisputed evidence at trial indicating that Mr. Losey knew Mr. Zoellner was the only person
17 present with a motive to stab Mr. Lawson, he was the only person seen fighting with and thus
18 having the opportunity to stab Mr. Lawson, and he was the only person with blood-soaked clothes.
19 Further, the identification of Mr. Zoellner as the stabber was corroborated by Mr. Wright's
20 credible and nearly-contemporaneous observations. The evidence emphasized by Mr. Zoellner
21 may have made it difficult to prove his conduct beyond a reasonable doubt, but it does not defeat
22 the much lower standard of probable cause.

23 **CONCLUSION**

24 As Mr. Zoellner has not satisfied the lack of probable cause element of his malicious
25 prosecution claim, the claim fails and judgment must be entered in Mr. Losey's favor.

26 The Court will hold a further case management conference on November 17, 2022 at 1:30
27 p.m. via Zoom video. An updated joint case management conference statement is due seven days
28 in advance. The statement should address whether separate judgment should be issued on the

1 malicious prosecution claim (along with the claims disposed of on summary judgment) pursuant to
2 Federal Rule of Civil Procedure 54(b), as well as propose next steps with respect to the bifurcated
3 claim.

4 **IT IS SO ORDERED.**

5 Dated: October 17, 2022


6 JACQUELINE SCOTT CORLEY
7 United States District Judge
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United States District Court
Northern District of California