Appendix A

NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KYLE CHRISTOPHER ZOELLNER, Plaintiff-Appellant, v. CITY OF ARCATA; et al., Defendants-Appellees.	No. 23-15505 D.C. No. 3:18-cv-04471-JSC MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Jacqueline Scott Corley, Magistrate Judge, Presiding

Argued and Submitted June 10, 2024
San Francisco, California

Before: NGUYEN, R. NELSON, and BRESS, Circuit Judges.

This appeal is about the arrest and subsequent prosecution of Appellant Kyle Zoellner for murder. After charges were dropped for a lack of probable cause, Zoellner sued the City of Arcata and several of its officials and police officers (collectively Defendants). The district court entered judgment for Defendants. We have jurisdiction to review that judgment. *See* 28 U.S.C. § 1291. Because the

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

district court reached the correct result, we affirm.

1. On appeal are three 42 U.S.C. § 1983 claims (unlawful arrest, malicious prosecution, and inadequate medical care), a *Monell* claim, and defamation claims related to Detective Dokweiler's probable cause statement and Chief Chapman's press statement.[1] We review a grant of summary judgment, as well as a court's probable cause determination, de novo. *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1029 (9th Cir. 2004) (summary judgment); *United States v. Garza*, 980 F.2d 546, 550 (9th Cir. 1992) (probable cause).

2. Zoellner's unlawful arrest and malicious prosecution claims fail because he has not shown any genuine issue of fact as to whether there was probable cause. *See, e.g., Dubner v. City & County of San Francisco*, 266 F.3d 959, 964 (9th Cir. 2001) (proof of an unlawful arrest claim requires lack of probable cause); *see also Conrad v. United States*, 447 F.3d 760, 767 (9th Cir. 2006) (proof of a malicious prosecution claim requires lack of probable cause). Probable cause is a low standard and only requires the "fair probability or substantial chance" that the suspect has committed

[1] Zoellner also alleges that the district court exhibited judicial bias and abused its discretion by denying him leave to amend his complaint and his requests for discovery sanctions. These claims fail. Zoellner's identified reasons for judicial bias—the district court's legal decisions and litigation management—are not viable bases for a judicial bias claim. *See, e.g., Liteky v. United States*, 510 U.S. 540, 551 (1994). And we find no abuse of discretion in the district court's denial of sanctions. *See Unigard Sec. Ins. Co. v. Lakewood Engineering & Mfg. Corp.*, 982 F.2d 363, 367, 369 (9th Cir. 1992).

a crime. *United States v. Patayan Soriano*, 361 F.3d 494, 505 (9th Cir. 2004) (quoting *United States v. Bishop*, 264 F.3d 919, 924 (9th Cir. 2001)).

Here, ample undisputed evidence supports a "fair probability" that Zoellner may have committed the crime. Zoellner was identified by witnesses at the scene as the "stabber" and his clothes were covered in blood. The blood pattern on Zoellner's clothes was not consistent with his own nosebleed. Zoellner also admitted to a physical fight that night with the victim, which was corroborated by an eyewitness. Additionally, a kitchen knife was found at the scene, and Zoellner worked as a chef.

3. Zoeller's deliberate indifference to serious medical needs claim fails because Defendants have qualified immunity. To assess qualified immunity for a deliberate indifference claim arising before April 2018, "we apply the current objective deliberate indifference standard to analyze whether there was a constitutional violation, and 'concentrate on the objective aspects of the [pre-*Gordon*] constitutional standard' to evaluate whether the law was clearly established." *Sandoval v. County of San Diego*, 985 F.3d 657, 672 (9th Cir. 2021) (quoting *Horton by Horton v. City of Santa Maria*, 915 F.3d 592, 600 (9th Cir. 2019)). Here, there was no clearly established violation of Zoellner's constitutional rights. These facts are not as extreme as those in *Sandoval* or those cases on which *Sandoval* relies. While Zoellner was not taken to the hospital for at least an hour after Officer Nilsen detained him, Zoellner at first refused medical treatment. And

shortly after Zoellner requested medical treatment, Officer Nilsen took him to the hospital. The hospital medically cleared Zoellner, and his medical release showed he only had facial lacerations and swelling.

4. Zoellner's defamation claim against Detective Dokweiler is based on his probable cause statement filed with the court that other witnesses had seen Zoellner stab the victim. This defamation claim fails because the allegedly defamatory statement is protected under California's litigation privilege. *See* Cal. Civ. Code § 47. Section 47 designates any statement made (a) "[i]n the proper discharge of an official duty" and (b) in any "judicial proceeding" as privileged. Detective Dokweiler's statement to the superior court is protected because it was "made in connection with a judicial proceeding." *Pech v. Doniger*, 290 Cal. Rptr. 3d 471, 488 (Cal. Ct. App. 2022).

Zoellner alleges that Chief Chapman defamed him in a press statement where Chapman said that it was "a white male who stabbed and killed a black male." Because of this, Chapman thought it "prudent and logical to look at race as an issue." This statement is not defamatory because there is no evidence that it was causally linked to Zoellner's claimed actual damages. *See Price v. Stossel*, 620 F.3d 992, 998 (9th Cir. 2010). We agree with the district court that Zoellner suffered his claimed injuries "simply because of the charges that had been filed against him." *Zoellner v. City of Arcata*, 588 F. Supp. 3d 979, 1009 (N.D. Cal. 2022). No evidence suggests

that Chief Chapman's statement resulted in any of Zoellner's claimed actual damages.

5. Finally, Zoellner's *Monell* claim fails. The district court did not abuse its discretion in denying Zoellner's request for leave to amend for a fifth time. *See, e.g.*, *Rich v. Shrader*, 823 F.3d 1205, 1209 (9th Cir. 2016) ("[W]hen the district court has already afforded the plaintiff an opportunity to amend the complaint, it has wide discretion in granting or refusing leave to amend after the first amendment."). Zoellner's *Monell* claim also fails on the merits. *Monell* liability exists when a violation of a federally protected right is attributable to (1) an express official policy; (2) a pervasive practice or custom; (3) a failure to train; or (4) the decision or act of a final policymaker. *Horton*, 915 F.3d at 602–03. Zoellner identifies no error in the district court's decision limiting his *Monell* claim to only a policymaker ratification theory due to repeated pleading deficiencies. As a result, only the fourth factor is at issue, and it fails because Zoellner does not identify plausible facts demonstrating that the defendants had final policymaking authority over Zoellner's prosecution or knowledge of the alleged constitutional violation. *See Christie v. Iopa*, 176 F.3d 1231, 1238–40 (9th Cir. 1999).

AFFIRMED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KYLE CHRISTOPHER ZOELLNER,

Plaintiff,

v.

CITY OF ARCATA, et al.,

Defendants.

Case No. 18-cv-04471-JSC

ORDER RE: MOTION FOR JUDGMENT ON THE PLEADINGS

Re: Dkt. No. 412

Before the Court is Defendants' motion for judgment on the pleadings as to the single claim remaining in Mr. Zoellner's fifth amended complaint ("5AC"). (Dkt. No. 412.)[1] Having carefully considered the briefing, the Court concludes that oral argument is unnecessary, *see* N.D. Cal. Civ. L.R. 7-1(b), VACATES the March 16, 2023 hearing, and GRANTS the motion. Mr. Zoellner's claim is barred by California's litigation privilege as a matter of law.

BACKGROUND

The operative 5AC asserts nine claims and names 11 Defendants. (Dkt. No. 106.) In April 2021, the district judge then presiding over the case granted in part and denied in part Defendants' motion to dismiss the 5AC. (Dkt. No. 131.) As relevant here, the district judge denied the motion to dismiss as to claim nine, styled "wrongful threat of criminal prosecution" in the 5AC but construed by the judge as an intentional infliction of emotional distress ("IIED") claim. (Dkt. No. 106 at 67; Dkt. No. 131 at 18.) That claim was bifurcated and stayed. (Dkt. No. 161; *see* Dkt. No. 233 at 12:15-16, 40:17-19.) In March 2022, the district judge granted summary judgment to Defendants on all live claims except the malicious prosecution claim against Mr. Losey only.

[1] Record citations are to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

(Dkt. No. 233.)

The malicious prosecution claim proceeded to trial in October 2022. The jury returned findings favorable to Mr. Zoellner on all elements that were put to the jury. (Dkt. Nos. 376, 377.) The Court then determined, based on the trial record, that Mr. Zoellner had not proved the lack of probable cause element of malicious prosecution—an element that was not put to the jury because the law requires the trial judge to decide it. (Dkt. No. 383; *see* Dkt. No. 370 at 12 (instructing jury that "[t]he law requires that the trial judge, rather than the jury, decide if Mr. Zoellner has proven element 3 above, whether a reasonable person in Mr. Losey's circumstances would have believed that there were grounds for causing Mr. Zoellner to be prosecuted"). Thus, the trial verdict was in Mr. Losey's favor. (*See* Dkt. No. 383 at 11:24-25.)

The parties now turn to the bifurcated claim of wrongful threat of criminal prosecution/IIED, which is asserted against all Defendants. Mr. Zoellner alleges Defendants' counsel, acting as each Defendant's agent, "attempted to extort Plaintiff by threatening him with a new prosecution for the death of [David Josiah] Lawson unless Plaintiff dismissed this lawsuit, but in exchange for Plaintiff's dismissal, Defendants would agree to not file any further criminal charges against Plaintiff." (Dkt. No. 106 ¶ 282.) The 5AC refers to "four different occasions," "in particular . . . December 15, 2021 and December 21, 2021."[2] (*Id.* ¶¶ 135, 282.) The Court lifted the stay with respect to Defendants filing a motion for judgment on the pleadings, (*see* Dkt. No. 411 at 12:21-22), on the grounds that California's litigation privilege precludes the claim, (Dkt. No. 412).

DISCUSSION

"Judgment on the pleadings is properly granted when, accepting all factual allegations in the complaint as true, there is no issue of material fact in dispute, and the moving party is entitled

[2] Magistrate judge settlement conferences were held on those two dates. (*See* Dkt. Nos. 95, 96; *see also* Dkt. No. 143-1 (Mr. Zoellner's declaration in support of motion to disqualify Defendants' counsel, describing threats); Dkt. No. 143-2 (Mr. Zoellner's counsel's declaration in support of same); Dkt. No. 411 at 5:5-23 (Mr. Zoellner's counsel representing that the claim arises out of statements made in a proceeding before the formerly presiding district judge, a discovery proceeding before a magistrate judge, and a settlement conference before a magistrate judge).)

to judgment as a matter of law." *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012) (cleaned up); *see* Fed. R. Civ. P. 12(c). Like a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a motion under Rule 12(c) challenges the legal sufficiency of the claims asserted in the complaint. *Chavez*, 683 F.3d at 1108. "[I]t is common to apply Rule 12(c) to individual causes of action." *Strigliabotti v. Franklin Res., Inc.*, 398 F. Supp. 2d 1094, 1097 (N.D. Cal. 2005).

I. LITIGATION PRIVILEGE

Under Section 47(b), formerly 47(2), "[a] privileged publication or broadcast is one made . . . [i]n any . . . judicial proceeding." Cal. Civ. Code § 47(b)(2). "California's litigation privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that has some connection or logical relation to the action." *Graham-Sult v. Clainos*, 756 F.3d 724, 741 (9th Cir. 2014) (cleaned up). As to the first element, "[t]he communication may be made outside a courtroom, since many portions of a 'judicial proceeding' occur outside of open court, such as settlement negotiations." *Carney v. Rotkin, Schmerin & McIntyre*, 206 Cal. App. 3d 1513, 1521 n.4 (1988) (cleaned up). "When a communication meets these requirements, the privilege is absolute; that is, it is unaffected by the presence of malice." *Id.* at 1521. Unlike evidentiary privileges, "which operate by excluding evidence," the litigation privilege "directly affects liability." *Id.* at 1520. It "applies to judges and other official officers, attorneys, parties, jurors, and witnesses." *Id.* "Any doubt about whether the privilege applies is resolved in favor of applying it." *Finton Constr., Inc. v. Bidna & Keys, APLC*, 238 Cal. App. 4th 200, 212 (2015) (cleaned up).

"The litigation privilege . . . serves broad goals of guaranteeing access to the judicial process, promoting the zealous representation by counsel of their clients, and reinforcing the traditional function of the trial as the engine for the determination of truth." *Flatley v. Mauro*, 39 Cal. 4th 299, 324 (2006). The privilege "afford[s] litigants and witnesses the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions." *Silberg v. Anderson*, 50 Cal. 3d 205, 213 (1990) (cleaned up), as modified (Mar. 12, 1990). The

privilege "enhanc[es] the finality of judgments and avoid[s] an unending roundelay of litigation, an evil far worse than an occasional unfair result." *Id.* at 214.

The privilege "immunizes defendants from virtually any tort liability (including claims for fraud), with the sole exception of causes of action for malicious prosecution." *Olsen v. Harbison*, 191 Cal. App. 4th 325, 333 (2010). "Malicious prosecution actions are permitted because the policy of encouraging free access to the courts is outweighed by the policy of affording redress for individual wrongs when the requirements of favorable termination, lack of probable cause, and malice are satisfied." *Silberg*, 50 Cal. 3d at 216 (cleaned up). "We recognize . . . that the disallowance of derivative tort actions based on communications of participants in an earlier action necessarily results in some real injuries that go uncompensated." *Id.* at 218. "But . . . that is the price that is paid for witnesses who are free from intimidation by the possibility of civil liability for what they say." *Id.* (cleaned up). And "in a good many cases of injurious communications, other remedies aside from a derivative suit for compensation will exist and may help deter injurious publications during litigation," including "State Bar disciplinary proceedings." *Id.* at 218–19.

II. APPLICATION

Construing the 5AC allegations in the light most favorable to Mr. Zoellner, *see Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009), his wrongful threat of criminal prosecution/IIED claim is barred by the absolute litigation privilege, *see Graham-Sult*, 756 F.3d at 741.

First, the alleged threats were made in a judicial proceeding because they were communicated by Defendants' counsel to Mr. Zoellner during the latter's active civil case. *See Olsen*, 191 Cal. App. 4th at 334. Second, Defendants' counsel was a participant authorized by law. *See Carney*, 206 Cal. App. 3d at 1520; *e.g.*, *Finton Constr.*, 238 Cal. App. 4th at 211–13 (privileged statement by counsel); *Bergstein v. Stroock & Stroock & Lavan LLP*, 236 Cal. App. 4th 793, 814–16 (2015) (same). As to the third and fourth elements, Defendants' counsel made the alleged threats to achieve their object of the litigation—that is, a resolution in Defendants' favor. *See Olsen*, 191 Cal. App. 4th at 336 (noting third and fourth elements "overlap to a considerable degree"). The 5AC squarely alleges Defendants' counsel "threaten[ed] [Mr.

Zoellner] with a new prosecution" to "convince him to dismiss the case." (Dkt. No. 106 ¶¶ 282, 136; *see id.* ¶ 135.) Those communications could not be more related to this case. *See Asia Inv. Co. v. Borowski*, 133 Cal. App. 3d 832, 842 (1982) (privileged "threat to coerce Asia into settling"); *see also Olsen*, 191 Cal. App. 4th at 336 ("Had there been no litigation, these comments would never have been made.").

Accordingly, the privilege applies. The Court addresses Mr. Zoellner's other arguments below.

A. Law of the Case

Mr. Zoellner argues the formerly presiding district judge rejected the litigation privilege at the motion to dismiss stage, creating law of the case.

The law of the case is a "discretionary" doctrine, *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000), which:

> generally provides that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. The doctrine expresses the practice of courts generally to refuse to reopen what has been decided, but it does not limit courts' power.

Musacchio v. United States, 577 U.S. 237, 244–45 (2016) (cleaned up). "The law of the case doctrine does not preclude a court from reassessing its own legal rulings in the same case . . . before judgment is entered or the court is otherwise divested of jurisdiction over the order."[3] *Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1042 (9th Cir. 2018). "For the doctrine to apply, the issue in question must have been decided explicitly or by necessary implication in the previous disposition." *Lummi*, 235 F.3d at 452 (cleaned up).

Here, in one paragraph of Defendants' reply to their motion to dismiss, they argued the alleged threats "fall within the litigation privilege." (Dkt. No. 127 at 11 (citing *Silberg*).) The parties did not discuss the privilege at the motion hearing, (Dkt. No. 416-1), nor did the district

[3] Mr. Zoellner does not argue, and the Court sees no good faith basis to do so, that the district judge's order is a decision by a higher court. *See Askins*, 899 F.3d at 1042 ("The doctrine applies most clearly where an issue has been decided by a higher court; in that case, the lower court is precluded from reconsidering the issue and abuses its discretion in doing so . . . .").

judge's written order address it, (Dkt. No. 131).[4] Thus, the privilege issue was not decided explicitly. Even assuming it was decided by necessary implication of the order denying dismissal as to Mr. Zoellner's wrongful threat of criminal prosecution/IIED claim, the Court will exercise its discretion not to apply the doctrine. *See Lummi*, 235 F.3d at 452. Neither the hearing nor the order mentioned the privilege. So, to the extent the issue was decided, it was without meaningful analysis and "reassess[ment]" with more robust briefing is appropriate. *Askins*, 899 F.3d at 1042; *cf. Strigliabotti*, 398 F. Supp. 2d at 1098 ("[T]hat defense counsel believes that the previous motion to dismiss was erroneously decided, and erroneously presented by his co-counsel, is not a persuasive reason for the Court to exercise its discretion to revisit an issue . . . .").

B. Waiver

Mr. Zoellner next argues Defendants waived the privilege by failing to assert it in their answer to the 5AC.

"A defendant may . . . raise an affirmative defense for the first time in a motion for judgment on the pleadings, but only if the delay does not prejudice the plaintiff." *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001) (cleaned up); *see Quigley v. Garden Valley Fire Prot. Dist.*, 7 Cal. 5th 798, 810 (2019) ("the absolute litigation privilege . . . is an affirmative defense subject to principles of forfeiture and waiver"). There is no prejudice to Mr. Zoellner because "this affirmative defense would have been dispositive had [Defendants] asserted it when the action was filed." *Owens*, 244 F.3d at 713 (finding defendant's failure to plead res judicata in its answer did not prejudice plaintiff). Whether Defendants asserted the privilege in their answer or at this stage, the result would be the same: Defendants are entitled to judgment as a matter of law. Moreover, because this claim has been bifurcated and stayed, the parties have not invested resources in it in a way that prejudices anyone.

C. Unfairness

Finally, Mr. Zoellner argues this Court has denied him due process and advocated for

[4] The district judge's order discussed whether "statements made by defense counsel are inadmissible because they were made during a settlement conference," (Dkt. No. 131 at 15), but only in reference to Federal Rule of Evidence 408, not the litigation privilege.

Defendants by raising issues for them.

The Court raised the litigation privilege at a case management conference ("CMC") following trial. (Dkt. No. 411 at 5:24–10:12; *see id.* at 8:6-7 (the Court to Defendants' counsel: "I'm raising that. You didn't raise that in your CMC statement.").) The Court noted the privilege would be Defendants' burden, (*id.* at 8:14-15 ("[I]t is an affirmative defense. It's your burden to show it.")), and has held them to that burden in this Order. Raising a legal issue that a party did not raise in its CMC statement does not show unfairness or partiality. *See Pau v. Yosemite Park & Curry Co.*, 928 F.2d 880, 885 (9th Cir. 1991) (finding "no prejudicial misconduct" where judge's "most egregious acts" *outside* the presence of the jury were "stat[ing] that he had seen better cases before" and that he "would consider" motion for judgment notwithstanding the verdict but "was not overly impressed with the Paus' case on liability"). Resolving Mr. Zoellner's claim would involve discovery of the settlement conference magistrate judge. Before allowing such an extraordinary process, this Court has a duty to ensure the law is properly applied.

Earlier, the Court raised the issue of privity in its tentative ruling on one of Mr. Zoellner's motions in limine, more than a month in advance of the pre-trial conference. (Dkt. No. 299 at 2–4 ("The Court acknowledges that Detective Losey did not raise the privity argument in response to Plaintiff's motion. Nonetheless, the Court must apply the correct law and place the burden on Mr. Zoellner [to establish issue preclusion].").) At the pre-trial conference, the Court heard argument from Mr. Zoellner's counsel, who had had the opportunity to research the issue. (Dkt. No. 324 at 10:24–14:20; *see id.* at 10:24-25 (Mr. Zoellner's counsel: "I looked at the cases that were cited by the Court.").) The Court then ruled on the motion in Mr. Losey's favor. (Dkt. No. 306 at 1–4 ("Mr. Zoellner has not met his burden of proving that a police officer is in privity with the prosecution such that he is bound by a finding of no probable cause . . . .").) Raising a legal issue that a party did not raise in its opposition to a motion in limine does not show unfairness or partiality. Again, the Court has an obligation to correctly apply the governing law.

Moreover, the Court has also raised issues to Mr. Zoellner's benefit. First, one of Mr. Zoellner's motions in limine sought to exclude evidence from the criminal investigation, including DNA evidence implicating Mr. Zoellner, on grounds of relevance and prejudice. (Dkt. No. 250.)

The evidence was likely relevant given Mr. Zoellner sought damages based on his testimony that he did not stab Mr. Lawson; that is, evidence developed post-preliminary hearing showing that he did stab Mr. Lawson would be relevant to his claimed emotional distress damages. And, given he was seeking millions of dollars in damages, the DNA evidence's prejudicial effect would not outweigh its probative value. But, although the Court was not persuaded by Mr. Zoellner's arguments for excluding the evidence, the Court sua sponte raised the issue of whether the DNA evidence was admissible at all "given that [Mr. Losey] does not have on [his] witness list a DNA expert or the person who performed the DNA test." (Dkt. No. 289 at 2.) The Court ordered Mr. Losey to brief the issue, (*id.*), and subsequently excluded Mr. Losey's Proposed Exhibits 22-26. (Dkt. No. 299 at 5–7 ("The DNA evidence is not proffered in admissible form as Detective Losey does not have a witness on his list competent to testify to the DNA results as substantive evidence."); *see* Dkt. No. 324 at 91:7-15.) Thus, the Court excluded evidence on a basis Mr. Zoellner failed to raise.

Similarly, another of Mr. Zoellner's motions in limine sought to exclude Mr. Losey's expert on grounds of scope and summarizing witness testimony. (Dkt. No. 246.) Again, the Court was unpersuaded by those arguments. But the Court sua sponte raised the issue of whether the expert's report was admissible given that it may have opined on the legal question of probable cause. (Dkt. No. 299 at 4 ("[A]lthough not raised by Mr. Zoellner, an expert witness cannot give an opinion as to her legal conclusion, i.e., an opinion on an ultimate issue of law." (cleaned up)).) The Court ordered Mr. Losey to file the full report for the Court's review, (*id.* at 5), and subsequently excluded it. (Dkt. No. 306 at 4 ("The report . . . is excluded because it opines on an ultimate issue of law").) Thus, the Court excluded expert testimony on a basis Mr. Zoellner failed to raise.

Finally, when Mr. Zoellner put District Attorney Maggie Fleming on his witness list, Mr. Losey objected that Ms. Fleming was never disclosed under Federal Rule of Civil Procedure 26(a). (Dkt. No. 264 at 8; *see* Dkt. Nos. 290, 294.) The Court ruled:

> The Court will allow Mr. Zoellner to call District Attorney Maggie Fleming as a witness at trial. It was not until April 2022—after summary judgment was decided—that Defendants produced an email

> from Ms. Fleming in which she states that she filed the charges in part because of Detective [Losey's] inaccurate statement. While Mr. Zoellner certainly could have taken Ms. Fleming's deposition prior to the close of fact discovery, this email is highly relevant to the causation element of Mr. Zoellner's malicious prosecution claim and thus makes Ms. Fleming an even more central witness. The late production of the email justifies Mr. Zoellner's late disclosure of Ms. Fleming.

(Dkt. No. 297 at 3.) Thus, despite Mr. Zoellner not disclosing or deposing Ms. Fleming—*the* District Attorney whose decision to file murder charges was at the heart of Mr. Zoellner's malicious prosecution claim—during fact discovery, the Court allowed Mr. Zoellner to depose her and call her as a witness. (*See* Dkt. No. 324 at 37–38.)

* * *

In sum, the absolute litigation privilege precludes Mr. Zoellner's wrongful threat of criminal prosecution/IIED claim, and Defendants are entitled to judgment as a matter of law on this claim. *See Graham-Sult*, 756 F.3d at 741; *Chavez*, 683 F.3d at 1108.

CONCLUSION

Defendants' motion is GRANTED.

This Order disposes of Docket No. 412.

IT IS SO ORDERED.

Dated: March 10, 2023

Jacqueline Scott Corley

JACQUELINE SCOTT CORLEY
United States District Judge

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KYLE CHRISTOPHER ZOELLNER,

Plaintiff,

v.

CITY OF ARCATA, et al.,

Defendants.

Case No. 18-cv-04471-JSC

JUDGMENT

The Court dismissed Counts 4, 5, 6 (as to all Defendants other than Chief Chapman, Det. Sgt. Dokweiler, and the City of Arcata), 7, and 8 by Order filed April 19, 2021 (Dkt. No. 131); granted summary judgment to Defendants on Counts 1, 2 (as to all Defendants other than Det. Losey), 3, and 6 by Order filed March 1, 2022 (Dkt. No. 233); and granted judgment on the pleadings to Defendants on Count 9 by Order filed March 10, 2023 (Dkt. No. 417).[1] An October 2022 jury trial on Count 2 resulted in a verdict in favor of Defendant Det. Losey. (Dkt. Nos. 376, 377, 383; *see* Dkt. No. 370 at 12.)

Accordingly, the Court enters judgment in favor of Defendants and against Plaintiff.

IT IS SO ORDERED.

Dated: March 13, 2023

Jacqueline Scott Corley

JACQUELINE SCOTT CORLEY
United States District Judge

[1] Record citations are to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

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

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

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

> In resolving that issue, the first question is what Detective Losey knew at the time he allegedly caused the charges to be filed against Mr. Zoellner. If there is a dispute as to what he knew, the jury resolves those disputes of fact. Once those facts are established, the 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).

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

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

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

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

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

II. Lack of Probable Cause Element

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

> Whereas the element of malice focuses on the defendant's state of mind at the time he initiated the underlying litigation, probable cause: "is measured by the state of the defendant's *knowledge*, not by his *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."

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

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

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

III. The Record Demonstrates Probable Cause

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[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.

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Judicial Notice

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

* * *

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

CONCLUSION

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

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

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

IT IS SO ORDERED.

Dated: October 17, 2022

JACQUELINE SCOTT CORLEY
United States District Judge

United States District Court
Northern District of California

Additional material from this filing is available in the Clerk's Office.