COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

FAR-_____

Appeals Court No. 18-P-0179

JUDY C. LYNCH, et al.,

Plaintiffs-Appellees,

v.

KEITH D. CRAWFORD, M.D.,

Defendant-Appellant.

On Appeal From An Interlocutory Order
Of The Suffolk County Superior Court
Civil Action Nos. 13-3785-G & 16-00438-E

DEFENDANT-APPELLANT KEITH D. CRAWFORD, M.D.'S APPLICATION FOR FURTHER APPELLATE REVIEW

Dated: December 18, 2018

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes And Rules **Page(s)**

PRELIMINARY STATEMENT

This application presents this Court with an opportunity to reconcile conflicting SJC case law (which the Appeals Court below acknowledged is "somewhat difficult to harmonize") on an issue of significant importance to volunteers and the organizations that depend on them to operate: whether an interlocutory order denying a defendant charitable immunity is immediately appealable under the doctrine of present execution.

The Court should grant this application to clarify its cases addressing so-called "immunities from suit" (which may give rise to an interlocutory appeal) and "immunities from liability" (which may not), and should decide -- as a matter of first impression -- whether appellate courts may review an interlocutory order denying charitable immunity to an unpaid, volunteer of a non-profit organization.

The Appeals Court ruled in a published opinion that the charitable immunity statutes at issue confer only immunity "from liability," and that this interlocutory appeal was therefore improper. However, the Appeals Court reached that conclusion "absent the Supreme Judicial Court's explicit guidance" on what

the Appeals Court conceded was facially conflicting case law. Lynch v. Roxbury Comprehensive Community Health Center, 94 Mass. App. Ct. 528, 534 (2018).[1] The Appeals Court's decision was erroneous and introduced yet another complication to this line of cases by creating a new test -- which has never before been recognized by this Court -- to distinguish immunities from suit and immunities from liability.

This case is important to the public interest because in Massachusetts last year alone, nearly 2 million citizens donated 141 million hours of volunteer service (over $3 billion of economic value) to charitable causes.

The Court should allow this application for further appellate review, and find that present execution permits this appeal of an order denying the defendant the protections of charitable immunity.

I. REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

Pursuant to Rule 27.1 of the Massachusetts Rules of Appellate Procedure, Defendant-Appellant Keith D. Crawford, M.D. requests that this Court grant further appellate review of the Memorandum Of Decision And

[1] A copy of the Appeals Court's November 30, 2018 published opinion is attached hereto as Exhibit A.

Order On The Parties' Motions For Summary Judgment of the Suffolk Superior Court (Honorable Paul D. Wilson) dated January 18, 2017 (the "Order") on the limited issue of whether Dr. Crawford was erroneously denied the protections of charitable immunity, and the subsequent November 30, 2018 Opinion of the Appeals Court dismissing Dr. Crawford's appeal.

II. STATEMENT OF PRIOR PROCEEDINGS RELEVANT TO THIS APPEAL

Dr. Crawford is a former unpaid, volunteer member of the Board of Directors of Roxbury Comprehensive Community Health Center ("RoxComp"), a now-defunct non-profit health center. Plaintiffs are former employees of RoxComp who were owed wages when RoxComp closed under financial distress in 2013. Thereafter, the Attorney General initiated a receivership action, and the former RoxComp employees filed claims in that action for unpaid wages (and ultimately were awarded their base wages and additional damages).

While the receivership was pending, a group of former employees filed this separate action, asserting Massachusetts Wage Act claims for unpaid wages and treble damages against two unpaid, volunteer members of the RoxComp Board, Dr. Crawford and Lawrence J.

Smith. Although Plaintiffs were awarded their base wages and additional damages from RoxComp in the receivership action, they nevertheless continue to pursue this action in an attempt to recover additional damages from the volunteer directors.

In August 2016, Dr. Crawford and Mr. Smith moved for summary judgment on multiple grounds, including that immunity under the federal Volunteer Protection Act ("VPA") (42 U.S.C. § 14503(a)) and the analogous Massachusetts statute (M.G.L. ch. 231, § 85W) protect them from this suit.

The Superior Court, in its January 18, 2017 Order, denied summary judgment as to Dr. Crawford, but granted summary judgment in favor of Mr. Smith.[2] The Superior Court correctly determined that Mr. Smith, as an unpaid volunteer, was entitled to immunity pursuant to the VPA. (Order at 9.) However, as to Dr. Crawford, the Superior Court stated that "there is some evidence in the record from which a reasonable finder of fact could conclude that Crawford engaged in willful misconduct, and thus, Crawford is not entitled

[2] A copy of the Superior Court's January 18, 2017 Order is attached hereto as Exhibit B.

to summary judgment on his claim of VPA immunity." (Id.)

Dr. Crawford timely moved for reconsideration of the Superior Court's ruling, which was denied by the Superior Court (Wilson, J.) on March 21, 2017.[3] Thereafter, on April 24, 2017, Dr. Crawford timely filed a notice of appeal in the Superior Court as to the January 18, 2017 Order and the subsequent order denying his motion for reconsideration.[4]

The Appeals Court (Milkey, J., Wendlandt, J and Desmond, J.) heard argument on October 4, 2018, and issued a published opinion on November 30, 2018. The Appeals Court erroneously dismissed Dr. Crawford's appeal as untimely because the doctrine of present

[3] A copy of the Superior Court's March 21, 2017 Order denying Dr. Crawford's motion for reconsideration is attached hereto as Exhibit C. The Order was entered on the docket on March 23, 2017.

[4] Dr. Crawford also timely filed a petition for interlocutory relief to the Single Justice, which was denied in an April 27, 2017 order, stating that "the method for asserting that [appellate] right was to file a timely notice of appeal in the Superior Court." After that denial, on May 3, 2017, Plaintiffs moved in the Superior Court to strike and/or dismiss Dr. Crawford's notice of appeal. That motion was denied in an October 4, 2017 order, stating that "Defendant has taken [the] course of action suggested [in the] Single Justice Order of April 27, 2017 by filing a Notice of Appeal." The parties do not dispute -- and the Appeals Court has determined -- that Dr. Crawford's notice of appeal was timely filed.

execution does not permit interlocutory review of an order denying immunity under the charitable immunity statutes at issue. Lynch, 94 Mass. App. Ct. at 531-539. The Appeals Court also declined to grant discretionary review because, in its view, this appeal did not implicate sufficient public interests. (Id. at 539.) No party submitted a request for rehearing in the Appeals Court.

Dr. Crawford now brings this timely application for further appellate review. Contrary to the Appeals Court's holding, this application implicates important rights relating to charitable immunity applicable to volunteers throughout the Commonwealth.

III. STATEMENT OF FACTS RELEVANT TO THIS APPEAL

Dr. Crawford is the former unpaid, volunteer Chairman of the Board of Directors of RoxComp. Dr. Crawford never received any payment for his multiple years of service on RoxComp's Board.

Beginning in the fall of 2012, RoxComp faced a host of financial and regulatory challenges. (R.A. Vol. I at 125.) In February 2013, the Board voted to remove RoxComp's Chief Executive Officer and hire an interim replacement with experience managing distressed companies, Pratt Wiley ("CEO Wiley"). (Id.

at 127.) In a February 25, 2013 memorandum to the Board, CEO Wiley suggested several "Short-Term" and "Long-Term" strategies for salvaging RoxComp, including laying off employees, hiring new management, identifying new funding sources, and pursuing a merger with another hospital or clinic. (Id. at 129-30.) With the Board's approval, CEO Wiley began his work restructuring RoxComp (id. at 130-32), but by the middle of March 2013, CEO Wiley had determined that his efforts were unlikely to be successful. (Id. at 132.) In a March 20, 2013 memorandum to the Board, CEO Wiley stated that "[a]ll attempts to raise capital have failed," and that "[t]o not conduct an orderly wind-down of the Center and transfer of patient care at this time would be contrary to the medical advice of the Center's providers." (Id.)

On March 22, 2013, RoxComp shut down operations. (Id. at 133.) During the prior month, CEO Wiley had informed the Board that RoxComp did not "intend to make payroll until after [a federal grant] reimbursement has been received." (Id. at 132.) At the time RoxComp closed, the grant had not been received and RoxComp had not paid final wages to employees. (Id. at 133.) No record evidence suggests

that Dr. Crawford participated in the decision not to pay final wages.

On March 25, 2013 -- three days after RoxComp shut down without paying wages -- Dr. Crawford received an email from a former RoxComp employee stating that "[t]he balance in the payroll account is approximately $88,000." (R.A. Vol. II at 298) At that time, all RoxComp employees, including CEO Wiley, had been terminated, but the receiver had not yet been appointed to wind-down the company. (R.A. Vol. I at 133.) In subsequent emails, Dr. Crawford stated that he believed RoxComp would receive federal funding that could be used for, among other things, "[e]mployees pay." (R.A. Vol. II at 244) Dr. Crawford further stated that he "would like to use the funds available in the bank to pay [certain] venders but I am open to suggestions. I can give you my permission but will discuss with board." (Id.) The record does not reflect that any payments were made at Dr. Crawford's direction.

In April 2013, a receiver was appointed to take control of RoxComp's assets and liabilities, including wages owed to former employees. (R.A. Vol. I at 133.) This litigation was commenced soon thereafter.

IV. STATEMENT OF POINTS WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT

1. Whether the doctrine of present execution permits interlocutory appellate review of the Superior Court's Order denying Dr. Crawford charitable immunity under the VPA and M.G.L. ch. 231, § 85W.

2. If this application is allowed, whether the Superior Court erred in holding that Dr. Crawford is not entitled to charitable immunity as a matter of law based solely on Dr. Crawford's mere awareness and discussion of RoxComp's finances after RoxComp's failure to pay wages -- the only misconduct at issue in this case.

V. STATEMENT INDICATING WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

A. The Appeals Court Erroneously Applied This Court's Conflicting Case Law To Deprive Dr. Crawford Of The Right To Appeal The Order Denying Him Immunity

This Court should reconcile its conflicting case law and hold that the doctrine of present execution permits an appeal of an interlocutory order denying a defendant charitable immunity.[5] The Appeals Court concluded that the doctrine of present execution does not permit this appeal because the charitable immunity statutes confer only "immunity from liability" rather than "immunity from suit." Lynch, 94 Mass. App. Ct. at 532.

Although this Court's precedent contemplates a difference between "immunity from suit" as distinct from "immunity from liability," that dichotomy has proven unworkable. The Appeals Court recognized this confusion, noting that "the theory behind the case law is straightforward, [but] difficulties abound in applying such principles in practice." (Id.)

A trilogy of SJC decisions, all considered by the Appeals Court below, illustrates this uncertainty.

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[5] The applicable immunity statutes are the federal Volunteer Protection Act and an analogous Massachusetts statute (M.G.L. ch. 231, § 85W).

First, in the frequently-cited Breault v. Chairman of the Board of Fire Commissioner of Springfield case, the Court held that the qualified immunity of public officials from Massachusetts Civil Rights Act claims is an immunity from suit, and permitted interlocutory review. 401 Mass. 26, 35, n.9 (1987). However, the Court concluded that immunity would not apply if the defendant acted intentionally, and affirmed that summary judgment was properly denied because "the defendant could be viewed as having [acted intentionally]." Id. at 34. Further, even if the Court ruled in favor of the defendant on immunity, the case would have continued because the defendant had not asserted immunity as to the entire suit. Id. at 30, n.5. Thus -- even though this Court determined that the immunity at issue was "from suit" -- the case continued for two more years.[6]

Second, several years later, this Court in Maxwell v. AIG Domestic Claims, Inc. concluded that an immunity "shielding insurers from civil liability in

[6] The Court countenanced a similar circumstance in Town of Boxford v. Massachusetts Highway Department, permitting an interlocutory appeal, even where the defendant "asserts sovereign immunity only as to some of the counts of the complaint." 458 Mass. 596, 601, n.13 (2010).

the absence of malice or bad faith . . . should be interpreted as providing immunity from suit rather than mere immunity from liability." 460 Mass. 91, 98 (2011). As in Breault, the Court reached that conclusion even though the statute contained an exception for bad faith conduct.

Third, in the following year, the Court decided Marcus v. City of Newton, 462 Mass. 148 (2012). The Court determined that the Massachusetts recreational land use statute (M.G.L. ch. 21, § 17C) -- which resembles the statutes in Breault and Maxwell in that it provides immunity absent intentional conduct -- provided only immunity from liability because "[e]ven if a landowner can claim the full scope of immunity available under the statute, that landowner will still be liable for 'willful, wanton, or reckless conduct, and thus is not immune from suit." Id. at 153. The Marcus opinion does not expressly overrule Breault or Maxwell (and, indeed, does not cite Maxwell at all).[7]

[7] The Court in Marcus, examining the "plain language" of the statute, also held that the words "shall not be liable" in the statute at issue reflected a legislative intent to "merely provid[e] an exemption from liability for ordinary negligence claims," not an immunity from suit. 462 Mass. at 153. But that approach has proven unworkable, given that the word "liable" in a statute, standing alone, says

As the Appeals Court stated, this precedent is "somewhat difficult to harmonize." Lynch, 94 Mass. App. Ct. at 534. In Breault and Maxwell, this Court found immunities from suit even though the immunities were subject to exceptions for intentional conduct, but in Marcus, this Court found that the immunity was not from suit because it was subject to such exceptions. Further, this Court found immunity from suit in Breault even though the immunity, if it applied, would not have barred all claims arising from the protected conduct, whereas in Marcus this Court did not find an immunity from suit, even though the immunity would have ostensibly barred all the claims at issue.

In the absence of "the Supreme Judicial Court's explicit guidance on how to harmonize [the cases]," the Appeals Court unsuccessfully attempted to do so. Id. It noted that because the statute in Maxwell "placed strict reporting requirements" on insurers, it

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little about the scope of immunity, and the Court's prior decisions have identified statutes using similar language as providing immunities from suit. For example, the statute in Maxwell contains materially identical language, stating that "no insurer . . . shall be subject to civil liability for damages by reasons of any statement, report or investigation made pursuant to this section." 460 Mass. at 102.

must have also intended to "provid[e] full immunity from suit for complying with them." Id. In contrast, "the recreational use statute at issue in Marcus places no affirmative obligation on the owners of recreational land," and thus there is no basis to "infer an intent to provide immunity from suit." Id. Although this Court has never articulated such a test, the Appeals Court surmised that this Court must have deemed the "affirmative obligation" in Maxwell "significant." Id. at 535. Applying this newly-created framework, the Appeals Court ruled that the charitable immunity statutes do not confer immunity from suit because they "impos[e] no obligations on people who serve as volunteer board members." Id.[8]

That reasoning is erroneous. The statute in Maxwell did not actually provide "full immunity from suit," as the Appeals Court stated. Rather, the Court in Maxwell concluded that "[a]ll the counts set forth

[8] The Appeals Court also considered at length whether the federal VPA preempted Massachusetts law regarding the right to appeal interlocutory orders denying immunity. Lynch, 94 Mass. App. Ct. at 536. Yet, this Court has previously held that there is little difference between Massachusetts and federal law with respect to present execution. See Breault, 401 Mass. at 31, n.6 (citing Mitchell v. Forsyth, 472 U.S. 511 (1985), and holding that the Court would reach the same result under Massachusetts and federal law).

in Maxwell's complaint thus rest, at least in part, on conduct by [the defendant] that is not subject to statutory immunity." 460 Mass. at 106. Moreover, while the statute at issue in Marcus imposed "no affirmative obligations on the owners of recreational land," neither do other statutes determined by this Court to provide immunities from suit. E.g., Fabre v. Walton, 436 Mass. 517, 521 (2002) (anti-SLAPP statute does not impose affirmative obligations); Brum v. Town of Dartmouth, 428 Mass. 684, 688 (1999) (Tort Claims Act does not impose affirmative obligations on public officials).

This Court should allow further appellate review to refocus the analysis on the original purpose of the present execution doctrine: "'If an appeal from [the] final disposition of the case would not be likely to protect the party's interests,' the order is appealable." Brum, 428 Mass. at 687. The test should be whether the defendant's claim of immunity -- if it applies -- would protect against "the burden of litigation and trial" in its entirety. Estate of Moulton v. Puopolo, 467 Mass. 478, 485 (2014).

This case presents precisely these circumstances. The charitable immunity statutes generally provide

broad immunity for all claims arising from a volunteer's conduct, with typical exceptions for willful or illegal conduct. Thus, if Dr. Crawford is entitled to charitable immunity, it is undisputed that Plaintiffs' case will be dismissed in its entirety, sparing Dr. Crawford from a trial. This is precisely the type of right that "cannot be remedied on appeal from a final judgment," and therefore should be appealable under present execution. Id.

B. The Superior Court Erroneously Denied Dr. Crawford Charitable Immunity Despite An Absence Of Evidence That He Participated In The Misconduct At Issue

This Court should also consider and reverse the Superior Court's Order denying charitable immunity. This application presents a straightforward question of law, which this Court may review *de novo*: whether a reasonable jury could find that Dr. Crawford acted willfully (thus disqualifying him from immunity) in the absence of any evidence that he participated in the Wage Act violation at issue.

Although the Superior Court correctly determined that the VPA applies to Plaintiffs' Wage Act claims, it incorrectly determined that the "willful or criminal misconduct" exception could apply here.

(Order at 8.) The only misconduct in this case is RoxComp's Wage Act violation, which is not a continuing violation, but rather created "discrete injuries" at the time RoxComp failed to pay. Crocker v. Townsend Oil Co., 464 Mass. 1, 10-12 (2012). Although no evidence suggested that Dr. Crawford participated in that violation,[9] the Superior Court determined that the willful conduct exception could apply based on two legally insufficient pieces of evidence: (i) an email sent on March 25, 2013 (three days after RoxComp's violation), by which "Crawford was made aware that RoxComp had $88,000 in a payroll account"; and (ii) an email "[d]ays later," on March 27, 2013, in which Dr. Crawford stated "that he wanted to use those funds to pay various RoxComp vendors, although he was open to suggestions." (Order at 8.)

Dr. Crawford's statements in those emails cannot, as a matter of law, show willful conduct in connection with the misconduct at issue: they post-date the violation by multiple days and reflect only upon Dr.

[9] The undisputed record at summary judgment demonstrates that CEO Wiley chose not to pay wages as required. See supra pages 6-8. While Dr. Crawford and the rest of the Board were advised of that decision, the Superior Court correctly held that mere awareness "would not rise to the level of 'willful or criminal misconduct.'" (Order at 8.)

Crawford's prospective intent at that later time. Thus, they are legally insufficient for a reasonable jury to find that Dr. Crawford acted willfully, and the Superior Court's Order should be vacated and reversed.

C. This Appeal Is Important To Millions Of Unpaid Volunteers Across The Commonwealth

This application should be granted for "substantial reasons affecting the public interest," and is in the "the interests of justice." See M.R.A.P. 27.1(a). Volunteerism is critically important to the Commonwealth: last year alone, in Massachusetts, 1,815,262 volunteers donated 141.3 million hours of service, contributing an economic value to the Commonwealth of more than $3.4 billion.[10] Indeed, by passing charitable immunity statutes, both Congress and the Massachusetts Legislature recognized the importance of encouraging volunteerism and sought to protect volunteers from suits like this one.[11]

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[10] Corporations for National and Community Services, Massachusetts Volunteerism Statistics, https://www.nationalservice.gov/serve/via/states/Massachusetts (last visited Dec. 18, 2018).

[11] See, e.g., 42 U.S.C. § 14501 (Congress's purpose in passing the VPA was to "sustain the availability of programs, nonprofit organizations, and governmental entities that depend on volunteer contributions" in

The Superior Court's ruling will impede the purposes of those statutes. If permitted to stand, unpaid volunteers providing good-faith services would be subjected to protracted litigation, as Dr. Crawford has been subjected to here. This would discourage volunteerism generally and create a perverse incentive for volunteers to abandon an organization when it likely needs help the most.

Likewise, the Appeals Court's decision introduces additional public uncertainty by foreclosing the right to appellate review of an order denying charitable immunity. In the future, there will almost certainly be other directors and volunteers facing claims that would be barred by charitable immunity.

Dr. Crawford has never been paid for his years of service as a volunteer director on RoxCom's Board, and now has endured four years of litigation, despite his valid claim of statutory immunity. As a matter of fairness and justice, this Court should hear this appeal now.

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light of its findings that "the willingness of volunteers to offer their services is deterred by the potential for liability actions against them," and that "many nonprofit public and private organizations . . . have been adversely affected by the withdrawal of volunteers from boards of directors and service in other capacities").

CONCLUSION

For the foregoing reasons, this appeal is appropriate for further appellate review by the Supreme Judicial Court.

Dated: Dec. 18, 2018
Boston, MA

Respectfully submitted,

/s/ Aaron T. Morris

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EXHIBIT A

Judy C. Lynch & others[1] *vs.* Roxbury Comprehensive Community Health Center, Inc., & another.[2]

No. 18-P-179.

Suffolk. October 4, 2018. - November 30, 2018.

Present: Milkey, Desmond, & Wendlandt, JJ.

Practice, Civil, Interlocutory appeal, Summary judgment, Judicial discretion. *Massachusetts Wage Act*. *Immunity from Suit*. *Federal Preemption*. *Statute*, Federal preemption.

This court concluded that, in determining whether the doctrine of present execution applies to a party's claim of immunity under a statute designed to encourage private conduct and allows an interlocutory appeal to be taken, the court must look to whether the statute speaks in terms of providing immunity only from liability and places no affirmative obligations on the protected party to take the actions being immunized and, if so, the court may not, without more, infer an intent to provide immunity from suit. [531-535]

This court concluded that, in a civil action alleging, inter alia, that the defendant chairperson of the board of directors of a nonprofit health care provider was personally liable for violations of the Wage Act, G. L. c. 149, § 148, the doctrine of present execution did not apply with respect to the defendant's claimed immunity under G. L. c. 231, § 85W, where the language of the statute spoke in terms of immunity only from liability, not from suit [535]; further, this court concluded that nothing in the Volunteer Protection Act, 42 U.S.C. § 14503 (2012), entitled the defendant to interlocutory review as of right of his claimed immunity under that statute, where, although the statute included an express Federal preemption provision, the language of that provision in no way addressed questions of State appellate procedure, and the plain language of the operative provision of the statute spoke in terms of immunity only from liability [536-538]; finally, this court declined to exercise its discretion to nonetheless reach the merits of the defendant's improper appeal (given that the issue raised was of limited import to other parties) [538] or issues raised in the plaintiffs' appeal (given that no party had requested that the court reach them as a matter of discretion, that there was at least some doubt whether the court could properly resolve the issues in the plaintiffs' favor in light of the lack of a cross appeal by the plaintiffs, that the

[1]Johanna Vega, Iris Montijo, Marie Maxis, Maltina Kelsey, Elizabeth Rhodes, Reshauna Jackson, Hycienth Jackson, Gwendolyn Smith, Kennia Moreno, Wendy Pavlovich, Michelle Villarta, Connie Cohen, Shipra Chadda, Pedro Alvarez, and Rachel Woolson.

[2]Keith D. Crawford.

single justice had already declined to allow a discretionary appeal, and that neither side had briefed with care and completeness the issues whether Wage Act claims fell within the scope of the two immunity statutes) [538-539].

CIVIL ACTION commenced in the Superior Court Department on October 24, 2013.

The case was heard by *Paul D. Wilson*, J., on motions for summary judgment, and a motion for reconsideration was considered by him.

Christopher G. Clark for Keith D. Crawford.

Andrew E. Goloboy for the plaintiffs.

MILKEY, J. The plaintiffs are former employees of the Roxbury Comprehensive Community Health Center, Inc. (RCCHC), a now-defunct, nonprofit health care provider. Alleging that they were not paid wages owed to them, the plaintiffs brought the current action against RCCHC pursuant to the Wage Act, G. L. c. 149, § 148. They also asserted that defendant Keith D. Crawford, the chairman of RCCHC's board of directors, personally was liable for the alleged Wage Act violations.[3] Crawford moved for summary judgment, arguing that — as a volunteer director of a nonprofit institution — he enjoyed immunity from Wage Act claims. He asserted such immunity based on two separate statutes: the Volunteer Protection Act (VPA), 42 U.S.C. § 14503 (2012), and G. L. c. 231, § 85W. A Superior Court judge concluded that these statutes applied to Wage Act claims. However, the judge ultimately denied Crawford's motion for summary judgment on the ground that there was a dispute of fact over whether Crawford's conduct here fell within statutory exceptions to such immunity.[4] After Crawford unsuccessfully pursued a motion for reconsideration, he appealed. We are now called upon to decide whether this appeal is properly before us. For the reasons that follow, we conclude that it is not, and we decline to exercise our discretion to reach the underlying merits. Accordingly, we dismiss the appeal.

Background. We summarize the relevant facts set forth in the summary judgment record in the light most favorable to the plain-

[3]Initially, the plaintiffs also joined a second board member as a defendant. A separate and final judgment entered in favor of that defendant pursuant to Mass. R. Civ. P. 54 (b), 365 Mass. 820 (1974), and no appeal was taken. Therefore, no issues regarding the second individual are before us.

[4]The plaintiffs filed a cross motion for summary judgment, which the judge also denied. The propriety of that ruling is not before us.

tiffs, the nonmoving party. *Augat* v. *Liberty Mut. Ins. Co.*, 410 Mass. 117, 120 (1991).

1. *The alleged Wage Act violations*. By early 2013, RCCHC began to experience serious financial difficulties. At that time, Crawford served not only as chairman of RCCHC's board, but also held himself out as its "[p]resident" and "acting CEO." Crawford learned by February 25, 2013, that RCCHC did not intend to pay its employees for future work unless and until a Federal grant came through. He also learned that RCCHC likely would be unable to meet its payroll obligations on March 15, 2013. Nevertheless, he personally encouraged the employees to keep working and assured them that they would get paid. RCCHC did in fact miss its payroll on March 15, 2013, and it had not paid its employees by March 22, 2015 (the date by which Crawford alleges any Wage Act violation accrued). As documented by electronic mail messages (e-mails) sent a few days after that, once apprised of limited funds remaining in RCCHC's payroll account, Crawford suggested using that money toward paying off RCCHC's vendors instead of its employees.

2. *The interlocutory rulings for which review is sought*. The plaintiffs allege that with Crawford effectively having served as "president" of RCCHC, he personally is liable for the Wage Act violations. See G. L. c. 149, § 148 (defining "employer" for purpose of Wage Act as including president of corporation). Crawford's principal defense was that because he was not paid for any roles he was serving at RCCHC, a nonprofit entity, he is immune from a Wage Act violation by operation of the VPA and its State counterpart, G. L. c. 231, § 85W.[5]

As noted, the judge denied Crawford's motion for summary judgment on the ground that the plaintiffs had raised a triable issue as to whether Crawford's conduct met the exceptions set forth in the two immunity statutes. With respect to the VPA, the judge concluded that "there is at least some evidence in the record from which a jury could conclude that Crawford engaged in 'willful' misconduct," which falls outside the immunity provided by the statute. With respect to G. L. c. 231, § 85W, the judge ruled

[5]Crawford also argued that he was entitled to statutory immunity under G. L. c. 231, § 85K, which provides immunity for "director[s], officer[s] or trustee[s] of [tax-exempt] educational institution[s]." The judge concluded that Crawford was not entitled to immunity under § 85K because RCCHC did not qualify as an "educational institution" under the statute, and Crawford has abandoned any reliance on § 85K on appeal.

that there was some evidence upon which a jury could conclude that Crawford's acts were "intentionally designed to harm" the plaintiffs, which would place them outside the scope of the immunity that statute provided.

In his motion for reconsideration, Crawford argued that the only real evidence that he might have engaged in disqualifying conduct was the e-mails that could be taken to indicate his preference to pay RCCHC's vendors over its employees. According to him, these e-mails could not be considered because of their timing, the e-mails having been sent only after any Wage Act violations already had occurred. The judge denied the motion for reconsideration, and Crawford appealed.[6]

Discussion. 1. *Whether an interlocutory appeal is proper*. The initial question we face is whether the current interlocutory appeal is properly before us.[7] The denial of a motion for summary judgment is a classic interlocutory ruling that typically cannot be appealed. See *Elles* v. *Zoning Bd. of Appeals of Quincy*, 450 Mass. 671, 673-674 (2008). There are, however, recognized exceptions to this rule, including those that are denominated collectively as the doctrine of present execution (a venerable, if confusing, label). *Id.* at 674. In short, under that doctrine, immediate appeals are allowed "where the interlocutory ruling 'will interfere

[6]Meanwhile, pursuant to G. L. c. 231, § 118, first par., Crawford requested that the single justice allow him to bring an interlocutory appeal challenging the denial of his motion for summary judgment. The single justice denied that petition, thereby declining to refer the matter to a three-judge panel. However, in his order, the single justice indicated that if Crawford believed he enjoyed an appeal as of right pursuant to the doctrine of present execution, the proper procedure was to file a notice of appeal in Superior Court.

[7]If the doctrine of present execution applies, then there is no separate timing problem with Crawford's appeal, even though he did not file his notice of appeal until well after thirty days from the date the order denying his motion for summary judgment was docketed. That is because within ten days of that order, he served on the plaintiffs a motion for reconsideration, and then brought his appeal within thirty days of the denial of that motion. Were the denial of his motion for summary judgment determined to be appealable pursuant to the doctrine of present execution, then that order is considered as a final judgment for purposes of the appellate rules, and the timely motion for reconsideration is deemed to be have tolled the running of the appeal period. See *Slade* v. *Ornsby*, 69 Mass. App. Ct. 542, 544-545 (2007) (because disqualification order is subject to doctrine of present execution, it is treated as final judgment, and timely motion to reconsider such ruling is treated as motion for amendment of judgment pursuant to Mass. R. Civ. P. 59 [e], 365 Mass. 827 [1974]). Hence, the key question here is whether the doctrine of present execution applies; no separate timing impediments are present.

with rights in a way that cannot be remedied on appeal' from the final judgment, and where the matter is 'collateral' to the merits of the controversy." *Id.*, quoting *Maddocks* v. *Ricker*, 403 Mass. 592, 597-600 (1988).

As relevant here, the question whether the doctrine of present execution applies comes down to whether the statutes at issue here confer immunity from suit, or merely immunity from liability. If the statutes confer immunity only from liability, a defendant who is compelled to defend himself at trial remains in a position fully to vindicate his rights in an appeal taken after final judgment has entered. *Breault* v. *Chairman of the Bd. of Fire Comm'rs of Springfield*, 401 Mass. 26, 31 (1987), cert. denied sub nom. *Forastiere* v. *Breault*, 485 U.S. 906 (1988). However, if the defendant is entitled to immunity from suit, then having to continue to defend himself in the litigation works a separate wrong that a deferred appeal cannot undo. *Id.* ("If . . . the asserted right is one of freedom from *suit*, the defendant's right will be lost forever unless that right is determined [on interlocutory appeal]"). In that situation, the doctrine of present execution is said to apply, and an interlocutory appeal can be taken.[8] See *id.*

Although the theory behind the case law is straightforward, difficulties abound in applying such principles in practice. A pair of relatively recent cases from the Supreme Judicial Court well illustrates this. In *Maxwell* v. *AIG Domestic Claims, Inc.*, 460 Mass. 91, 93-94 (2011), a workers' compensation insurer concluded that an employee of an insured may have filed a fraudulent claim, and it therefore referred that individual to the private investigatory body known as the Insurance Fraud Bureau (IFB). Based on that referral and related actions, the employee brought an action against the insurer alleging malicious prosecution and similar claims. *Id.* at 100. In defense, the insurer claimed qualified immunity pursuant to St. 1996, c. 427, § 13 (*i*), the statute that created the IFB and the reporting system that insurers are

[8]The cases generally speak of the need for the appellate issue to be " 'collateral' to the merits of the [underlying] controversy" as an independent prerequisite for the doctrine of present execution to apply. See, e.g., *Elles*, 450 Mass. at 674. However, they do not appear to demand separate analysis of this question when the defense at issue is one of immunity. See *Estate of Moulton* v. *Puopolo*, 467 Mass. 478, 485 (2014), quoting *Kent* v. *Commonwealth*, 437 Mass. 312, 317 (2002) ("[T]he denial of a motion to dismiss on immunity grounds is always collateral to the rights asserted in the underlying action because it 'is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated' ").

mandated to follow.[9] *Id.* at 98. After its motion for summary judgment claiming such immunity was denied, the insurer filed an appeal. *Id.* at 97-98. Even though the relevant statutory language speaks only in terms of insurers being protected from "liability," see note 9, *supra*, the court inferred a "legislative intent" to protect insurers from suit. *Id.* at 102. The court reasoned that "[r]eporting to the IFB might be chilled if protection could be secured only after litigating a claim through to conclusion, so we conclude that [the statute] should be interpreted as providing [insurers] immunity from suit rather than mere immunity from liability." *Id.* at 98. In other words, the court examined whether the over-all purpose of the statute might be frustrated if an interlocutory appeal could not be taken. See *id.* Based on that approach, the court concluded that the doctrine of present execution applied and proceeded to reach the merits.[10]

A year after *Maxwell* was decided, the Supreme Judicial Court issued its decision in *Marcus* v. *Newton*, 462 Mass. 148 (2012). The plaintiff there was injured during a softball game on a public ballfield. *Id.* at 149. The defendant city asserted that it was immune based on the recreational use statute, G. L. c. 21, § 17C.[11] *Id.* at 150. That statute provides immunity to entities that make their land available for recreational or related uses without remuneration.[12] Like the statute in *Maxwell*, see 460 Mass. at 98, the recreational use statute in *Marcus* provides only qualified immu-

[9]Under that statute, "[i]n the absence of malice or bad faith, no insurer . . . shall be subject to civil liability for damages by reason of any statement, report or investigation made pursuant to the provisions of this section." St. 1996, c. 427, § 13 (*i*).

[10]The court ultimately upheld the denial of the motion for summary judgment, concluding that the plaintiff's claims were based, "at least in part, on conduct by [the insurer] that is not subject to statutory immunity."*Maxwell*, 460 Mass. at 106.

[11]Although the defendant in *Marcus* was a municipality, it was asserting immunity under a generally applicable statute. Therefore, special considerations applicable to governmental officials acting in their official capacity were not implicated. Compare *Littles* v. *Commissioner of Correction*, 444 Mass. 871, 875-876 (2005) (doctrine of qualified immunity protecting government officials from liability for exercise of discretion includes immunity from suit).

[12]The operative provision of G. L. c. 21, § 17C, provides:

> "Any person having an interest in land . . . who lawfully permits the public to use such land for recreational, conservation, scientific, educational, environmental, ecological, research, religious, or charitable purposes without imposing a charge or fee therefor . . . shall not be liable for personal injuries or property damage sustained by such members of the

nity; land owners are immunized from liability for injuries arising out of their ordinary negligence, but not for "wilfull, wanton or reckless conduct." *Marcus*, *supra* at 153. See St. 1996, c. 427, § 13 (*i*) ("In the absence of malice or bad faith"); G. L. c. 21, § 17C. Also like the statute in *Maxwell*, the recreational use statute speaks only in terms of immunity from liability. See note 12, *supra*. Focusing on the statute's plain language, the court concluded that it did not provide immunity from suit and that the doctrine of present execution therefore did not apply.[13] *Marcus*, *supra*. The court did not engage in the type of analysis on which *Maxwell* rests; that is, it did not examine whether the purpose of the recreational use statute — to encourage people to make their land available for public use — "might be chilled if protection could be secured only after litigating a claim through to conclusion." *Maxwell*, *supra*. In fact, *Marcus* does not mention *Maxwell* at all.

Employing, as they do, different modes of analysis, *Maxwell* and *Marcus* are somewhat difficult to harmonize. On the surface, the specific reasoning on which each case rests would seem to apply to the other, and yet the cases reached opposite results on whether an interlocutory appeal was proper. However, there is one potential distinction between the two cases, and absent the Supreme Judicial Court's explicit guidance on how to harmonize them, we infer that the court must have deemed this distinction significant. In *Maxwell*, 460 Mass. at 98, the court placed sustained emphasis on the fact that the same statute that provided immunity to insurers also placed strict reporting requirements on them.[14] Indeed, it is the insurers' fulfilling such reporting duties that is the very subject of the immunity that the statute concurrently offers. See *id.* The court's emphasis on the insurers' mandatory reporting duties strongly suggests that the court viewed the Legislature's creation of those obligations as going hand-in-hand with insurers being provided full immunity from suit for complying with them (perhaps even as an implied quid pro quo). See *id.*

public . . . while on said land in the absence of wilful, wanton, or reckless conduct by such person."

[13]Nevertheless, the court went on to exercise its discretion to reach the merits. *Marcus*, 462 Mass. at 153.

[14]Thus, for example, the court highlighted that "the statute mandates that insurers promptly report transactions to the IFB where they merely 'hav[e] reason to believe' that fraud may have occurred."*Maxwell*, 460 Mass. at 98.

By contrast, the recreational use statute at issue in *Marcus* places no affirmative obligations on the owners of recreational land. See G. L. c. 21, § 17C. Rather, it simply offers incentives for such owners to open their land to the public for such use. See *id.* Reading *Maxwell* and *Marcus* together, we conclude that where a statute designed to encourage private conduct speaks in terms of providing immunity only from liability, and that statute places no affirmative obligations on the protected party to take the actions being immunized, courts are not, without more, to infer an intent to provide immunity from suit.[15]

With this understanding in place, we turn to the specific statutes before us. We begin with the State statute, because the analysis that applies to it is more straightforward.

The language of G. L. c. 231, § 85W, speaks in terms of immunity only from liability, not from suit.[16] Moreover, like the recreational use statute, § 85W imposes no obligations on people who serve as volunteer board members of nonprofit institutions, but rather merely encourages such volunteerism by removing a potential impediment (fear of liability). See G. L. c. 231, § 85W. We have no basis for distinguishing this case from *Marcus*, 462 Mass. at 153, and therefore hold that the doctrine of present execution does not apply with respect to Crawford's claimed immunity under State law.

[15]We do not view *Estate of Moulton*, 478 Mass. at 479-481, as a counter example. In that case, the estate of an employee at a health care provider sought to bring a wrongful death action against the entity's directors, and the issue was whether such an action was barred by the workers' compensation act, the relevant provision of which was incorporated into the wrongful death statute by reference. *Id.* The workers' compensation act provides that "[c]ompensation under the act is the exclusive remedy for injuries to an employee suffered in the course of employment, regardless of the wrongfulness of the employer's conduct . . . or the foreseeability of harm." *Id.* at 482-483. Characterizing the exclusive remedy provision as providing employers a species of immunity from suit, the court held that the doctrine of present execution applied. *Id.* at 485-486.

[16]In pertinent part, G. L. c. 231, § 85W, provides:

> "no person who serves without compensation . . . as an officer, director or trustee of any nonprofit charitable organization . . . shall be liable for any civil damages as a result of any acts or omissions relating solely to the performance of his duties as an officer, director or trustee; provided, however, that the immunity conferred by this section shall not apply to any acts or omissions intentionally designed to harm or to any grossly negligent acts or omissions which result in harm to the person."

We turn then to whether the plaintiffs nonetheless have the right to pursue their interlocutory appeal by force of the VPA. Generally speaking, the operative provisions of the VPA and G. L. c. 231, § 85W, are similar in both wording and function.[17] However, the analytical framework that applies to our consideration of the VPA is somewhat different from the one that applies to its State counterpart. That is because the question whether the VPA bestows on Crawford an interlocutory appeal as of right implicates issues of federalism.[18] Since the VPA includes an express preemption clause, it is plain that Congress intended it to preempt State law to some extent. See 42 U.S.C. § 14502(a) (2012).[19] But the existence of that provision does not resolve the particular preemption issue before us in the current appeal. For the reasons set forth above, as a matter of Massachusetts appellate law, Crawford cannot appeal the denial of his motion for summary judgment but instead may raise his immunity claims on appeal only after final judgment has entered. With respect to the VPA, the question then is whether, by enacting that statute, Congress intended to preempt State law by conferring on people in Crawford's position a statutory entitlement to immediate appellate review in State court.

In addition to applying a general presumption against Federal preemption, appellate courts are particularly loath to infer preemption of neutral procedural rules established by State courts. See *Ajemian* v. *Yahoo!, Inc.*, 478 Mass. 169, 178 (2017), cert. de-

[17]In pertinent part, the VPA generally provides:

> "no volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity if . . . the volunteer was acting within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity at the time of the act or omission . . . [and] the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer."

42 U.S.C. § 14503(a).

[18]In addition, because the VPA is a Federal statute, we must apply interpretive rules established by the United States Supreme Court.

[19]In pertinent part, the preemption clause of the VPA provides that "[the VPA] preempts the laws of any State to the extent that such laws are inconsistent with this chapter, except that this chapter shall not preempt any State law that provides additional protection from liability relating to volunteers or to any category of volunteers in the performance of services for a nonprofit organization or governmental entity." 42 U.S.C. § 14502(a).

nied sub nom. *Oath Holdings, Inc.* v. *Ajemian*, 138 S. Ct. 1327 (2018) ("we presume that Congress did not intend to intrude upon traditional areas of State regulation or State common law unless it demonstrates a clear intent to do so"). As the United States Supreme Court has stated, "[w]hen a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, we must act with utmost caution before deciding that it is obligated to entertain the claim." *Howlett* v. *Rose*, 496 U.S. 356, 372 (1990). Cf. *St. Fleur* v. *WPI Cable Sys./Mutron*, 450 Mass. 345, 352 (2008) (procedural rules set forth in Federal Arbitration Act do not apply in State courts).

We find particularly instructive a line of United States Supreme Court cases involving interlocutory review of qualified immunity defenses raised with regard to civil rights claims brought pursuant to 42 U.S.C. § 1983 (2012). The Court long ago recognized that qualified immunity provides defendants protection "from the burdens of trial as well as a defense to liability." *Johnson* v. *Fankel*, 520 U.S. 911, 915 (1997). See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). In addition, the Court held that a defendant who has raised qualified immunity as a defense to a § 1983 action brought in Federal court has the right to bring an interlocutory appeal of the denial of a motion to dismiss. See *Mitchell* v. *Forsyth*, 472 U.S. 511, 524-530 (1985). In *Johnson*, *supra* at 918-921, the Court faced the question whether such an official had a Federal right to seek an interlocutory appeal when the § 1983 claim was brought in State court. The Court held that no such right existed, and that therefore no interlocutory appeal would lie in States whose rules did not permit one. *Id.* at 920-921.

With such cases in mind, we see nothing in the VPA that entitles Crawford to interlocutory review as of right. Although the VPA includes an express preemption provision, the language of that provision in no way addresses questions of State appellate procedure. See note 19, *supra*. Moreover, like its State counterpart, the plain language of the operative provision of the VPA speaks in terms of immunity only from liability. See 42 U.S.C. § 14503(a). To be sure, a separate section of the VPA setting forth legislative findings does include some Congressional expressions of concern over volunteer board members facing undue litigation costs, not just liability.[20] However, we do not view such state-

[20]See 42 U.S.C. § 14501(a) (2012) ("Congress finds and declares that . . . the willingness of volunteers to offer their services is deterred by the potential for

ments, standing alone, as commanding State interlocutory appellate review when such an appeal otherwise would not be available.[21]

2. *Whether to reach the merits*. Although we have concluded that Crawford's appeal is not properly before us, we still could reach the underlying merits as a matter of our discretion. See, e.g., *Commonwealth* v. *Delnegro*, 91 Mass. App. Ct. 337, 343 (2017). Reaching the merits in an improper appeal typically is done only where the relevant claim "has been briefed fully by the parties, it raises a significant issue [of law], and addressing it would be in the public interest." *Marcus*, 462 Mass. at 153 (even in absence of proper interlocutory appeal, court chose to address whether defendant city could claim immunity under recreational use statute). The legal issues that Crawford urges us to address go to whether the judge erred in determining that the particular summary judgment record here raised triable questions of fact with regard to the application of exceptions to the immunity statutes. Such record-bound issues are of limited import to other parties, and we decline to reach them.

Our job is not yet done, because we also face whether to reach certain legal issues that the plaintiffs themselves raised in litigating this appeal. Specifically, the plaintiffs question, as they did in Superior Court, whether the immunity provided by the VPA and G. L. c. 231, § 85W, even applies to Wage Act claims. According to the plaintiffs, both immunity statutes were intended to cover only common-law tort claims, not statutory claims of the sort at issue here. These threshold issues are pure questions of law that have potentially broad application.

Nevertheless, we decline to reach these issues in the current appeal for four reasons. First, no party actually has requested that

liability actions against them . . . [and that] due to high liability costs and unwarranted litigation costs, volunteers and nonprofit organizations face higher costs in purchasing insurance, through interstate insurance markets, to cover their activities").

[21]It bears noting that Congress's providing immunity from liability itself helps reduce litigation costs through resolving cases sooner or discouraging them altogether. Therefore, the fact that Congress expressed concern over volunteer directors potentially facing litigation costs does not mean that Congress necessarily intended to provide them with immediate rights of appeal. Moreover, allowing interlocutory appeals, of course, lowers litigation costs for an appellant only where he actually prevails in such an appeal.

we reach them as a matter of our discretion.[22] Second, because the plaintiffs pursued no cross appeal, there is at least some doubt whether we properly could resolve these issues in their favor in the current interlocutory appeal.[23] Third, the single justice already declined to allow a discretionary appeal here (see note 6, *supra*), and, nothing having changed since that ruling, we are disinclined to revisit it. Fourth, although both sides have touched on whether Wage Act claims fall within the scope of the two immunity statutes, neither side has briefed such issues with the care and completeness that they deserve. See *Phillips* v. *Youth Dev. Program, Inc.*, 390 Mass. 652, 660 (1983) (declining to reach issue "raised as an afterthought and not fully briefed on both sides"). We note, for example, that consideration whether Congress intended the VPA to preempt States from subjecting volunteer board members to Wage Act claims necessitates a level of analysis absent from the parties' current briefs. It would be imprudent for us to decide such issues based on the current state of those briefs.

Appeal dismissed.

[22]The plaintiffs' brief requests that we dismiss this appeal, and it questions whether the immunity statutes apply only as a fallback argument should we reach the merits.

[23]We could not grant the relief that Crawford seeks through this interlocutory appeal — judgment in his favor as a matter of law — without considering whether the judge was correct in ruling that the immunity statutes applied to Wage Act claims. In addition, as a general matter, we can affirm a final judgment on any ground supported by the record. See *Roman* v. *Trustees of Tufts College*, 461 Mass. 707, 711 (2012) ("we may affirm the [grant of summary] judgment on any ground supported by the record"). However, the extent to which that principle applies to an interlocutory appeal of the denial of summary judgment is more complicated. Were we to rule that the immunity statutes did not apply to the Wage Act, this would provide the plaintiffs more encompassing relief than they obtained in Superior Court (the denial of Crawford's motion for summary judgment based on there being facts in dispute), a result that typically cannot occur in the absence of a cross appeal. Cf. *Taylor* v. *Beaudry*, 82 Mass. App. Ct. 105, 112 (2012) ("It is blackletter law that in the absence of a cross appeal an appellee may not obtain a decree more favorable than the one issued below").

EXHIBIT B

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2013-3785-G
NO. 2016-0438-G

JUDY C. LYNCH & others[1]

vs.

KEITH D. CRAWFORD & others[2]

Consolidated with

KENNIA MORENO & others[3]

vs.

KEITH D. CRAWFORD & another[4]

MEMORANDUM OF DECISION AND ORDER ON THE PARTIES' MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs are two groups of former employees of the Roxbury Comprehensive Community Health Center, Inc. ("RoxComp"). Plaintiffs allege that Defendants Keith Crawford, M.D. and Lawrence Smith, former members of the RoxComp Board of Directors, owe Plaintiffs for unpaid wages and accrued vacation time under G.L. c. 149, §§ 148, 150 (the "Wage Act"). This matter is before me on the parties' cross motions for summary judgment.[5] For the

[1] Johanna Vega, Iris Montijo, Marie Maxis, Maltina Kelsey, Elizabeth Rhodes, Reshauna Jackson, Hycienth Jackson, Gwendolyn Smith, Oswald Henderson, Denise Fergusin, and Guity Valizadeh (the "Lynch Plaintiffs")

[2] Lawrence J. Smith, Jr. and John Doe 1-50

[3] Wendy Pavlovich, Michelle Villarta, Connie Cohen, Shipra Chadda, Pedro Alvarez, and Rachel Woolson (the "Moreno Plaintiffs")

[4] Lawrence J. Smith, Jr.

[5] Plaintiffs Henderson, Fergusin, and Valizadeh are not listed as moving parties on Plaintiffs' motion. According to Defendants, these Plaintiffs informed Defendants that they no longer wished to pursue this case but have not yet

following reasons, Defendants' motion is **ALLOWED IN PART** and **DENIED IN PART** and Plaintiffs' motion is **DENIED**.

BACKGROUND

RoxComp was a licensed, nonprofit community health center located in Roxbury. RoxComp provided healthcare services at low or no cost to underserved portions of the community. RoxComp's Articles of Organization state that the health center was established to, in part, "prevent illness and to maintain health in the community . . . and to render social, and education, and other assistance needed by the families and individuals served . . . ."

Plaintiffs were employed at RoxComp in various positions, including as pediatricians, social workers, and dentists. Defendants joined RoxComp's Board of Directors (the "Board") as volunteer members in 2009. At a September 2011 Board meeting, Crawford was elected as Chairman of the Board and Smith was elected as Vice Chair and Interim Treasurer.

On January 24, 2013, RoxComp filed its annual report with the Massachusetts Secretary of the Commonwealth. In this filing, Crawford is listed as the "President" of RoxComp and Smith is listed as the "Treasurer." This document was signed by Crawford under the penalties of perjury.

Around this same time, RoxComp's corporate charter was revoked for failure to file annual reports for the preceding three years. Thus, an "Application for Revival" was submitted to the Massachusetts Secretary of the Commonwealth in order to revive RoxComp's corporate charter. Crawford signed the application under the penalties of perjury and listed his title with RoxComp as "President." The application was filed on January 25, 2013.

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filed formal notices of dismissal. See Defendants' Memorandum in Support of Summary Judgment at footnote 3. Below I direct the clerk to issue a 30-day nisi order as to the claims of these Plaintiffs.

Further, on February 4, 2013, RoxComp filed a "Certificate of Change of Directors or Officers of Non-Profit Corporations" form with the Secretary of the Commonwealth. On this form, which Crawford also signed under the penalties of perjury, Crawford is listed as the "President" of RoxComp. On this same form, Smith is listed as the "Treasurer" of RoxComp. Smith acknowledges in his deposition testimony that he was in fact the treasurer of RoxComp.[6]

Also in early 2013, RoxComp was facing various financial and regulatory challenges. In efforts to keep RoxComp afloat, various changes in leadership were implemented. RoxComp's CEO, Anita Crawford,[7] was placed on administrative leave, and new interim CEO Pratt Wiley was appointed. Despite this change in leadership, the situation at RoxComp did not improve. In a February 25, 2013 memorandum, interim CEO Wiley informed the members of the Board, apparently including Defendants, that RoxComp did not "intend to make payroll until after" a federal reimbursement was received.

Finally, in March of 2013, RoxComp closed. In a March 20, 2013 memorandum to the Board, Wiley informed the Board members that RoxComp would begin winding down its affairs. On March 22, 2013, RoxComp closed its doors and surrendered its clinical license. As a result of the financial difficulties facing RoxComp prior to ceasing operations, Plaintiffs were not paid for work performed after February 25, 2013.

After RoxComp closed, Crawford actively assisted in efforts to wind down RoxComp's affairs. Specifically, on March 25, 2013, Crawford received an email written the same day by Bob Whiting, the former controller of RoxComp, summarizing the status of RoxComp bank

[6] Portions of Smith's deposition testimony are contained in the record at Exhibit 17 of the parties' Joint Appendix for Plaintiffs' Motion for Summary Judgment. Smith states the he "held the title of treasurer" and that his role was "the typical treasurer's role."

[7] Anita Crawford is not related to Defendant Keith Crawford.

accounts.[8] The Whiting email stated that the balance in the RoxComp payroll account was estimated to be about $88,000. Two days later, on March 27, Crawford communicated with Whiting regarding outstanding bills from various RoxComp vendors. During the course of the email communication with Whiting, Crawford stated, "I would like to use the funds available in the bank to pay those venders [sic] but I am open to suggestions." It is a fair inference that Crawford was referring to the $88,000 in the payroll account, because the Whiting email of March 25 had disclosed that RoxComp's operating account currently stood in a $15,000 deficit, and further pointed out that money could be transferred from the payroll account into the operating account.

On April 4, 2013, the Massachusetts Attorney General's Office filed a receivership action against RoxComp in Suffolk Superior Court.[9] In that receivership lawsuit, in an order dated January 14, 2016, Judge Fahey ruled that "RoxComp's W-2 employees are entitled to treble damages" on unpaid wages and accrued vacation time, and to attorneys' fees, from the assets of RoxComp, because of RoxComp's violation of the Wage Act. It is a fair inference that those assets were insufficient to cover this liability to the employees.

Looking to Defendants Crawford and Smith to pay RoxComp's Wage Act obligations, the Lynch Plaintiffs brought suit on October 24, 2013, and the Moreno Plaintiffs brought suit on February 10, 2016. Judge Ullmann consolidated the two cases on April 13, 2016. The parties filed cross motions for summary judgment on August 22, 2016. I heard argument on December 21, 2016.

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[8] Crawford received this information in an email sent to him by Michael Ndungu, who forwarded to Crawford the March 25, 2013 email from Whiting described in this paragraph. Joint Appendix for Defendants' Motion for Summary Judgment at Exhibit 70. The record does not make clear Ndungu's role at RoxComp.

[9] Martha Coakley Attorney Gen. v. Roxbury Comprehensive Cmty. Health Ctr., Inc., No 13-1284H (Suffolk Super. Ct.)

DISCUSSION

Summary judgment should be granted where, "viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." Nelson v. Salem State Coll., 446 Mass. 525, 530 (2006). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Cmty. Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976). The moving party bears the burden of proving that "there is no genuine issue of material fact on every relevant issue." Pederson v. Time, Inc., 404 Mass. 14, 17 (1989).

1. Defendants as Plaintiffs' "Employer" under the Wage Act

The Wage Act requires employers to timely pay employees' wages, and holds employers strictly liable for treble damages. G.L. c. 149, § 148; Somers v. Converged Access, Inc., 454 Mass. 582, 589, 592 (2009). The Wage Act also provides that "[t]he president and treasurer of a corporation and any officers or agents having the management of such corporation shall be deemed to be the employers of the employees of the corporation . . . ." G.L. c. 149, § 148.

Defendants first argue that they cannot be held individually liable under the Wage Act because neither Defendant qualifies as Plaintiffs' "employer" for purposes of the Wage Act. According to Defendants, although they served as Board members, Crawford was not the president of RoxComp and Smith was not the treasurer of RoxComp. Based upon the evidence in the record, Defendants' argument on this point is unpersuasive.

As to Crawford, there is ample evidence in the record from which a jury could reasonably conclude that he was the president of RoxComp and thus liable under the Wage Act as Plaintiffs'

"employer." Significantly, in response to the revocation of RoxComp's corporate charter, RoxComp submitted to the Secretary of Commonwealth's office an "Application for Revival." In this application, Crawford stated under the penalties of perjury that he was the president of RoxComp. Crawford also signed under the penalties of perjury the January 2013 Annual Report, and the "Certificate of Change of Directors or Officers of Non-Profit Corporations" form, both listing himself as the president of RoxComp.

Defendants seek to analogize the facts of this case to Yayo v. Museum of Fine Arts, 2014 U.S. Dist. LEXIS 86992 (D. Mass. June 26, 2014). In that case, the United States District Court for the District of Massachusetts granted summary judgment for a defendant, a board member of the Museum of Fine Arts ("MFA"), on the plaintiff's Wage Act claim. Id. at *26. There, even though the defendant board member was listed as the president of the MFA in the MFA's annual filing with the Secretary of the Commonwealth's office, the court found that there was no basis to hold the board member individually liable. Id. However, the facts of Yayo are distinguishable in one key respect. In Yayo, there was no allegation that the defendant board member signed and filed with the Secretary of the Commonwealth's office, under the penalties of perjury, any document listing himself as President, whereas here, Crawford did just that.

As to Smith, his own deposition testimony contradicts his claim that he was not the treasurer of RoxComp. Smith testified at his deposition that he held the position of treasurer and stated that his role was "the typical treasurer's role." Smith is also listed as the treasurer of RoxComp on the "Certificate of Change of Directors and Officers of Non-Profit Corporations" form that was filed with the Secretary of the Commonwealth on February 4, 2013, and in the January 2013 Annual Report (although Smith did not sign these filings with the Secretary of the Commonwealth, as Crawford did).

Thus, there is evidence in the record from which a reasonable finder of fact could conclude that both Defendants were Plaintiffs' "employer," subjecting Defendants to liability under the Wage Act.

2. Volunteer Immunity

Defendants next argue that even if they qualify as Plaintiffs' "employer" for purposes of the Wage Act, as unpaid volunteers at RoxComp they are entitled to immunity under three statutes: (1) the federal Volunteer Protection Act, 42 U.S.C. § 14503 (the "VPA"); (2) G.L. c. 231, § 85K; and (3) G.L. c. 231, § 85W. I address each in turn below.

a. Immunity Pursuant to the Federal Volunteer Protection Act

The VPA provides, in relevant part, that, "no volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity if the volunteer was acting within the scope of the volunteer's responsibilities . . . [and] the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer . . . ." 42 U.S.C. § 14503(a). Thus, volunteers are entitled to invoke immunity under the VPA for harm caused while acting within the scope of the volunteer's responsibilities, unless one of the above listed statutory exceptions applies.

Plaintiffs argue that the VPA does not operate to immunize Defendants for two reasons. First, Plaintiffs argue that the VPA applies only to tort claims, and thus is inapplicable to the claims at issue in this case. Yet nothing in the text of the statute limits the statute's applicability solely to tort claims. The parties do not cite to any controlling authority for their respective interpretations of the statute. The cases the parties cited reveal that the courts that have considered the issue have likewise reached varying interpretations. Compare, e.g., Wäschle v.

Winter Sports, Inc., 127 F. Supp. 3d 1090, 1094-1095 (D. Mont. 2015) (the VPA "was enacted due to a concern that the willingness of volunteers to offer their services would be deterred by the fear of negligence claims against them") with Armendarez v. Glendale Youth Ctr., Inc., 265 F. Supp. 2d 1136, 1140 n.5 (D. Ariz. 2003) ("the historical and statutory notes following the VPA state, 'this Act applies to *any* claim for harm caused by an act or omission of a volunteer'")(emphasis in original). While the law is unsettled on this point, given that the plain language of the statute does not limit the VPA's applicability solely to tort claims, the better view is that VPA immunity is not limited in that fashion. Therefore, Defendants are entitled to invoke its protections, unless an exception to immunity applies.

And Plaintiffs argue that an exception does prevent Defendants from claiming immunity under the VPA. Even if the VPA applies to non-tort claims, Plaintiffs say, Defendants are still not entitled to immunity because their conduct constituted "willful or criminal misconduct" which, the VPA provides, forfeits VPA immunity.

The only evidence in the record regarding Smith's alleged "willful or criminal misconduct" is the fact that Smith was aware by February 25, 2013 that RoxComp did not intend to fulfil its payroll obligations, but nonetheless allowed employees to continue working. But such passive conduct, if proven, would not rise to the level of "willful or criminal misconduct."

In contrast, there is at least some evidence in the record from which a jury could conclude that Crawford engaged in "willful" misconduct. Crawford was made aware that RoxComp had $88,000 in a payroll account on March 25, 2013. Days later, Crawford stated in an email that he wanted to use those funds to pay various RoxComp vendors, although he was open to suggestions. From this, a jury could conclude that Crawford actively encouraged the RoxComp employees who paid the bills to use the money in RoxComp's payroll account for purposes other

than to pay employees. Whether Crawford's acts or omissions rose to the level of "willful" for purposes of the VPA is a question of fact to be determined by the finder of fact at trial. See Nashua Corp. v. First State Ins. Co., 420 Mass. 196, 204 (1995) ("party's intent is a question of fact").

Lastly, Plaintiffs' argument that a violation of the Wage Act constitutes criminal misconduct, and thus neither Defendant is entitled to immunity under the VPA, is unavailing. Plaintiffs argue that because the Wage Act allows for criminal charges and sanctions, Defendants have thus engaged in "criminal misconduct" and cannot claim immunity under the VPA. Plaintiffs' Opposition at 6-7. It is true that the Wage Act provides for criminal penalties for willful offenses. G.L. c. 149, § 27C. Yet there is no evidence that criminal charges have been filed against either Defendant. Plaintiffs are really suggesting that any violation of the Wage Act automatically subjects the violator to strict criminal liability. They cite no case law to support the theory, and I reject it.[10]

In sum, Smith can properly invoke statutory immunity under the VPA because there is an absence of evidence in the record that he engaged in "willful or criminal misconduct." Thus, Smith is entitled to summary judgment. However, there is some evidence in the record from which a reasonable finder of fact could conclude that Crawford engaged in willful misconduct, and thus, Crawford is not entitled to summary judgment on his claim of VPA immunity.

b. Immunity Pursuant to G.L. c. 231, §§ 85W & 85K

Defendants also argue that even if they are not entitled to immunity under the VPA, they are entitled to immunity under both G.L. c. 231, § 85W and G.L. c. 231, § 85K. Having already

[10] In any event, this theory would not work with regard to Smith, because, as described above, Plaintiffs have failed to introduce evidence that his actions were even willful.

found that Smith is entitled to immunity under the VPA, I need only reach the question of whether Crawford can appropriately claim immunity under either state statute.

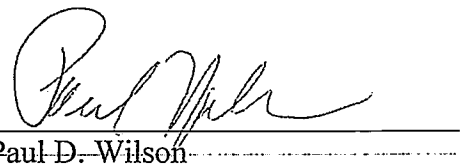
Section 85K states, "No person who serves as a director, officer or trustee of an educational institution which is [tax exempt] and who is not compensated for such services . . . shall be liable solely by reason of such services as a director, officer or trustee for any act or omission resulting in damage or injury to another, if such person was acting in good faith and within the scope of his official functions and duties, unless such damage or injury was caused by willful or wanton misconduct." G.L. c. 231, § 85K. Under section 85W volunteers are entitled to immunity "for any civil damages as a result of any acts or omissions relating solely to the performance of his duties as an officer, director or trustee" except where the volunteer's "acts or omissions [are] intentionally designed to harm." G.L. c. 231, § 85W.

I have already concluded that there is sufficient evidence in the record for a jury to conclude that Crawford engaged in willful misconduct. It would take no great leap for the jury to further conclude, based on the same evidence, that Crawford is not entitled to immunity under either section 85K (which does not immunize "willful or wanton misconduct") or section 85W (which does not immunize "acts . . . intentionally designed to harm").

Further, Crawford is not entitled to claim immunity under section 85K for another reason. While RoxComp's Articles of Organization state that one of RoxComp's missions was to provide "education, and other assistance needed by the families and individuals served," no reasonable jury could find that RoxComp qualifies as an "educational institution" for purposes of section 85K.

ORDER

For the reasons set out above, Defendant Smith's motion for summary judgment is **ALLOWED**, Defendant Crawford's motion for summary judgment is **DENIED**, and Plaintiffs' motion for summary judgment is **DENIED**. In addition, the clerk shall **ISSUE** a 30-day nisi order as to the claims of those Plaintiffs (and only those Plaintiffs) listed in footnote 5 above.



Paul D. Wilson
Justice of the Superior Court

January 18, 2017

EXHIBIT C

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2013-3785-G
NO. 2016-0438-G

JUDY C. LYNCH & others[1]

vs.

KEITH D. CRAWFORD & others[2]

Consolidated with

KENNIA MORENO & others[3]

vs.

KEITH D. CRAWFORD & another[4]

ORDER ON DEFENDANT KEITH D. CRAWFORD, M.D.'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER DENYING SUMMARY JUDGMENT AS TO DR. CRAWFORD

notice Sent 03.23.17 CAL ATM CN SASM GJL DDM mtass DMB RBR AFG BIR RWD SLP

This is a Wage Act case. By order dated January 18, 2017, I denied the motion for summary judgment of defendant Crawford, who served as the president of the entity employing plaintiffs ("RoxComp"). From an email exchange in the summary judgment record, I concluded that a jury could reasonably decide that Crawford engaged in "willful" misconduct that resulted in RoxComp's failure to pay plaintiffs' wages. If a jury so found, I said, then Crawford would not be entitled to volunteer immunity under federal or state law.

[1] Johanna Vega, Iris Montijo, Marie Maxis, Maltina Kelsey, Elizabeth Rhodes, Reshauna Jackson, Hycienth Jackson, Gwendolyn Smith, Oswald Henderson, Denise Fergusin, and Guity Valizadeh (the "Lynch Plaintiffs")

[2] Lawrence J. Smith, Jr. and John Doe 1-50

[3] Wendy Pavlovich, Michelle Villarta, Connie Cohen, Shipra Chadda, Pedro Alvarez, and Rachel Woolson (the "Moreno Plaintiffs")

[4] Lawrence J. Smith, Jr.

Crawford now moves for reconsideration of that decision. A motion for reconsideration should be based on "(1) changed circumstances such as (a) newly discovered evidence or information, or (b) a development of relevant law; or (2) a particular and demonstrable error in the original ruling or decision." Commonwealth v. Charles, 466 Mass. 63, 84 (2013), quoting Audubon Hill S. Condominium Ass'n v. Community Ass'n Underwriters of America, Inc., 82 Mass. App. Ct. 461, 470 (2012). Crawford relies on the second criterion, arguing that I committed demonstrable error.

My error, Crawford said, concerns the timing of the email exchange on which I relied. Plaintiffs assert in their Complaints that they were not paid for work performed between February 25, 2013 and March 22, 2013, the day on which RoxComp ceased operations. The potentially "willful" conduct that I cited occurred a few days after this period. Specifically, on March 25, 2013, Crawford received an email informing him that there existed a balance of about $88,000 in a RoxComp payroll account. In an email two days later, Crawford stated his desire that those payroll funds be used to pay RoxComp's unpaid vendors rather than its unpaid employees.

Crawford argues that his actions could not constitute a "willful" violation of the Wage Act. The violation occurred, he suggests, when RoxComp discharged its employees without paying them on March 22, 2013. Because there is no evidence the summary judgment record that Crawford was aware of the existence of the payroll account on that day, he argues, he "could not have influenced [RoxComp] with respect to Wage Act violations that had already happened." Crawford's Brief at 5.

Crawford misconstrues the basis for individual liability under the Wage Act. The legislature has not imposed liability on the president of a corporate employer for "influencing"

the corporation not pay wages. Instead, the president is liable as if he himself *were* the employer: "[t]he president and treasurer of a corporation . . . shall be deemed to be the employers of the employees of the corporation . . ." G.L. c. 149, § 148. So Crawford could be liable for the Wage Act violation even if he never became aware of it until he was sued by the employees.

Nor do I accept the basic premise of Crawford's argument, that he could not have acted "willfully" because he did not learn of the payroll account until three days after the corporation discharged its employees without paying them. A jury could find that, as of March 25, 2013: (1) Crawford knew that employees had not been paid when they were discharged three days earlier; (2) Crawford knew of the existence of a payroll account; and (3) Crawford decided that the payroll funds could be better deployed to purposes other than paying employees who had been discharged a few days earlier without being paid. On the question of "willfulness," it cannot matter whether he discovered the existence of those funds three days before, or three days after, the employees were terminated without being paid.

I make no prediction about how a jury will deal with these facts. But I continue to believe that these facts raise an issue that a jury must decide.

Defendant Keith D. Crawford, M.D.'s Motion for Reconsideration of the Court's Order Denying Summary Judgment as to Dr. Crawford is **DENIED**.

Paul D. Wilson
Justice of the Superior Court

March 21, 2017

CERTIFICATE OF SERVICE

Under the penalties of perjury I, Aaron T. Morris, counsel for Defendant-Appellant Keith D. Crawford, M.D., hereby certify that on December 18, 2018, a true copy of the foregoing Defendant-Appellant Keith D. Crawford, M.D.'s Application For Further Appellate Review was served by first-class mail, postage prepaid, upon counsel for Plaintiffs-Appellees:

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Dated: Dec. 18, 2018

/s/ Aaron T. Morris
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