IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

KATHLEEN AUDIA, Plaintiff, v. BRIAR PLACE, LTD., an Illinois Corporation, Defendant.	Case No. 1:17-cv-06618 Hon. Samuel Der-Yeghiayan

DEFENDANT BRIAR PLACE, LTD.'S MEMORANDUM IN SUPPORT OF ITS RULE 12(b)(6) MOTION TO DISMISS AMENDED COMPLAINT

COMES NOW Defendant, BRIAR PLACE, LTD., (hereinafter, "Defendant" and/or "Briar Place"), by and through its attorneys, Omar J. Fayez and Anthony A. Cavallo of HUSTON, MAY & FAYEZ LLC, and respectfully submits, pursuant to Rule 12(b)(6) of the Fed. R. Civ. Pro. its Memorandum in support of its Motion to Dismiss Plaintiff's Amended Complaint. In support of its Motion, Defendant states as follows:

I. Background

Plaintiff is a hearing impaired, former resident at Defendant's skilled nursing facility. Plaintiff alleges in her Amended Complaint (Dkt. No. 15, p. 3 at para. 6) that Defendant failed to provide her with the same quality of care as other residents and deprived her of the opportunity to participate in her care based on her disability. The Amended Complaint attempts to state causes of action based on 1) the Rehabilitation Act, 29 U.S.C. §704 (Count I); 2) the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116 (Count II); 3) negligence (Count III); and 4) the Illinois Nursing Home Care Act, 201 ILCS 45/1-101, et seq. (Count IV).

As will be set forth herein, Rule 12(b)(6) warrants dismissal of Plaintiff's Amended Complaint.

II. Legal Standard

In ruling on a motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6), the court must draw all reasonable inferences that favor the plaintiff, construe the allegations of the complaint in the light most favorable to the plaintiff, and accept as true all well-pleaded facts and allegations in the complaint. *Appert v. Morgan Stanley Dean Witter, Inc.*, 673 F.3d 609, 622 (7th Cir. 2012); *Thompson v. Ill. Dep't of Prof'l Regulation*, 300 F.3d 750, 753 (7th Cir. 2002).

A plaintiff is required to include allegations in the complaint that "plausibly suggest that the plaintiff has a right to relief, raising that possibility above a 'speculative level' " and "if they do not, the plaintiff pleads itself out of court." *E.E.O.C. v. Concentra Health Services, Inc.*, 496 F.3d 773, 776 (7th Cir. 2007)(citation omitted); *Morgan Stanley Dean Witter, Inc.*, 673 F.3d at 622 ("[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged", quoting *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

"[T]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Limestone Dev. Corp. v. Vill. of Lemont*, 520 F.3d 797, 803 (7th Cir. 2008). The allegations that are entitled to the assumption of truth are those that are factual, rather than mere legal conclusions. *Iqbal*, 556 U.S. at 679 (2009); *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009).

III. Argument

A. Plaintiff's claim under the Rehabilitation Act (Count I) fails to plead facts that allege Defendant intentionally discriminated against and was deliberately indifferent to Plaintiff.

Under the Rehabilitation Act, 29 U.S.C. § 701, *et seq*., it is necessary to show intentional discrimination in order to recover compensatory damages. *Everett v. Baldwin*, 2016 WL 8711476,

at *8 (N.D. Ill. Jan. 15, 2016), citing *Phipps v. Sheriff of Cook Cnty.*, 681 F. Supp. 2d 899, 917 (N.D. Ill. 2009) and *Kennington v. Carter*, 2004 WL 2137652, at *7 (S.D. Ind. June 28, 2004).

The Seventh Circuit has yet to decide whether discriminatory animus or deliberate indifference is required to show intentional discrimination. *Strominger v. Brock*, 592 Fed.Appx. 508, 511-12 (7th Cir. 2014). What has been decided, however, is that intentional discrimination is required to recover compensatory damages under the Rehabilitation Act. *Everett*, at * 9, citing *Reed v. Columbia St. Mary's Hosp.*, 782 F.3d 331, 337 (7th Cir. 2015)("Compensatory damages are available under the Rehabilitation Act ... but may be available only for claims of intentional discrimination."); *CTL ex rel. Trebatoski v. Ashland Sch. Dist.*, 743 F.3d 524, 528 n.4 (7th Cir. 2014)("We note that all circuits to consider the question have held that compensatory damages are only available for intentional discrimination" under the Rehabilitation Act); *Strominger v. Brock*, 592 Fed.Appx. 508, 511 (7th Cir. 2014)("Even if [a plaintiff] could show a violation of the ADA and/or Rehabilitation Act, he could not recover compensatory damages without showing intentional discrimination.").

Everett, which evaluated the sufficiency of the pleadings associated with intentional discrimination under the Rehabilitation Act, is instructive, stating:

> The Seventh Circuit has not detailed what "intentional discrimination" means in the context of the ADA and the Rehab[ilitation] Act, but "the majority approach ... is to apply a **deliberate indifference standard**."[1] *McKinnie v. Dart*, 2015 WL 5675425, at *7 (N.D. Ill. Sept. 24, 2015). This standard "does not require personal animosity or ill will but rather may be inferred when there is knowledge that a harm

[1] Two Courts of Appeals have suggested that plaintiffs seeking compensatory damages must demonstrate a higher showing of intentional discrimination than deliberate indifference, such as discriminatory animus. *S.H. ex rel. Durrell v. Lower Merion School Dist.*, 729 F.3d 248, 263 (3rd Cir. 2013), citing *Nieves–Marquez v. Puerto Rico,* 353 F.3d 108, 126-27 (1st Cir. 2003)(suggesting that discriminatory animus is the level of intent required)(citing *Schultz v. Young Men's Christian Ass'n of U.S.,* 139 F.3d 286, 290–91 (1st Cir.1998)); *Delano–Pyle v. Victoria Cnty.,* 302 F.3d 567, 575 (5th Cir. 2002)(rejecting a deliberate indifference standard and adopting a higher showing for intentional discrimination)(citing *Carter v. Orleans Parish Pub. Schs.,* 725 F.2d 261, 264 (5th Cir.1984)). To succeed under a discriminatory animus standard, a plaintiff must show "prejudice, spite or ill will." *Liese v. Indian River Cnty. Hosp. Dist.,* 701 F.3d 334, 344 (11th Cir. 2012).

> to a federally protected right is substantially likely, and a failure to act upon that likelihood." Id. (citations omitted).

Everett, at *9 (emphasis added). Deliberate indifference, in turn, "requires both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that likelihood." *City of Canton v. Harris*, 489 U.S. 378, 389 (1989). Under this standard, negligence or bureaucratic inaction is not sufficient to establish liability. *S.H. ex rel. Durrell v. Lower Merion School Dist.*, 729 F.3d 248, 263 (3rd Cir. 2013).

The *Everett* plaintiff (an inmate at a state prison) alleged repeated requests for reassignment in compliance with his permits (i.e., converted medical prescriptions) and his multiple formal grievances. These complaints should have alerted the correctional center defendants of the need to accommodate his medical condition, and the failure to do so suggests deliberate indifference to Everett's medical needs. The court in *Everett* relied upon *Hildreth v. Cook Cnty.*, 2010 WL 1656810, at *3 (N.D. Ill. Apr. 23, 2010); in this case the plaintiff, who had Parkinson's disease and could not write, alleged deliberate indifference when defendants refused to enforce a court order for access to the library and typewriter. *Everett*, at * 10.

Unlike *Everett*, intentional discrimination cannot be inferred from the Amended Complaint. The Amended Complaint does not allege that Defendant Briar Place violated any court order or failed to honor a medical prescription. To the extent this Court elects to adopt a discriminatory animus standard to establish deliberate indifference, the Amended Complaint is devoid of allegations that Defendant displayed prejudice, spite, or ill will.

The Amended Complaint lacks of any such allegations implicating the deliberate indifference of Defendant. Instead, it simply contains generic boilerplate, and the allegations do not even rise to the level suggesting that Defendant was even negligent.

In Count I, Plaintiff simply concludes that Defendant acted intentionally and with deliberate indifference in failing to provide: 1) "the benefit or its services, programs, and activities" and 2) "appropriate auxiliary aids and services" for effective communication. (Dkt. No. 15, p. 4 at paras. 7, 8) Similarly, Plaintiff also alleges that Defendant "intentionally and deliberately denied [Plaintiff] full and equal enjoyment of Defendant's healthcare and rehabilitative services" and that Defendant's "intentional and deliberate acts and omissions" violated the Rehabilitation Act. Plaintiff fails to plead any relevant facts to substantiate these allegations. (Dkt. No. 15, pp. 7-8, at paras. 18, 21)

Thus, there are no factual allegations from which to infer Defendant's deliberate indifference, and dismissal of Count I is appropriate. In addition, the Amended Complaint fails to allege that Defendant denied Plaintiff benefits because of her disability, a necessary element to establish a cause of action under the Rehabilitation Act.[2]

B. The Affordable Care Act does not provide a private right of action, requiring the dismissal of Count II.

Not all federal statutes provide a basis for a private individual to maintain a legal action against another private individual. See, *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) ("[I]t is only violations of rights, not ***laws***, which give rise to [private] actions.") (emphasis in original). The Affordable Care Act does not codify an express private right of action permitting individuals to seek redress for violations of this statute. Statutes passed pursuant to the Spending Clause of the Constitution (Art. I, Section 8, Clause 1), like the Affordable Care Act, see, *National*

[2] In order to state a claim under Section 504, plaintiff must allege (1) the existence of a state program receiving federal financial assistance, (2) that plaintiff is an intended beneficiary of the federal assistance, and (3) that plaintiff is a qualified handicapped person who was subjected to discrimination solely by reason of his or her handicap. *Doe v. City of Chicago*, 883 F.Supp. 1126, 1143-35 (N.D. Ill. 1994), citing *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226, 1231–32 (7th Cir.1980).

Federation of Independent Business v. Sebelius, 567 U.S. 519, 576-78 (2012), rarely confer private rights of action.

The Supreme Court examines the text and history of a statute to determine whether Congress intended to create a right of action. *Touche Ross & Co. v. Redington,* 442 U.S. 560, 575–576 (1979). More recently, the Supreme Court observed that "'[r]ecognition of any private right of action for violating a federal statute, currently governing decisions instruct, 'must ultimately rest on congressional intent to provide a private remedy.'" *Astra USA, Inc. v. Santa Clara County, Cal.*, 563 U.S. 110, 117 (2011)(citations omitted).

Three factors guide judicial inquiry into whether or not a statute confers a right: 1) Congress must have intended that the provision in question benefit the plaintiff; 2) the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence; and 3) the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms. *Gonzaga University v. Doe,* 520 U.S. 273, 281 (2002)(statutory references to individual parental consent cannot make out the requisite Congressional intent to confer individually enforceable rights because each of those references is made in the context of describing the type of "policy or practice" that triggers a funding prohibition), citing *Blessing v. Freestone,* 520 U.S. 329, 340–341 (1997)(rejecting attempts to infer enforceable rights from Spending Clause of Constitution statutes whose language did not unambiguously confer such a right upon the act's beneficiaries).

The analysis in *Schwerdtfeger v. Alden Long Grove Rehabilitation and Health Care Center, Inc.*, 2014 WL 1884471, at *2 -*3 (N. D. Ill. May 12, 2014)(holding that there was no private right of action under the federal Nursing home Reform Act (NHRA)), is instructive. The court stated:

> In order to provide a basis for a private right of action, a federal statute must create both a *right* in favor of the plaintiff, and a *remedy* for a violation of that right against the defendant. *See Alexander v. Sandoval,* 532 U.S. 275, 286 (2001) ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.").
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> "For a statute to create ... private rights, its text must be 'phrased in terms of the persons benefited.' " *Gonzaga,* 536 U.S. at 284 (quoting *Cannon v. Univ. of Chi.,* 441 U.S. 677, 692 n.13 (1979)). Only statutory "rights," and "not the broader or vaguer 'benefits' or 'interests,' " are actionable. *Gonzaga,* 536 U.S. at 283. The statutory terms creating such rights must be "clear and unambiguous," *id.* at 290, and not so "vague and amorphous that its enforcement would strain judicial competence." *Blessing v. Freestone,* 520 U.S. 329, 340–41 (1997).
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> For a statute to create a private remedy, the statutory language must "display[ ] an intent to create ... a private remedy." *Sandoval,* 532 U.S. at 286. "Without [statutory intent], a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286–87. "[I]t is [not] the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose expressed by a statute." *Id.* at 287.

Schwerdtfeger, at *2 -*3.

Critical to the court's analysis was the fact that the statutes (like NHRA) passed pursuant to the Constitution's Spending Clause (Art. I, Section 8, Clause 1), rarely confer private rights of action. *Schwerdtfeger,* at *3, citing *Grammer v. John J. Kane Regional Ctrs.,* 570 F.3d 520, 532 (3rd Cir. 2009) (Stafford, J., dissenting) (quoting *Gonzaga,* 536 U.S. at 290). The Affordable Care Act is one such law passed pursuant to the Spending Clause. See, *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 576-78 (2012). Further,

> "unless Congress speak[s] with a clear voice, and manifests an unambiguous intent to confer individual rights, federal funding provisions provide no basis for private enforcement." *Gonzaga,* 536 U.S. at 280; *see also Bruggeman v. Blagojevich,* 324 F.3d 906, 911 (7th Cir. 2003) (holding that a provision of the Medicaid Act, 42 U.S.C. § 1396(a)(19), did not create a private right "given the Supreme Court's hostility ... to implying such rights in spending statutes").[3]

[3] The Seventh Circuit has stated, however, that there is no "broad rule that spending power statutes can never be enforced by private actions. [Rather,] courts must examine each statutory scheme closely." *Ind. Prot. & Advocacy Servs. v. Ind. Family & Soc. Servs. Admin.,* 603 F.3d 365, 378 (7th Cir. 2010).

Schwerdtfeger, at *3.

No Court of Appeals has fully analyzed discrimination claims under §1557 of the Affordable Care Act. *Briscoe v. Health Service Corp.*, 2017 WL 5989727, at *9 (N. D. Ill., Dec. 4, 2017). Moreover, the district courts which analyzed §1557 and found an implied private right of action did not consider the Supreme Court's hostility to creating an implied private right of action for statutes passed pursuant to the Spending Clause of the Constitution.[4] Section 1557 states, in relevant part, that an individual:

> shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity . . . . The enforcement mechanisms provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection.

42 U.S.C. § 18116(a).

Courts analyzing this section (see, fn. 4) relied on the enforcement mechanisms language to find a private right of action. Defendant disagrees with this reasoning as it posits that this enforcement mechanisms language instead implies that § 1557 may simply be enforced under the four civil rights statutes specifically referenced. That is, the remedies are cumulative rather than additive or independent. The ability, i.e., mechanisms, for individuals to address potential claims under the Affordable Care Act are available and already exist under 1) title VI of the Civil Rights Act, 42 U.S.C. § 2000d, *et seq*., 2) title IX of the Education Amendments, 20 U.S.C. § 1681, 3)

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[4] *See, e.g.*, *Briscoe*, at *9-10; *Esparza v. Univ. Med. Ctr. Mgmt. Corp.*, 2017 WL 4791185, at *5 (E. D. La. Oct. 10, 2017); *Se. Pa. Transp. Auth. v. Gilead Scis., Inc.*, 102 F. Supp. 3d 688, 698 (E.D. Pa. 2015); *Callum v. CVS Health Corp.*, 137 F. Supp. 3d 817, 848 (D.S.C. 2015); *Rumble v. Fairview Health Servs.*, 2015 WL 1197415, at *7 n. 3 (D. Minn. Mar. 16, 2015).

the Age Discrimination Act, 42 U.S.C. § 6101, *et seq.*, and 4) section 504 of the Rehabilitation Act, 29 U.S.C. § 794. There is no need to judicially create an implied private right of action under the Affordable Care Act when other statutory remedies already exist.

This approach is consistent with the Supreme Court's hostility toward finding implied private rights of action in legislation (like the Affordable Care Act) passed pursuant to the Spending Clause of the Constitution. Further, had Congress intended to create a private right of action under § 1557, it could have been easily effected with precise statutory language, and courts should not struggle to find an implied right of action where none exists. For the foregoing reasons, this court should dismiss Count II.

C. Plaintiff's failure to attach a physician's affidavit pursuant to 735 ILCS 5/2-622 requires dismissal of her negligence claim (Count III).

Count III of Plaintiff's Amended Complaint attempts to plead a cause of action sounding in healing arts malpractice negligence. Specifically, the conduct on which Plaintiff relies to support her negligence claim alleges that Defendant: 1) denied Plaintiff the opportunity to enjoy Defendant's goods, services, facilities, and accommodations; 2) denied Plaintiff the opportunity to participate in her care, care planning process, and rehabilitation given the absence of auxiliary aids and services to communicate effectively; 3) failed to implement practices and procedures to enable Plaintiff to participate in Defendant's goods, services, facilities, and accommodations; and 4) failed to provide auxiliary aids or other means of effective communication resulting in withholding of adequate care. (Dkt. No. 15, p. 14 at para. 6) These allegations sound in healing arts malpractice and require an affidavit pursuant to 735 ILCS 5/2-622.[5]

[5] 735 ILCS 5/2-622 states, in relevant part: "In any action, whether in tort, contract or otherwise, in which the plaintiff seeks damages for injuries or death by reason of medical, hospital, or other healing art malpractice, the plaintiff's attorney … shall file an affidavit, attached to the original and all copies of the complaint, declaring one of the following: … that the reviewing health professional has determined in a written report, after a review of the medical

However, Plaintiff has failed to comply with Illinois' requirement, set forth in 735 ILCS 5/2-622, that a medical malpractice plaintiff attach to his complaint an affidavit from a health professional with relevant experience averring that he has reviewed the record and that the suit is well founded. 735 ILCS 5/2-622(a)(1). The failure to attach such a certificate is grounds for dismissal. 735 ILCS 5/2-622(g).

Federal courts apply Section 2-622 since it is substantive rather than procedural law. See, *Palmer v. Franz*, 2017 WL 4122741, at *10 (N.D. Ill. Sept. 18, 2017)(citations omitted); *Banks v. Santaniello*, 2017 WL 2936702, at *2 (N.D. Ill. July 10, 2017)("Under the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), Section 2-622 is substantive, not procedural, law, and so must be enforced by federal courts exercising diversity jurisdiction over a state law claim." *See Hahn v. Walsh*, 762 F.3d 617, 633 (7th Cir. 2014)(additional citations omitted).

"Illinois law defines 'medical, hospital, or other healing art malpractice' broadly, and looks to three factors to determine whether a claim is covered by Section 2-622: '(1) whether the standard of care involves procedures not within the grasp of the ordinary lay juror; (2) whether the activity is inherently one of medical judgment; and (3) the type of evidence that will be necessary to establish plaintiffs' case.'" *Banks v. Santaniello*, 2017 WL 2936702, at *3, citing *Jackson v. Chicago Classic Janitorial & Cleaning Serv., Inc.*, 355 Ill. App.3d 906, 823 N.E.2d 1055, 1058 (Ill. App. 2005); *see also Dyer v. Carle Found. Hosp.*, 2015 WL 708873, at *4 (Ill. App. Feb. 17, 2015).

Here, the analysis of Defendant's alleged negligent conduct involves medical judgment, namely, the assessment and reporting of the medical needs of a patient. Plaintiff's negligence claim raises issues of medical judgment and/or failure to exercise an adequate degree of care in

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record and other relevant material involved in the particular action that there is a reasonable and meritorious cause for the filing of such action …"

rendering services as a nurse. Plaintiff's negligence allegations (Dkt. No. 15, at p. 14, para. 38) - that Defendant 1) prevented Plaintiff from taking advantage of Defendant's services, 2) prevented Plaintiff from participating in her care, care planning process, and rehabilitation, 3) failed to implement practices and procedures to permit Plaintiff to use Defendant's services, and 4) withheld care – all implicate the exercise of medical judgment necessitating a Section 2-622 affidavit.

First, these standard of care issues are not within the ken of the average lay person. Whether Plaintiff required assistive devices in order for Defendant to assess and render treatment to Plaintiff requires at least some degree of specialized medical knowledge. Further, non-medical personnel do not assess and report a patient's medical conditions. Second, whether Defendant's alleged failure to provide hearing assistive devices or services affected the medical care and treatment she received is precisely an issue of medical judgment. The determination of what, if any, hearing assistive devices or equipment Defendant failed to provide is inherently one of medical judgment. Third, at least some expert testimony is needed to establish Plaintiff's case. At a minimum, an expert would be expected to testify about Plaintiff's medical conditions and set forth factors influencing a decision whether or not to provide assistive devices to a hearing impaired person. Plaintiff's negligence claim raises issues of medical judgment, dereliction from professional duty as a nurse, and/or failure to exercise an adequate degree of care in rendering service as a nurse, and thereby implicates the requirements of Section 2-622.

The failure to comply with Section 2-622 requires dismissal of Plaintiff's negligence claim (Count III).

D. Plaintiff has not plead sufficient allegations to permit an action seeking punitive damages under the Illinois Nursing Home Care Act in Count IV.

In her prayer for relief in Count IV, Plaintiff seeks punitive damages. Under Illinois law, plaintiffs who sue for violation of the Nursing Home Care Act may "recover common law punitive damages upon proof of willful and wanton misconduct on the part of defendant." *Vincent v. Alden-Park Strathmoor, Inc.*, 241 Ill.2d 495, 502, 948 N.E.2d 610 (2011).

Punitive damages may not be pled in a complaint, under Illinois law, without prior leave of the court. 735 ILCS 5/2-604.1. Courts in this district have generally concluded that this provision, which is part of the Illinois Code of Civil Procedure, is procedural rather than substantive law and does not govern federal courts deciding state claims. *MCI Worldcom Network Services, Inc. v. Big John's Sewer Contractors, Inc.*, 2003 WL 22532804, at * 3 (N.D. Ill. Nov. 7, 2003), citing *Randle v. City of Chicago,* 2000 WL 1536070, at *6 (N.D. Ill. Oct. 17, 2000), *Probasco v. Ford Motor Co.*, 182 F.Supp.2d 701, 703–04 (C.D. Ill. 2002); *Serfecz v. Jewel Food Stores, Inc.*, 1997 WL 543116, at *6–7 (N.D. Ill. Sept. 2, 1997).

Nevertheless, Plaintiff still must make allegations to support a claim for punitive damages. She has failed to do so, and this court should dismiss Plaintiff's claim for punitive damages.

The Seventh Circuit's analysis in *Parker v. Four Seasons Hotels, Ltd.*, 845 F.3d 807, 812-13 (7th Cir. 2017), is instructive on the pleading requirements necessary to support a claim for punitive damages:

> Under Illinois law, "punitive or exemplary damages may be awarded when torts are committed with fraud, actual malice, deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others." … Punitive damages serve to punish the offender and to deter that party and others from engaging in similar acts of wrongdoing in the future. "Because of their penal nature, punitive damages are not favored in the law." (citations omitted)

> Illinois courts distinguish negligence from wilful and wanton conduct. One court described wilful and wanton conduct as "a hybrid between acts considered to be negligent and intentional acts." Negligence that does not justify punitive damages includes "mere inadvertence, mistake, errors of judgment and the like." But punitive damages may be awarded in cases involving "reckless indifference to the rights of others," or conduct that approaches the degree of moral blame attached to intentional harm, where a defendant inflicts a highly unreasonable risk of harm on another in conscious disregard of that risk. (citations omitted)

845 F.3d at 812-13; see also, *Anthony v. Security Pacific Financial Services, Inc.*, 75 F.3d 311, 316 (7th Cir. 1996); *Hollerich v. Acri*, 259 F.Supp.3d 806, 815 (N.D. Ill. 2017)(plaintiff was not entitled to punitive damages without showing how the defendants' representations were wanton or willful, such that further punishment was necessary).

The Amended Complaint does not allege an aggravated or egregious form of tort, or any conduct approaching willfulness and wantonness. At best, it summarily avers, without any factual support, that Defendant "acted intentionally and with deliberate indifference." (Dkt. No.15, at p. 4, paras. 7, 8) Merely alleging intentional conduct is insufficient under Illinois to claim punitive damages. *Anthony*, *id*., citing *Europlast, Ltd. v. Oak Switch Systems, Inc.*, 10 F.3d 1266, 1276 (7th Cir.1993), citing *Cornell v. Langland*, 109 Ill.App.3d 472, 440 N.E.2d 985, 987 (1st Dist.1982)); *Loitz v. Remington Arms*, 138 Ill.2d 404, 563 N.E.2d 397, 402 (1990)(punitive "damages can be awarded only for ... conduct involving some element of outrage similar to that usually found in crime."); *Harvey v. Price*, 603 F.Supp. 1205, 1207 (S.D. Ill.1985)(punitive damages are proper when the defendant acted fraudulently, with actual malice, deliberate violence or oppression, or in a grossly negligent manner so as to indicate a wanton disregard for the safety of others).

Absent factual allegations that Defendant's conduct was willful and wanton or recklessly indifferent, Plaintiff's Amended Complaint cannot sustain a claim for punitive damages under the Illinois Nursing Home Care Act and this Court should dismiss this requested relief in Count IV.

E. To the extent that this court dismisses Plaintiff's federal claims, it should decline to exercise jurisdiction over her state law claims.

"When a district court has dismissed the claims over which it had original jurisdiction, it can also decline to exercise its supplemental jurisdiction over the state-law claims." *Ross v. Board of Educ. of Tp. High School Dist. 211*, 2006 WL 695471, at *13 (N.D. Ill. Mar. 14, 2006), citing 28 U.S.C. § 1367(c)(3); *Williams v. Aztar Ind. Gaming Corp.* 351 F.3d 294, 300 (7th Cir. 2003) (quoting *Wright v. Associated Insurance Companies Inc.,* 29 F.3d 1244, 1251 (7th Cir.1994) for its proposition that "the general rule is that once all federal claims are dismissed before trial, the district court should relinquish jurisdiction over pendent state-law claims rather than resolv[e] them on the merits").

Thus, to the extent that this court dismisses Plaintiff's federal claims in Counts I and II, it should also decline to exercise jurisdiction over her state law claims in Counts III and IV, should they not be dismissed.

III. Conclusion

Plaintiff's Amended Complaint fails to state a claim upon which relief may be granted and dismissal is appropriate under Fed. R. Civ. Pro. Rule 12(b)(6) since 1) there are insufficient factual allegations that Defendant intentionally discriminated against and was deliberately indifferent to Plaintiff to support a claim for damages under the Rehabilitation Act (Count I); 2) the Affordable Care Act (Count II) does not provide a private right of action; 3) Plaintiff failed to attach a Section 2-622 affidavit to support her claim for negligence and healing arts malpractice (Count III), and 4) there are no allegations suggesting that Defendant's conduct was willful or wanton or recklessly indifferent to support a claim for punitive damages under the Illinois Nursing Home Care Act (Count IV).

WHEREFORE, Defendant, BRIAR PLACE, LTD., respectfully requests that this Court dismiss Plaintiff's Amended Complaint with prejudice pursuant to Rule 12(b)(6) of the Fed. R. Civ. Pro., and/or for any other relief which this Court deems just and appropriate.

Respectfully submitted,

HUSTON, MAY & FAYEZ, LLC

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