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**UNITED STATES DISTRICT COURT  
DISTRICT OF ALASKA**

**DIANA NAYOKPUK,**  
**Plaintiff,**  
**vs.**  
**UNITED STATES OF AMERICA,**  
**Defendant.**



**2:09-cv-00009 JWS**  
**ORDER AND OPINION**  
**[Re: Motion at Docket 77]**

**I. MOTION PRESENTED**

At docket 77, plaintiff Diana Nayokpuk (“plaintiff” or “Nayokpuk”) moves pursuant to Federal Rule of Civil Procedure 56 for partial summary judgment that the *Sweet*<sup>1</sup> presumption of negligence applies. Defendant the United States of America (“the government”) opposes the motion at docket 100. Nayokpuk’s reply is at docket 107. Oral argument was not requested and would not assist the court.

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<sup>1</sup>*Sweet v. Sisters of Providence*, 895 P.2d 484 (Alaska 1995).

1 **II. BACKGROUND<sup>2</sup>**

2 This lawsuit arises out of the medical treatment of A.N., who is Nayokpuk's  
3 daughter. A.N. is Alaska Native and lives in the village of Shishmaref. In many remote  
4 Alaskan villages, there are no doctors. First-line medical care is instead provided by  
5 Community Health Aides ("CHAs"), who are supervised by doctors at regional hospitals.  
6 CHAs examine patients locally and then telephone the doctors who receive calls in the  
7 "radio room." Upon examining a patient, CHAs complete a Patient Encounter Form  
8 ("PEF"), which describes the patient's complaints, symptoms, current medications, vital  
9 signs, and the CHA's assessment. The PEFs are then faxed to the doctor at the  
10 regional hospital. After talking to the doctor over the phone, CHAs generally record the  
11 doctor's diagnosis on the PEF.

12 A.N. was born on September 1, 2007. On September 27, 2007, A.N. was found  
13 to have a temperature of 102.4. She was transported to Norton Sound Regional  
14 Hospital ("NSRH") in Nome, Alaska, where a full bacteriological work-up was done. She  
15 was treated with two antibiotics. On November 13, 2007, A.N. was taken to NSRH after  
16 her temperature was recorded at 103.1. Again a bacteriological work-up was done, and  
17 A.N. returned to Shishmaref on November 16, 2007.

18 On January 28, 2008, A.N. went to her village clinic with a temperature of 99.5.  
19 Gwen Nayokpuk was the CHA who examined her. She reported the encounter to  
20 Dr. Livermont at NSRH. Dr. Livermont prescribed Tylenol and amoxicillin. Plaintiff  
21 maintains that the government has been unable to produce the faxed PEF that  
22 Dr. Livermont would have reviewed. Dr. Livermont has no recollection of treating A.N.

23 On February 1, 2008, A.N. was taken back to the clinic with a temperature of  
24 100. A different CHA, Frieda Eningowuk ("Eningowuk"), treated her. Eningowuk  
25 assessed A.N. and thought that she had a common cold. Eningowuk contacted  
26 Dr. Head at NSRH, and Dr. Head ordered a continuation of Tylenol and amoxicillin.

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28 <sup>2</sup>This background is taken from the order at docket 76.

1 A.N. was scheduled to be in Anchorage, Alaska, the following week, where she had an  
2 appointment scheduled at the Alaska Native Medical Center ("ANMC"). Plaintiff  
3 maintains that the government has been unable to produce any notes made by  
4 Dr. Head regarding his treatment or diagnosis, although plaintiff was provided with the  
5 PEF and the faxed PEF.

6 On February 3, 2008, A.N. returned to the clinic after her mother reported that  
7 her cold had worsened. She was seen again by Gwen Nayokpuk. A.N. was having  
8 difficulty breathing and was coughing up discharge. She had a fever of 100.2. Gwen  
9 Nayokpuk diagnosed A.N. with bronchiolitis and contacted Dr. Sharma at NSRH.  
10 Dr. Sharma ordered a continuation of amoxicillin and saline nebulizer treatments to help  
11 A.N.'s breathing. Plaintiffs maintain that the government has been unable to produce  
12 the PEF that was faxed to Dr. Sharma.

13 A.N. was brought back to the clinic on February 5, 2008, with a temperature of  
14 102.8. She was still coughing, displayed an audible wheezing, was picking at her ears,  
15 and her upper lip was blue. Eningowuk was the on-duty CHA, and she called  
16 Dr. Sharma. Dr. Sharma authorized A.N. to be flown to NSRH on the next commercial  
17 flight. Dr. Sharma does not recall treating or evaluating A.N.

18 A.N. was flown to Nome later that day. She was examined by Dr. Superville at  
19 NSRH and diagnosed with a viral respiratory infection and bronchospasm. She  
20 returned to Shishmaref on February 7.

21 A.N. returned to the village clinic on February 19, 2008, and was examined by  
22 CHA Amelia Milligrock ("Milligrock"). A.N. was vomiting and coughing, and she had a  
23 temperature of 102.9. Her right tympanic membrane was red and bulging, and she had  
24 lesions on her mouth. Milligrock diagnosed A.N. with acute otitis media and  
25 bronchiolitis. A.N. visited the clinic a second time on February 19 because her feet  
26 were turning blue and her temperature had increased to 104. Eningowuk was on duty  
27 and she called Dr. Superville at NSRH. Dr. Superville ordered A.N. to be transported to  
28 NSRH that evening. Her flight could not land due to weather, and A.N. was therefore

1 rescheduled for a flight on the morning of February 20. Plaintiff maintains that there are  
2 no records of the reasons for A.N.'s transport and no record of Dr. Superville's  
3 treatment.

4 A.N. was taken to the clinic again at 2:45 a.m. on February 20. Her temperature  
5 had risen to 104.5, and she had an irregular pulse. Eningowuk contacted Dr. Logan at  
6 NSRH. Dr. Logan prescribed 100 mg of Rocephin, a dosage that plaintiff claims was  
7 insufficient. Dr. Logan does not recall his treatment of A.N., and plaintiff maintains that  
8 there is no contemporaneous record of his treatment of her.

9 Although A.N. was scheduled to be flown to Nome later that morning, the  
10 transport order was cancelled. Plaintiff maintains that there is no record of the order  
11 cancelling the transport.

12 Later on February 20, A.N. returned to the clinic and was seen by Milligrock. Her  
13 fever had decreased to 99.6. Milligrock spoke with Dr. Sharma who ordered that A.N.  
14 be seen again the next day. Dr. Sharma does not recall treating A.N., and plaintiff  
15 maintains that there is no record of her thoughts or impressions.

16 A.N. returned to the clinic on February 22, 2008. Her temperature was 100.8,  
17 and her hands and feet were blue. Milligrock contacted Dr. Logan who ordered that  
18 A.N. be kept warm and rechecked in two days. A.N. returned to the clinic on  
19 February 24, 2008, with a temperature of 102.2. Eningowuk contacted Dr. Superville  
20 who diagnosed unresolved bronchiolitis and authorized A.N. to be transported to NSRH  
21 the next morning. A.N. was transported to Nome on February 25, 2008. At  
22 approximately 3:15 p.m., A.N. began seizing. She was ultimately transported to Alaska  
23 Native Medical Center ("ANMC") in Anchorage. A lumbar puncture was performed  
24 which allowed doctors to identify the specific bacteria that had infected A.N.

25 Plaintiff maintains that the delay in diagnosing and treating A.N.'s meningitis  
26 caused irreversible brain damage and that A.N. will require intensive care for the rest of  
27 her life. Plaintiff filed a complaint against the United States, pursuant to the Federal  
28 Tort Claims Act, on November 11, 2009. The complaint alleged negligence on the part

1 of care providers at NSRH and ANMC, whose employees are deemed employees of the  
2 United States for purposes of the FTCA by virtue of compacts between those entities  
3 and the Indian Health Service. The complaint was amended to plead recklessness on  
4 June 17, 2011.

### 5 **III. STANDARD OF REVIEW**

6 Summary judgment is appropriate where “there is no genuine dispute as to any  
7 material fact and the movant is entitled to judgment as a matter of law.”<sup>3</sup> The materiality  
8 requirement ensures that “only disputes over facts that might affect the outcome of the  
9 suit under the governing law will properly preclude the entry of summary judgment.”<sup>4</sup>  
10 Ultimately, “summary judgment will not lie if the . . . evidence is such that a reasonable  
11 jury could return a verdict for the nonmoving party.”<sup>5</sup> In resolving a motion for summary  
12 judgment, a court must view the evidence in the light most favorable to the non-moving  
13 party.<sup>6</sup> The reviewing court may not weigh evidence or assess the credibility of  
14 witnesses.<sup>7</sup> The burden of persuasion is on the moving party.<sup>8</sup>

### 15 **IV. DISCUSSION**

16 The FTCA provides that the United States is liable for the “negligent or wrongful  
17 act[s] or omission[s] of any employee . . . if a private person . . . would be liable to the  
18 claimant in accordance with the law of the place where the act or omission occurred.”<sup>9</sup>  
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21 <sup>3</sup>Fed. R. Civ. P. 56(a).

22 <sup>4</sup>*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

23 <sup>5</sup>*Id.*

24 <sup>6</sup>*Lopez v. Smith*, 203 F.3d 1122 (9th Cir. 2000).

25 <sup>7</sup>*Dominguez-Curry v. Nevada Transp. Dept.*, 424 F.3d 1027, 1036 (9th Cir. 2005).

26 <sup>8</sup>*Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

27 <sup>9</sup>28 U.S.C. § 1346(b)(1).  
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1 Here, the alleged acts or omissions occurred in Alaska and, therefore, Alaska law  
2 governs disposition of plaintiff's claims.

3 In *Sweet*, the Alaska Supreme Court held that where a medical malpractice  
4 plaintiff's ability to prove negligence is impaired by the defendant's breach of duty to  
5 create or maintain adequate records, a trial court should shift the burden of proof to the  
6 defendant to prove by a preponderance of the evidence that it was not negligent.<sup>10</sup> "[A]  
7 plaintiff must first establish to the satisfaction of the court that the absence of the  
8 records hinders his ability to establish a prima facie case."<sup>11</sup> Second, "burden shifting  
9 should only occur when the essential medical records are missing through the  
10 negligence or fault of the adverse party."<sup>12</sup>

11 The court has already determined that the plaintiff's case has been impaired by  
12 the absence of certain records.<sup>13</sup> The only question therefore is whether that  
13 impairment is due to defendants' breach of any duty to create records.

14 Nayokpuk argues that NSRH had a duty, under *Patrick v. Sedwick*,<sup>14</sup> to create  
15 certain records and that NSRH breached that duty. In that case, the Alaska Supreme  
16 Court held that doctors have a duty to create records that "accurately and fully" describe  
17 any actions "of consequence."<sup>15</sup> Doctors must record "what was observed and [what  
18 was] done."<sup>16</sup> The court noted that it was disinclined to "permit the absence of personal  
19 recollection or of recorded facts to serve as a defense under the circumstances of" the  
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21 <sup>10</sup>*Id.*

22 <sup>11</sup>*Id.* at 491.

23 <sup>12</sup>*Id.* (citing *Public Health Trust v. Valcin*, 507 So.2d 596, 599 (Fla. 1987)).

24 <sup>13</sup>Doc. 76 at 8–9.

25 <sup>14</sup>391 P.2d 453 (Alaska 1964).

26 <sup>15</sup>*Id.* at 457.

27 <sup>16</sup>*Id.*

1 case.<sup>17</sup> At least three of the doctors who treated A.N. have no recollection of treating  
2 her.

3 **A. Transport Order and Dosage of Rocephin**

4 The government concedes that:

5 there are some omissions in the records that leave certain questions  
6 unanswered. The government [also] concedes there are certain records  
7 that are either missing or do not exist. There is no record of why the  
8 transport order of February 19 was cancelled. There is no record  
9 explaining why 100mg of Rocephin was prescribed. It is not contested  
10 that this was an inadequate dosage.<sup>18</sup>

11 Nonetheless, defendants argue that not every record that could have been made would  
12 assist Nayokpuk's case.<sup>19</sup> For instance, defendants argue that because Nayokpuk's  
13 expert has testified that A.N. should have been transported to Nome on February 20,  
14 and that 100mg of Rocephin was an insufficient dosage, Nayokpuk has not been  
15 impaired in her ability to assert a prima facie case. The court has already ruled that the  
16 absence of those records impairs plaintiffs' ability to prove negligence. The court also  
17 concludes that a failure to document cancellation of A.N.'s transport order and failure to  
18 document prescription of an insufficient amount of Rocephin fell short of the doctors'  
19 duty under *Patrick*.

20 **B. PEFs and Other Disputed Records**

21 The government argues that the records that do exist are adequate. Specifically,  
22 one of the government's experts stated that the PEFs, which are created and  
23 maintained by the CHAs, adequately incorporate the radio room doctors' feedback.<sup>20</sup>  
24 The same expert also stated that he would have no recommendations regarding

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25 <sup>17</sup>*Id.* at 458.

26 <sup>18</sup>Doc. 100 at 2.

27 <sup>19</sup>*Id.*

28 <sup>20</sup>Doc. 100-4 at 3.

1 appropriate changes to NSRH records-keeping procedures.<sup>21</sup> Plaintiff's experts have  
2 opined that the documentation of A.N.'s treatment was, in general, "egregiously  
3 insufficient,"<sup>22</sup> and that the tendency of doctors in Nome to rely on CHAs to record  
4 interaction with patients was insufficient.<sup>23</sup> The differing impressions of the record-  
5 keeping practice in rural Alaska illustrate that there are disputed issues of fact that  
6 preclude summary judgment with respect to application of the *Sweet* presumption  
7 based on the existing records of A.N.'s treatment.<sup>24</sup>

8 In *Sweet*, the court cautioned that the presumption should be applied only  
9 "absent a jury finding that [the health care provider's] failure to maintain [the plaintiff's]  
10 records was excused."<sup>25</sup> Although the present dispute will be resolved at a bench trial,  
11 the *Sweet* court's statement clearly contemplates that not all issues governing  
12 application of the doctrine may be resolved beforehand.<sup>26</sup> That is the case here, with  
13 respect to the records that do exist.

14 The expert testimony relied on by the government also precludes application of  
15 the *Sweet* presumption on the basis of some of the records that plaintiff argues should  
16 have been created but were not. For instance, plaintiff maintains that when A.N. arrived  
17 at NSRH on February 25, and began to seize, the standard of care required that an IV  
18 or IO be administered and that a lumbar puncture and full bacteriological workup be  
19 performed. Plaintiff's argument hinges on whether they are correct that A.N.'s medical  
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21 <sup>21</sup> *Id.* at 1.

22 <sup>22</sup> Doc. 78-12 at 5.

23 <sup>23</sup> *See, e.g.*, doc. 78-14 at 3.

24 <sup>24</sup> *See, e.g., Miller v. Phillips*, 959 P.2d 1147, 1254 (Alaska 1998) (interpreting *Sweet* to  
25 have rested on "uncontroverted proof of lost or inadequate records").

26 <sup>25</sup> *Sweet*, 895 P.2d at 492.

27 <sup>26</sup> *See also Miller*, 959 P.2d at 1254 ("[T]he adequacy and completeness of the medical  
28 records was a hotly disputed factual issue.").



