

IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA

**CREDIT MANAGEMENT SERVICES,
INC. f/k/a COLLECTION BUREAU OF
GRAND ISLAND, INC.,**

Plaintiff,

vs.

CHARLES PERCIVAL,

Defendant.

Case No. CI01-47

JUDGMENT

DATE OF TRIAL: April 23, 2002.
DATE OF RENDITION: May 16, 2002.
DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).
APPEARANCES:
For plaintiff: William M. Wroblewski.
For defendant: Mark Kozisek without defendant.
SUBJECT OF JUDGMENT: Trial on the merits to the court without a jury.
PROCEEDINGS: See journal entry made contemporaneously with trial.
FINDINGS: The court finds and concludes that:

1. The plaintiff asserts a claim for medical services to Theresa Percival (Theresa), wife of the defendant. The plaintiff acknowledges that Theresa agreed to pay for the services, but asserts that the defendant is responsible for the charges as “necessaries.”

2. The defendant denies liability. Nebraska law has long held a husband responsible for necessaries furnished to a wife by a third party. *Spaun v. Mercer*, 8 Neb. 357, 1 N.W. 245 (1879). However, the uncertainty in this case arises from the provisions of the express agreement between Theresa and the plaintiff, which is attached to the plaintiff’s amended petition as Exhibit “B1” and incorporated therein by reference. That agreement contains a section which appears as follows (although the date of birth and social security number blanks were completed, the information has been deleted for purposes of this discussion):

PATIENT / RESPONSIBLE PARTY INFORMATION	
Responsible party: <u>Theresa L Percival</u>	Date of Birth: _____
Relationship to Patient: <input checked="" type="checkbox"/> Self <input type="checkbox"/> Spouse <input type="checkbox"/> Other _____	Social Security #: _____
Responsible party's home phone: (<u>402</u>) <u>387 2681</u>	work phone: (_____) _____
Address: <u>748 N. Elm</u> (Apt# _____) City: <u>Ainsworth</u> State: <u>Ne</u> Zip: <u>69210</u>	
Employer's name: _____	Phone number: (_____) _____
Address: _____	City: _____ State: _____ Zip: _____
Your occupation: <u>Clean homes - businesses</u>	
Spouse's employer's name: <u>Dana F Cole</u>	Spouse's Work Phone: (<u>402</u>) <u>387 1673</u>
Address: _____	City: <u>Ainsworth</u> State: <u>Ne</u> Zip: <u>69210</u>

3. The question is: does the unambiguous designation of the wife as the “responsible party” preclude common law liability of the husband for these “necessaries.”

4. Nebraska case law does not appear to provide a direct answer. As early as the decision in *Spaun*, the court implied that the result may differ if “these services were given on the credit of the wife, or on any agreement that they were to be a charge upon her separate estate.” *Id.* at 359, 1 N.W. at ____.

5. General authority states that “[w]here one sells or furnishes necessaries to a married woman and extends credit exclusively to her in her individual capacity, or on the credit of her individual estate, the husband is not liable.” 41 C.J.S. *Husband and Wife* § 51 (1991). While it is presumed that a wife’s necessaries were furnished on her husband’s credit, the presumption may be rebutted by circumstances showing that the wife purchased on her own responsibility, and without assent, express or implied, on the part of the husband. *Id.* (citing *McMillan v. Fabretta*, 231 Ala. 188, 163 So. 793 (1935)). The *McMillan* court explained that the common law liability of the husband for necessaries has always rested upon the assumption that credit was given to the husband, and not to the wife, and that the purchase was made with his implied assent. The *McMillan* court stated that in no case did this liability arise when the facts showed affirmatively that credit was given to the wife, and charged to her, and not to the husband, and the goods were sold not upon his implied assent that they were to be charged to him.

6. Although the plaintiff’s amended petition furnishes the basis to show that Theresa purchased on her own responsibility, it does not demonstrate the absent of the defendant’s assent. The same section that describes Theresa as the responsible party also lists her spouse’s employment. This implies some assent of the spouse to the furnishing of the medical services.

7. In the decision of *In re Estate of White*, 150 Neb. 167, 33 N.W.2d 470 (1948), the Supreme Court stated that it could not simply choose between the holdings of different courts but must construe Nebraska statutes on the subject. The Supreme Court regarded the liability “as resting on the statute, and upon that wholly.” *Id.* at 169, 33 N.W.2d at _____. The court stated that at common law the husband was liable for medical expenses of the wife as necessities, and that under § 42-201 he continues to be primarily liable. *Id.* The court further stated that, unless the Legislature has, by statute, expressly relieved him thereof he continues to be so liable. *Id.* The court then reviewed other statutes potentially in that case, but found nothing which could be said to relieve the husband of his primary obligation. The court then concluded that, “unless the Legislature expressly so provides, we should not interpret them to have such meaning for the determination of legislative policy is not one of our functions but is a function of the Legislature.” *Id.* at 169-70, 33 N.W.2d _____.

8. The Supreme Court in *White* relied upon § 42-201. The Legislature has not amended the statute in the intervening years. The defendant did not cite, nor has this court found, any statute appearing to change the defendant’s liability. This court concludes that it is bound by the decision in *White* and that § 42-201 controls.

9. The plaintiff met its burden of persuasion as to part, but not all, of the charges asserted. The evidence supports the defendant’s liability for charges totaling \$8,739.00. The plaintiff failed to establish any claim for prejudgment interest. The plaintiff clearly had no express agreement for prejudgment interest with the defendant. The court concludes that the liability was not liquidated in amount, thus defeating plaintiff’s claimed basis for prejudgment interest.

JUDGMENT: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. Judgment is granted on the plaintiff’s amended petition in favor of the plaintiff, Credit Management Services, Inc., and against the defendant, Charles Percival, in the amount of \$8,739.00 and costs taxed in the amount of \$62.17.

2. The judgment shall bear interest from date of entry at the rate of 5.442% per annum until paid.

Signed in chambers at **Ainsworth**, Nebraska, on **May 16, 2002**;
DEEMED ENTERED upon file stamp date by court clerk.

If checked, the court clerk shall:

- Mail a copy of this order to all counsel of record and any pro se parties.
Done on _____, 20____ by _____.
- Note the decision on the trial docket as: [date of filing] **Signed "Judgment" entered**.
Done on _____, 20____ by _____.
- Mail postcard/notice required by § 25-1301.01 within 3 days.
Done on _____, 20____ by _____.
- Enter judgment on the judgment record.
Done on _____, 20____ by _____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge