[Cite as *Erie Ins. Co. v. Williams*, 2006-Ohio-6754.]

| STATE OF OHIO | ) | IN THE COURT OF APPEALS |
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| | )ss: | NINTH JUDICIAL DISTRICT |
| COUNTY OF SUMMIT | ) | |

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| ERIE INSURANCE | C. A. No. 23157 |
| Appellee | |
| v. | APPEAL FROM JUDGMENT ENTERED IN THE BARBERTON MUNICIPAL COURT COUNTY OF SUMMIT, OHIO CASE No. 05CVE01194 |
| EDWARD WILLIAMS | |
| Appellant | |

DECISION AND JOURNAL ENTRY

Dated: December 20, 2006

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

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WHITMORE, Presiding Judge.

**{¶1}** Defendant-Appellant Edward Williams has appealed from the judgment of the Barberton Municipal Court which denied his motion to dismiss. This Court affirms.

I

**{¶2}** Plaintiff-Appellee Erie Insurance Company filed suit against Appellant on July 7, 2005, alleging negligence. Appellee attempted to complete service of the complaint via certified mail, but the mailing was returned as unclaimed on July 27, 2005. Thereafter, the clerk attempted to complete service

via regular mail. The record contains no indication that this mailing was unsuccessful.

**{¶3}** Appellant did not respond to the complaint, and on November 21, 2005, Appellee moved for default judgment. The trial court granted the motion on November 22, 2005 and awarded damages in the amount of $1,800. On January 26, 2006, Appellant filed a motion which he captioned as a motion to dismiss. In his motion, however, Appellant urged that the default judgment should be vacated due to fact that he had not been served with the complaint. The trial court denied the motion of January 27, 2006. Appellant has timely appealed from that judgment, raising one assignment of error for review.

II

Assignment of Error

> "TRIAL COURT ABUSES ITS DISCRETION AND COMMITS REVERSIBLE ERROR WHEN OVERRULES PARTY'S MOTION TO VACATE DISMAL, WHERE PARTY HAS CLEARLY DEMONSTRATED THROUGH UNCHALLENGED TESTIMONY, THAT HE HAS NOT RECEIVED SERVICE OF OTHER PARTY'S MOTION TO DISMISS DESPITE COMPLIANCE OF OTHER PARTY WITH CIVIL RULES ON SERVICE." (sic.)

**{¶4}** In his sole assignment of error, Appellant has argued that the trial court erred in denying his motion to vacate the default judgment. Specifically, Appellant has asserted that he presented sufficient evidence to rebut the presumption that service was properly completed. We disagree.

**{¶5}** Initially, we note that Civ.R. 60(B) is not the exclusive means for a party to attack a default judgment when service of process of the original complaint is never completed. *Rondy v. Rondy* (1983), 13 Ohio App.3d 19, 21. When service of the complaint is incomplete, a resulting default judgment is void ab initio. *United Home Fed. v. Rhonehouse* (1991), 76 Ohio App.3d 115, 123. In that instance, "[a] court's authority to vacate a void judgment for lack of personal jurisdiction is derived from its inherent power as a court." *Hayes v. Gradisher* (Oct. 30, 1996), 9th Dist. No. 17791, at *2, citing *Patton v. Diemer* (1988), 35 Ohio St.3d 68, paragraph four of the syllabus.

**{¶6}** "[T]here is a presumption of proper service in cases where the Civil Rules on service are followed. However, this presumption is rebuttable by sufficient evidence." *Rafalski v. Oates* (1984), 17 Ohio App.3d 65, 66, citing *Grant v. Ivy* (1980), 69 Ohio App.2d 40. In the instant matter, it is undisputed that Appellee followed the civil rules and that the clerk of courts properly sent a copy of the complaint to Appellant via certified mail. See Civ.R. 4.1(A). Upon return of the complaint as "Unclaimed," the clerk properly served Appellant via regular mail. See Civ.R. 4.6(D). Civ.R. 4.6(D) provides as follows:

> "Service shall be deemed complete when the fact of mailing is entered of record, provided that the ordinary mail envelope is not returned by the postal authorities with an endorsement showing failure of delivery."

It is undisputed that the record contains no indication that the ordinary mail was returned showing failure of delivery. Accordingly, Appellee complied with the civil rules and a presumption arose that service was properly completed.

**{¶7}** Appellant failed to rebut that presumption. During the proceedings below, Appellant presented no evidence of any kind. While he filed a motion in which he alleged that he had not received service, Appellant provided no evidence. He did not make a sworn statement or provide any evidence that he had not received service. Furthermore, Appellant's motion to vacate was filed using the same address that Appellee used to serve the complaint. Accordingly, Appellant's filing served to support Appellee's claim that service was properly completed.

**{¶8}** In this Court, Appellant filed an affidavit swearing he did not receive service. His affidavit, however, was not before the trial court and therefore is not properly before this Court. App.R. 9(A). Therefore, we have not considered it.

**{¶9}** Accordingly, the undisputed record demonstrates that Appellee complied with the Civil Rules for completing service. Appellant provided no evidence to rebut the presumption that arose from following the civil rules. As such, the trial court did not err in denying Appellant's motion to vacate. Appellant's sole assignment of error lacks merit.

III

**{¶10}** Appellant's assignment of error is overruled. The judgment of the Barberton Municipal Court is affirmed.

Judgment affirmed.

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The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Barberton Municipal Court, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

MOORE, J.
BOYLE, J.
CONCUR

APPEARANCES:

EDWARD WILLIAMS, pro se, Appellant.

KIMBERLY L. RATHBONE, Attorney at Law, for Appellee.