Case of the Month—August, 2011

Dolan v. King County, ___ Wn.2d ___, 258 P.3d 20, 2011 WL 3612148 (2011)

Key Concept: The standard of review.

Substantively, Dolan involves the question of whether public defenders in King County are entitled to enroll in the Public Employees Retirement System (PERS). By a 5-4 vote, a majority of the State Supreme Court answered this question in the affirmative. What will make this case of abiding interest to appellate attorneys, however, is what the majority says about the standard of review to be applied following a bench trial in which there was no live testimony (the four justices in dissent did not challenge the majority's discussion of the standard of review).

Dolan's discussion of the standard of review begins by acknowledging the general rule that "[w]here the record at trial consists entirely of written documents and the trial court therefore was not required to assess the credibility or competency of witnesses, and to weigh the evidence, nor reconcile conflicting evidence, the appellate court reviews *de novo*." *Dolan*, 258 P.3d at 26-27 (citing to *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994)). However, prior to *Dolan* this general rule of *de novo* review of a purely written record had already been modified in those cases "where competing document evidence had to be weighed and conflicts resolved," and where "credibility [of conflicting affidavits] is very much at issue." *In re Marriage of Rideout*, 150 Wn.2d 337, 350-351, 77 P.3d 1174 (2003). In such cases, the appellate courts will review for substantial evidence. *Dolan*'s contribution is to extend and broaden the scope for applying the deferential substantial evidence standard of review to purely written records:

> [S]ubstantial evidence is more appropriate, *even if the credibility of witnesses is not specifically at issue,* in cases . . . where [1] the trial court reviewed an enormous amount of documentary evidence, [2] weighed that evidence, [3] resolved inevitable evidentiary conflicts and discrepancies, and [4] issued statutorily mandated written findings."

Dolan, 258 P.3d at 27 (emphasis added).

Is this the death-knell for de novo review of bench trials based on purely written records? It could well be. Certainly, in the wake of *Dolan*, appellate courts will have considerably more leeway to do a substantial evidence review rather than *de novo* review of written records. How they use that leeway might depend on how they interpret the four "factors" identified in the quote above (note—the numbering is not part of the original opinion, and the court did not refer to them as "factors"). How big does a record have to be to be "enormous"? Just big enough to discourage the Court of Appeals from conducting *de novo* review? If the matter is not resolved on summary judgment, won't there almost always—and almost by definition--be "evidentiary conflicts" (note that *Dolan* refers to them as "inevitable")? And doesn't CR 52(a)(1) "mandate" written findings of fact in all bench trials? After *Dolan*, the respondent on review of a bench trial will almost always have a strong argument for

application of the substantial evidence standard. Since this standard reduces the work load of the Court of Appeals, it's an argument that may find a receptive hearing.

Dolan may also have an effect on the willingness of attorneys to submit a matter to a bench trial based on a written record. Before *Dolan*, both parties to such a trial could believe they had a good chance of *de novo* review in the Court of Appeals. The trial court's decision would almost just be a dress rehearsal for the real decision to be rendered by the appellate court. Now, with *de novo* review less likely, the trial court's decision becomes more important, and each side will have a greater incentive to offer live testimony that might sway the trial court in their favor. So here's a prediction that could in theory be tested: *Dolan* will lead to fewer bench trials based solely on written records.

Finally, does *Dolan* imply anything about summary judgment practice? The obvious answer is "no":—*Dolan's* discussion of the standard of review is limited to review of bench *trials*. It doesn't affect the standard of review applied to grants of summary judgment, which remains *de novo*. However, anyone inclined to game-theoretic analysis may want to ponder the possible consequences of having two different standards of review for two quite similar procedures (summary judgment, and a bench trial based on purely written evidence). After *Dolan*, the unusual practitioner confronted with a choice between these two processes, and highly confident of winning either one, might want to try to have trial by affidavit. If both parties are confident of winning—which of course happens—they may agree to forego summary judgment practice in the hopes of getting a more abiding judgment via a bench trial. Note that this works against my previous prediction that *Dolan* will lead to a decrease in the frequency of bench trials on purely written records. My hunch, however, is that in the real world very few attorneys would pass up a chance to win on summary judgment because they think the standard of review would be more favorable after a bench trial on the papers.