IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

MARIANAS INSURANCE COMPANY, LTD.,
Plaintiff-Appellee,

v.

ISMAIL HOSSAIN,
Defendant-Appellant.

Supreme Court No. 2016-SCC-0015-CIV
Superior Court No. 11-0307-CIV

OPINION

Cite as: 2017 MP 14

Decided December 18, 2017

Mark A. Scoggins, Saipan, MP, for Plaintiff-Appellee.

Joseph E. Horey, Saipan, MP, for Defendant-Appellant.

BEFORE: ALEXANDRO C. CASTRO, Chief Justice; JOHN A. MANGLONA, Associate Justice; PERRY B. INOS, Associate Justice.

INOS, J.:

¶ 1 Defendant-Appellant Ismail Hossain ("Hossain") appeals the trial court's determination that Plaintiff-Appellee Marianas Insurance Company's ("MICO") failure to pay its insured, Hossain, for damage sustained by his car in an accident was justified based on a clause in the policy excluding coverage if the car is used as a "public or livery conveyance." Hossain argues the court erred by (1) admitting hearsay evidence in the form of insurance adjustor reports; and (2) concluding the car was used as a "public or livery conveyance" without sufficient evidence. For the following reasons, we AFFIRM the trial court's Final Judgment and Findings of Fact and Conclusions of Law.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 This case arises from Hossain's vehicle's involvement in a two-car accident in August of 2011. While Hossain owned the vehicle, which was under an insurance policy with MICO, Cheng Hu Zheng ("Zheng") operated it at the time of the accident. Hossain, who was off-island at the time of the accident, had left the car in the care of a friend, Ms. Chun Hong Gao Mangarero ("Mangarero"), who had then left the car in the care of Zheng. The accident resulted in damages of more than $3,000.00 to Hossain's vehicle. Following the accident, Mangarero and Zheng appeared together at the MICO office to file an insurance claim on behalf of Hossain. In the statement given by Mangarero and Zheng, Zheng stated he had a passenger in the car.

¶ 3 Later that day, MICO insurance adjusters, who suspected that Zheng had been using the car as an unregistered taxi at the time of the accident, observed Zheng driving a different vehicle, which also belonged to Hossain. They followed Zheng and watched him pick up a man at a grocery store, who got in to the backseat of the vehicle. Zheng then dropped his passenger off in Garapan.

¶ 4 On November 30, 2011, MICO sent Hossain a letter denying the first-party collision insurance claim in part because MICO found the vehicle was damaged while being used as a "public or livery conveyance" at the time of the accident, in violation of the policy. During the intervening period, however, MICO had paid out third-party claims for personal injury and damage to the other party's vehicle. Before denying Hossain's claims, but after paying out the third-party injury claims, MICO filed suit seeking judgment against Hossain, Zheng, and Mangarero to recompensate MICO for those payments to third parties.

¶ 5 Following a series of counterclaims, cross-claims, and alternative dispute resolution attempts, a bench trial was held on MICO and Hossains' claims and crossclaims. At trial, over Hossain's hearsay objections, the court permitted MICO to introduce and testify about reports containing written statements by two MICO insurance adjusters who did not testify at trial. The court denied MICO's claims for negligent entrustment and negligence per se, but granted MICO's

breach of contract claim on the grounds that the vehicle was used as a public or livery conveyance.

¶ 6 Hossain appeals the Final Judgment and Findings of Fact and Conclusions of law on the grounds the court improperly admitted the insurance adjustor reports and erred when it determined there was sufficient evidence to show the vehicle was used as a public or livery conveyance.

II. JURISDICTION

¶ 7 The Supreme Court has jurisdiction over final judgments and orders of the Commonwealth Superior Court. NMI CONST. art. IV, § 3.[1]

III. STANDARDS OF REVIEW

¶ 8 There are two issues on appeal. First, whether the court erroneously admitted hearsay evidence in the form of MICO's insurance adjustor reports. "We review a trial court's decision pertaining to the admission of evidence for abuse of discretion." *Commonwealth v. Cepeda*, 2009 MP 15 ¶ 12. Second, whether there was sufficient evidence to support the court's conclusion that the vehicle was used as a public or livery conveyance.[2] We review a court's finding of facts under the clearly erroneous standard. *In re The Estate of Olopai*, 2015 MP 3 ¶ 12.

IV. DISCUSSION

A. Insurance Adjusters' Reports

¶ 9 The court admitted MICO's insurance adjusters' reports and testimony regarding the reports on the basis of the business records exception to the rule

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[1] While MICO asserts Hossain, who has left the Commonwealth, did not authorize this appeal, there is no evidence supporting this contention, and Hossain's counsel vigorously denies MICO's assertion. We determine, therefore, we have jurisdiction to consider the appeal.

[2] The Eighth Circuit announced:

> The term 'public conveyance' means a vehicle used indiscriminately in conveying the public, and not limited to certain persons and particular occasions or governed by special terms. The words 'public conveyance' imply the holding out of the vehicle to the general public for carrying passengers for hire. The words 'livery conveyance' have about the same meaning.

Allstate Ins. Co. v. Roberson, 217 F.2d 10, 13 (8th Cir. 1954) (quoting *Elliot v. Behner*, 96 P.2d 852 (Kan. 1939)). "The primary factor in determining whether a vehicle is used as a public or livery conveyance depends upon whether the transportation is generally available to the public rather than whether any money has been or will be paid." *Marianas Insurance Co., Ltd. v. Ismail Hossain*, Civ. No. 11-0307 (NMI Super. Ct. Dec. 2, 2015) (Findings of Facts and Conclusions of Law at 12) (quoting *St. Paul Mercury Indem. Co. v. Knoph*, 87 N.W.2d 636, 638 (Minn. 1958)).

against hearsay. Under the business records exception, NMI Rule of Evidence 803(6) ("803(6)"), a record is not excluded by the rule against hearsay if:

> (A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;
> (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
> (C) making the record was a regular practice of that activity;
> (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
> (E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

¶ 10 "An abuse of discretion exists if the [trial] 'court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.'" *Cepeda*, 2009 MP 15 ¶ 12 (quoting *Commonwealth v. Campbell*, 4 NMI 11, 16 (1993)). Here, the adjustors' reports were prepared in the normal course of business. When an insured submits a claim to MICO, an insurance adjuster completes a report. When Hossain, through Zheng and Mangarero, submitted a claim, MICO's insurance adjusters completed their reports. The reports included the available parties' written and oral statements and a standard form used by MICO to report accidents. The reports conform with the business record exception outlined in 803(6), as it was made by someone with knowledge of the information transmitted, was kept in the course of a regular conducted activity in conformance with regular practice of MICO, was testified to by a qualified witness, and nothing in the record indicates any lack of trustworthiness.

¶ 11 Hossain argues insurance adjuster reports should be considered akin to police reports, as they are inherently prepared in anticipation of litigation. And, as Hossain points out, some jurisdictions, though the significant minority, have stopped admitting police reports under the 803(6) exception. *See, e.g.*, *Nettles v. Bishop*, 266 So.2d 260, 264 (Ala. 1972) (agreeing the general rule in Alabama excludes an investigating officer's report); *Brown v. State*, 549 S.E.2d 107, 109 (Ga. 2001) ("Police work by its very nature is adversarial and police investigations are inherently accusatorial. . . . while the narrative portion of a police report may meet the technical requirements of the statute, it does not have the reliability inherent in other documents . . . traditionally considered to be business records."); *Dubray v. South Dakota Dep't of Soc. Servs.*, 690 N.W.2d 657, 664 (S.D. 2004) ("The foregoing discussion also excludes the investigative police report"). However, Hossain points to no jurisdictions which have extended this reasoning to insurance adjusters' reports.[3] We see little connection between

[3] In support of his argument, Hossain cites a single Arkansas court of appeals case, *Ward v. Union Life Ins. Co.*, 653 S.W.2d 153, 156 (1983), where the court held the admission

police reports and insurance adjuster reports. Insurance adjuster reports, unlike police reports, are not inherently accusatorial or adversarial. They instead reflect a business relationship between an insurer and insured. While an insurance adjuster's report may, to some extent, be used in an investigative manner, the relationship between an insurance agent and an insured is markedly different from that between a police officer and a suspect. We decline to extend the reasoning behind excluding police reports to insurance adjuster reports.

¶ 12 Hossain further argues the reports contained information about MICO's investigation into Zheng's driving activity, and that such investigation and the reports that came from it went beyond the bounds of the "course of a regularly conducted activity of" MICO, and so should not be admissible under 803(6). We disagree. The purpose of an insurance adjuster is "to separate fact from fiction regarding a claim and obtain information to enable the insurance company to distinguish the valid claim from a claim for which the insurance company is not liable under its policy." *Bump v. Firemens Ins. Co.*, 380 N.W.2d 268, 275 (Neb. 1986). The regular conduct of the insurance adjusters at MICO, and adjusters generally, is to investigate claims, and nothing indicates the adjusters here were not qualified to do so. *See id*. (noting an insurance company has a duty to ensure its claims adjusters are qualified to "ascertain the loss and attendant circumstances" upon which a claim is based, and nothing indicated the adjuster in question was not qualified). Nothing in the record before us indicates that the adjusters' behavior was outside of the regular conduct of MICO's insurance adjusters, or would remove their reports from the business records exception. The court correctly applied the hearsay exception and we find no clearly erroneous assessment of the evidence. We conclude the court did not abuse its discretion in admitting the insurance adjusters' reports or permitting testimony regarding those reports by a qualified MICO employee.

¶ 13 We now consider whether there was sufficient evidence to justify the conclusion the vehicle was being used as a public or livery conveyance at the time of the accident.

B. Public or Livery Conveyance

¶ 14 We find clear error when, after reviewing all the evidence, we are "left with a definite and firm conviction a mistake has been made." *Pangelinan v. Itaman*, 4 NMI 114, 120 n.33 (1994). This does not mean we re-weigh the evidence—indeed, we "accord[] particular weight to a trial judge's assessment of conflicting and ambiguous evidence." *Arriola v. Arriola*, 1999 MP 13 ¶ 18. Generally, "the insured has the burden of proving that a benefit is covered, while

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of third-party medical reports included in an insurance adjuster's report under the business records exception was an abuse of discretion, as the reports were not compiled in the normal course of business but instead for the purpose of investigating the insurance claim. We note not only has *Ward* been criticized by the Arkansas Supreme Court, *Southern Farm Bureau Life Ins. Co. v. Cowger*, 748 S.W.2d 332, 335 (1988), but is also not factually analogous with the case at bar.

the insurer has the burden of proving that an exclusion applies." *Critchlow v. First UNUM Life Ins. Co. of Am.*, 378 F.3d 246, 256 (2d Cir. 2004) (quoting *Mario v. P & C Food Markets, Inc.*, 313 F.3d 758, 765 (2d Cir. 2002)).

¶ 15 At trial, the court heard conflicting testimony about whether Zheng knew the passenger in the vehicle at the time of the accident. Ms. Rosalia Cabrera ("Cabrera"), a MICO employee, testified Zheng told insurance adjusters he did not know the passenger. Cabrera also testified later in the day Zheng reported the claim, the insurance adjusters saw Zheng picking up and dropping off passengers in another vehicle, also owned by Hossain. She noted these two factors lead to MICO's conclusion the vehicle had been in use as a public or livery conveyance at the time of the accident. An expert for Hossain, Mr. Jacques Kirby ("Kirby"), testified that in his opinion as a former insurance adjuster, he did not believe the facts went beyond establishing a suspicion that the car was being used as a public or livery conveyance, and thus in his opinion MICO lacked the necessary evidence to deny the claim on that basis. On cross-examination, however, Kirby agreed that the evidence might "raise a red flag" and based on the report he "would have suspicions [himself]" the vehicle was being used as a public or livery conveyance. Tr. 115. However, he stated those suspicions would not, on their own, have been sufficient to deny the claim.

¶ 16 Additional evidence presented at trial included the insurance adjusters' report, a portion of Mangarero's deposition, and a letter from the passenger in the car driven by Zheng at the time of the accident, which contained statements that conflicted with Zheng's statements from the insurance adjusters' reports and indicated she had gotten Zheng's number from a friend. After weighing the evidence, the court determined "the evidence presented [was] sufficient to show that the option for transportation in Hossain's car was generally available to the public, and Zheng was using Hossain's case as a public or livery conveyance at the time of the collision." *Marianas Insurance Co., Ltd. v. Ismail Hossain*, Civ. No. 11-0307 (NMI Super. Ct. Dec. 2, 2015) (Findings of Facts and Conclusions of Law at 12–13). We agree.

¶ 17 While there is conflicting testimony, nothing in the record indicates the trial court's determination was clearly erroneous. We are not "left with a definite and firm conviction that a mistake has been made." *Pangelinan*, 4 NMI 114, 119 n.33 (1994). Instead, we defer to the trial court's assessment of conflicting evidence.

V. CONCLUSION

¶ 18 For the foregoing reasons, we AFFIRM the trial court's Final Judgment and Findings of Fact and Conclusions of Law.

SO ORDERED this 18th day of December, 2017.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

/s/
PERRY B. INOS
Associate Justice