

Hon. Michael D. Bustamante



Judge Michael D. Bustamante was on the New Mexico Court of Appeals, 1994 - 2016, Chief Judge 2005 – 2006. He authored over 1,000 opinions and participated on over 3,000 other cases covering the full panoply of the New Mexico Court of Appeals docket, including: class certification, contract interpretation, business and commercial law, corporate and partnership dissolution, construction defects, insurance coverage disputes, professional malpractice and real estate disputes, workers' compensation, public labor disputes, employment law, and contract actions against government entities.

Practice prior the bench focused on litigation, including employment matters, federal and state civil rights, personal injury and contracts. Served as general counsel to a savings and loan association, an Indian pueblo and a large community college.

Areas of Expertise:

- APPELLATE
- ATTORNEY FEE/MALPRACTICE
- BANKING/LENDER LIABILITY
- CIVIL RIGHTS
- CONSTRUCTION
- CONTRACTS
- EMPLOYMENT/LABOR
- INSURANCE/REINSURANCE
- OIL, GAS, ENERGY AND WATER
- PRODUCT LIABILITY
- REAL ESTATE

Representative Matters:

1. *Clayton v. City of Farmington*, 902 P.2d 1051 (1995) (Landowner challenged the City's denial of curb access to a busy thoroughfare. Affirming, the opinion examines the appropriate standard of review to be applied by the district court and on appeal when considering municipal zoning decisions and finds substantial evidence supporting the City's action and the district court's decision.)
2. *Buchanan v. Kerr McGee*, 908 P.2d 242 (1995) (Worker claim under the New Mexico Occupational Disease Act. Reversing a judgment in favor of the employer, the opinion held that worker's claim was not barred by a separate settlement and release and that the Act

did not preclude benefits based on the mere presence in his medical record of a non-occupational risk factor for lung cancer.)

3. *Long v. Allen, 906 P.2d 754 (1995)* (Seller of real estate appealed from a summary judgment entered in favor of Buyer. Buyer had asserted that Seller breached the residential purchase agreement between them. Affirming, the opinion held that the terms of the agreement and the actions of the parties were clear enough to allow entry of a judgment as a matter of law.)
4. *Sanders v. Est. of Sanders, 1196-NMCA-102, 927 P.2d 23* (Spouse filed an independent action seeking relief from a prior divorce settlement and judgment. The action was dismissed. Affirming, the opinion held that plaintiff improperly—and fatally—pursued Rule 60(B)(6) relief in an independent action rather than in the original case. In addition, the theories appropriately brought in the independent action failed as a matter of law.)
5. *Mountain States Mut. Cas. Co. v. Vigil, 1996-NMCA-062, 918 P.2d 728* (District court granted insurer a credit against uninsured motorist benefits owed to an injured worker. Reversing, the opinion noted that the applicable statute granted a right of reimbursement to an employer if the employer paid the premium on the UIM policy. Employer here settled its reimbursement right for less than 100% of its value. Insurer was not a beneficiary of the statutory provision and could not claim a credit for the amount foregone by the employer.)
6. *Cohn v. Cohn, 1997-NMCA-011, 934 P.2d 279* (Opinion affirms a divorce decree requiring spouse to provide lifetime child support for a severely disabled child, finding a common law duty to pay.)
7. *Miller v. Johnson, 1998-NMCA-059, 958 P.2d 745* (Opinion affirmed forfeiture of Buyer's interest in property under a New Mexico form real estate contract based on payment defaults and lack of maintenance of the property, ruling that the forfeiture was not unfair or inequitable under the facts as found by the district court.)
8. *Hubbard v. ATC, 1998-NMCA-058, 958 P.2d 111* (Trucker's request for repair damages exceeding the fair market value of the truck and for consequential damages were denied. The opinion affirmed as to the fair market value ruling but reversed as to the claim for consequential damages.)
9. *Enriquez v. Cochran, et. al., 1998-NMCA-157, 967 P.2d 1136* (Claim for severe injuries suffered when a tree plaintiff was helping to cut down broke and fell on him. A jury awarded substantial damages. The Court affirmed in a lengthy opinion discussing, inter alia, the propriety of sanctions imposed on defendant Boy Scouts of America and the tort law of inherently dangerous activities in New Mexico.)
10. *Restaurant Mgt. Co. v. Kidde-Fenwal et. al., 1999-NMCA-101, 986 P.2d 504* (Opinion provides a close examination and clarification of the courts' inherent power to sanction litigants for spoliation of evidence before litigation is initiated.)
11. *N.M State Hwy. & Trans. Dept. v. Gulf Ins. Co., 2000-NMCA-007. 996 P.2d 424* (In an interpleader proceeding, the opinion holds that a surety that issues a performance and payment bond and actually satisfies claims against its insured has a superior right as against

the insured's secured creditors to progress payments and retainage funds held by the project owner.)

12. *Tarin's Inc. v. Tinley*, 2000-NMCA-048, 3 P.3d 680 (Detailed discussion of privity of contract, third party beneficiary and real property licensee concepts.)
13. *Walta v. Gallegos Law Firm*, 2002-NMCA-015, 40 P.3d 449 (A jury entered a verdict for compensatory and punitive damages against the major stockholder and senior partner of a law firm in favor of a former shareholder/attorney in the firm. Affirming, the opinion provides an extended discussion of the nature of the fiduciary duty owed among shareholders in a close corporation.)
14. *Richards v. Allianz Life Ins. Co.*, 2003-NMCA-001, 62 P.3d 320 (Dispute over commissions owed to a long-term insurance agent upon termination of his contract. Defendant asked that the matter be referred to arbitration. The district court refused. Reversing, the opinion construed a series of agency contracts between the parties and concluded that they required a referral to arbitration.)
15. *Village of Wagon Mound v. The Mora Trust et. al.*, 2003-NMCA-026, 62 P.3d 1231 (All of the parties in the case had for a period of 70 years been dependent on the same source for their water needs. The Trust asserted that it had a right to the water superior to all other claimants and users. In an opinion preserving all parties' access to and use of the water, the Court provides an extended discussion of water rights as defined in New Mexico versus contractual rights and obligations as between parties. The opinion also provides an extended discussion of the concept of "floating" easements.)
16. *Fickbohm v. S. Paul Ins. Co.*, 2003-NMCA-040, 63 P.3d 517 (In the course of affirming a summary judgment in favor of the insurance company, the opinion provides a detailed examination of uninsured motorist coverage provisions and case law.)
17. *Romero v. Bank of the Southwest*, 2003-NMCA-124, 79 P.3d 288 (Affirming a judgment against the bank for wrongfully pressuring plaintiff to allow it to divert the proceeds of a land sale and apply it to debts owed to the bank by a corporation not owned by plaintiff; the opinion examines the concept of duress, ratification as a cure for duress and restitutionary damages.)
18. *Vigil v. Public Serv. Co. of NM*, 2004-NMCA-085, 94 P.3d 813 (Wrongful termination case holding that an employee covered by a collective bargaining agreement cannot bring an action for retaliatory discharge even when the union refuses to take the employee's issue to arbitration.)
19. *Berry v. Federal Kemper Life Ins. Co.*, 2004-NMCA-116, 99 P.3d 1166 (Partially affirming and partially reversing district court certification of a nationwide class action concerning modal premium disclosures. As a matter of first impression in New Mexico, the opinion addressed a. standards for requirements of numerosity, commonality, typicality and adequate representation; b. suggested approaches to the difficulties posed by multistate class actions, and; c. set appropriate methods for considering and resolving questions of predominance and superiority under Rule 1-023(B)(3).)
20. *Brooks v. Norwest Corp.*, 2004-NMCA-134, 103 P.3d 39 (Affirmed denial of a requested class certification, clarifying requirements for class definition and standards applicable to the

predominance and superiority criteria of Rule 1-023(B)(3) and suggested approach to determining manageability.)

21. *Bogle v. Summit Inv. Co., 2005-NMCA-024, 107 P.3d 520* (Complicated dispute over a commission earned on the sale of real property involving contract law, tort law and punitive damages issues. District court judgment affirmed with the exception of a judgment entered against one party in his personal capacity.)
22. *HBS Partnership v. NZEDP, Ltd. 2005-NMCA-040, 110 P.3d 526* (Interpretation of a right of first refusal in a limited partnership agreement with regard to triggering events and the price required to meet the ROFR.)
23. *HSBC Bank v. Fenton, 2005-NMCA-138, 125 P.3d 644* (Mortgage foreclosure action adopting first-in-time/first-in-right rule to prioritize redemption attempts by multiple parties.)
24. *McNeill v. Burlington, 2007-NMCA-024, 153 P.3d 46* (Opinion clarifies the proper measure of damages for injury to real property, including repair costs and loss of fair market value to property as a whole.)
25. *Rapid Temps Inc. v. Lamon, 2008-NMCA-122, 192 P.3d 799* (Consideration of employer covenant not to compete and claim of damages for alleged misappropriation of trade secrets.)
26. *Capco v. Greka, 2008-NMCA-153, 198 P.3d 354* (procedural and substantive issues arising from a long term failure to properly apportion payments of the proceeds from oil and gas well production.)
27. *Rael v. Page, 2009-NMCA-123, 222 P.3d 678* (Holding that a shareholder of a corporation has standing to assert direct causes of action against board members in the context of an allegedly unfair or invalid merger and concluding that the statutory right of appraisal does not provide an exclusive remedy for any resulting damages.)
28. *Bustos v. Hyundai, 2010-NMCA-090, 236 P.3d 440* (Opinion clarifies the type of evidence required and admissible to prove a products liability claim based on alleged design defects.)
29. *Grassie v. Roswell Hosp. Corp., 2011-NMCA-024, 258 P.3d 1075* (Affirms judgment grounded on medical malpractice theories, including punitive damages, applying the cumulative conduct approach and reverses judgment based on negligent hiring theory.)
30. *Sabatini v. Roybal, 2011-NMCA-086, 261 P.3d 1110* (Opinion clarifies standards for construing provisions of neighborhood restrictive covenants.)
31. *Nellis v. Farmers Ins. Co. of Az., 2012-NMCA-020, 272 P.3d 143* (Held as a matter of law that the defendant insurer appropriately explained and disclosed the cost of paying premiums in installments rather than in a yearly lump sum.)
32. *Dydek v. Dydek et. al., 2012-NMCA-088, 286 P.3d 608* (Insurance bad faith failure to settle case holding, inter alia, that the proper measure of damages against an insurer is the full amount of the judgment entered against its insured.)
33. *Clay v. NM Title Loans, Inc., 2012-NMCA-102, 288 P.3d 872* (Opinion holds, inter alia, that tort claims based on gunshot wounds suffered in the course of a self-help repossession of an automobile were not within the scope of the arbitration clause contained in the loan agreement signed by plaintiff.)



34. *Richter v. Presbyterian Healthcare Serv., 2014-NMCA-056, 326 P.3d 50* (Opinion, among a number of other substantive and procedural issues, provides an approach to deciding when expert testimony is required to prove assertions of negligence by medical care providers and testing laboratories.)
35. *Atherton v. Gopin, 2015-NMCA-003, 340 P.3d 630* (reversing and remanding a judgment against an attorney for damages under the NM Unfair Practices Act.)
36. *Shah v. Devasthali, 2016-NMCA-053, 371 P.3d 108* (Appeal from a district court judgment reducing an award entered in an arbitration proceeding in favor Appellant Shah. The district court's decision was based on its independent interpretation of the parties' operating agreements controlling their radiology practice. Reversing, the opinion noted that court review of arbitration awards is sharply limited and held that the district court's construction of the parties' contracts was wrong.)

Publications and Speaking Engagements:

- Incorporating the Law of Criminal Procedure in Termination of Parental Rights Cases: Giving Children A Voice Through *Mathews v. Eldridge*, 32 NMLR 143
- Appellate Bench/Bar Conference 10/28/2016 (3 presentations): Advocacy: What Works and What Doesn't in Briefs and Oral Argument; 2. Navigating the Court of Appeals Docketing and Calendaring Process; 3. Keys To Obtaining Discretionary Review
- 25th Annual Appellate Practice Institute 12/05/2014: What Is It You Don't Understand About Discretion?
- New Mexico Trial Lawyers' Foundation Ethics and Professionalism Seminar: Zen and the Art of Advocacy (Being Good for Goodness Sake)
- Keynote Speaker MALSA Fighting for Justice Award Banquet 2008
- National Conference of Hearing Officials 2007: Judicial Review of Administrative Action

Honors:

- Seth D. Montgomery Distinguished Judicial Service Award, State Bar of New Mexico 2017
- UNM School of Law Distinguished Achievement Award 2017
- Outstanding Contribution Award, State Bar of New Mexico 2000
- Outstanding Contribution Award, State Bar of New Mexico 1998
- 1993 New Mexico Bar Foundation Fellow for Outstanding Commitment to the Law, the Profession And the Public

Professional Associations:

- State Bar of New Mexico
- New Mexico Hispanic Bar Association
- State Bar Appellate Practice Section



Education:

- University of Virginia School of Law (Master of Laws in The Judicial Process—2001)
- University of New Mexico (BA—1971; JD—1974)