

MARTIN V. HOT SPRINGS, 1928-NMSC-036, 33 N.M. 396, 268 P. 568 (S. Ct. 1928)

**MARTIN et al.
vs.
VILLAGE OF HOT SPRINGS et al.**

No. 3260

SUPREME COURT OF NEW MEXICO

1928-NMSC-036, 33 N.M. 396, 268 P. 568

June 05, 1928

Appeal from District Court, Sierra County; Owen, Judge.

Action by Robert Martin and another doing business under the firm name and style of the Hot Springs Water Company, against the Village of Hot Springs and others. From the judgment, plaintiffs appeal. On appellee's motion to strike from the transcript of record appellant's motion for a new trial, appellant's requested findings of fact and the finding of fact and conclusions of law made by the trial court.

SYLLABUS

SYLLABUS BY THE COURT

1. A written application to the court to make findings of fact and conclusions of law is a motion, and, when filed in the cause, is a part of the record proper.
2. A motion for a new trial, regularly filed in the cause, is a part of the record proper.
3. Findings of fact and conclusions of law made by the trial court are a part of the record proper.

COUNSEL

Edward D. Tittmann and Edward L. Medler, both of El Paso, Texas, for appellants.

James G. Fitch, of Socorro, for appellees.

JUDGES

Parker, C. J. Bickley and Watson, JJ., concur.

AUTHOR: PARKER

OPINION

{*397} {1} OPINION OF THE COURT Appellees filed a motion to strike from the transcript of record appellants' motion for a new trial, appellants' requested findings of fact and conclusions of law, and the findings of fact and conclusions of law made by the trial court, upon the ground that said papers are not, and have not been made, a part of the record proper.

{2} The record discloses that all of said papers were filed in the office of the clerk of the court, and are a part of the record and files of said office in this case. The record further discloses that the trial court, by order filed, overruled the motion for a new trial, and by indorsement on the motion requesting findings of fact and conclusions of law allowed some and refused others.

{3} Appellee contends that none of said papers are a part of the record proper, and have been improperly included in the transcript, and therefore should be stricken. In support of this contention appellees cite Gradi v. Bachechi, 24 N.M. 100, 172 P. 188; Fulghum v. Madrid, 31 N.M. 91, 240 P. 990; Clark v. Maisen, 32 N.M. 246, 255 P. 404.

{4} In a recent decision of this court, Vosburg v. Carter, 33 N.M. 86, 262 P. 175, we specifically overruled the foregoing decisions, and held:

"A written request or application to the trial court to make findings of fact and conclusions of law is a motion and is among the papers contemplated by section 23, c. 43, Laws of 1917, as being a paper regularly filed in a cause, so as to be considered a part of the record proper."

In the case of State v. Foster, 28 N.M. 273, 212 P. 454, we only held that a motion for a new trial appearing {*398} in the files of this court but not in the transcript of record cannot be considered by us. Clearly a motion for a new trial regularly filed in, and considered by, the trial court, is a part of the record proper. Vosburg v. Carter, 33 N.M. 86, 262 P. 175.

{5} Findings of fact and conclusions of law made by the trial court and filed in said cause, in compliance with section 4197, Code 1915, which is in part as follows:

"Upon the trial of any question of fact by the court, its decision must be given in writing and filed with the clerk in the cause, and in such decision the court shall find the facts and give its conclusions of law pertinent to the case, which must be stated separately, * * *"

-- are a part of the court's decision, and among the papers contemplated by section 23, c. 43, Laws 1917, as being a part of the record proper.

{6} The appeal in this case was perfected long prior to the adoption by the Supreme Court, on January 7, 1928, of the rules of appellate procedure, which became effective

March 1, 1928. This opinion, therefore, is not to be construed as passing upon the provisions of the new rules, but only upon the law as it existed prior thereto.

{7} Appellees' motion to strike is therefore denied and it is so ordered.