EDGAR WILLIAMS, RONALD L. WILLIAMS, GAYNELL WILLIAMS, FANNIE W. JONES, ALFREDA PORTER, ANNETTE WILLIAMS, GEORGE WILLIAMS, VICTORIA HAWKINS, EUNIECESTINE T. WILLAIMS AS EXECUTRIX FOR ESTAE OF EDDIE WILLIAMS, SR., DOROTHY W. RODGERS, ET AL.	* *	**NO. 2002-CA-1226** **COURT OF APPEAL** **FOURTH CIRCUIT** **STATE OF LOUISIANA**

VERSUS

BASS ENTERPRISES PRODUCTION COMPANY, ABC INSURANCE COMPANY, BASS BROTHERS ENTERPRISES, INC., DEF INSURANCE COMPANY, THE BOARD OF LEVEE COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT ("LEVEE BOARD"), GHI INSURANCE COMPANY, RICHARDSON & BASS, ET AL.

APPEAL FROM
25TH JDC, PARISH OF PLAQUEMINES
NO. 38-349, DIVISION "B"
Honorable William A. Roe, Judge
* * * * * *
JUDGE MAX N. TOBIAS, JR.
* * * * * *

(COURT COMPOSED OF JUDGE CHARLES R. JONES, JUDGE TERRI F. LOVE, JUDGE MAX N. TOBIAS, JR.)

ROBERT A. BARNETT

GUSTE, BARNETT & SHUSHAN, L.L.P.
639 LOYOLA AVENUE
SUITE 2500, ONE POYDRAS PLAZA
NEW ORLEANS, LA 70113-7103
COUNSEL FOR PLAINTIFF/APPELLANT

M. HAMPTON CARVER
STACY SMITH BROWN
CARVER, DARDEN, KORETZKY, TESSIER, FINN, BLOSSMAN & AREAUX, L.L.C.
ENERGY CENTRE, SUITE 2700
1100 POYDRAS STREET
NEW ORLEANS, LA 70163
COUNSEL FOR DEFENDANT/APPELLEE

AFFIRMED.

On 29 October 2001, the trial court sustained an exception of prematurity filed by defendants/appellees, Bass Enterprises Construction Co., Bass Brothers Enterprises, Inc. and Richardson & Bass (Louisiana Account) (hereinafter collectively referred to as "Bass"), dismissing without prejudice the plaintiffs' suit against Bass for the plaintiffs' failure to comply with La. R.S. 31:137. The plaintiffs now appeal.

This matter involves a tract of land in Plaquemines Parish that is commonly referred to as the Bohemia Spillway ("the spillway"). The plaintiffs, Edgar Williams and his family, claim to be the owners of a part of

the spillway known as Tract #90. In the late 1920's the Board of Commissioners of the Orleans Levee Board ("Levee Board") expropriated, or purchased under threat of expropriation, from numerous owners, the land that now comprises the spillway for the purpose of providing flood protection to the city of New Orleans. Subsequently, the Levee Board granted mineral leases on the property to various entities, including Bass, and began collecting royalty and other income under the leases. In 1984 and 1985, the Louisiana legislature enacted the Return of Lands Acts, which required the Levee Board to return to the former owners or their successors the spillway land that had been expropriated, or purchased under threat of expropriation, in the 1920's. The Act directed the Levee Board to return the property after it had received a certificate from the Louisiana Secretary of Natural Resources identifying the successors in interest to the landowners at the time of the transfers in the 1920's. In order to preserve the rights of those who had contracted with the Levee Board in the interim, Section 5 of Act 233 of 1984 provides, in part:

> The return of the property by the board to the owners or their successors shall be subject to all servitudes and rights-of-way, whether acquired by expropriation or otherwise, or surface or mineral leases, or other valid contracts executed by or with the board prior to the effective date of this Act. Any deed whereby any property is returned shall state that such property is subject to such rights.

The plaintiffs filed a Petition for Declaratory Relief, Recission [sic] of Lease Contract and Damages, as a proposed class action, in April of 1994 against Bass, the Levee Board, and their alleged insurers seeking a declaration that they are the owners of Tract #90 and thus entitled to all royalty payments paid and received by the defendants from 1924 to 1984. In addition, the plaintiffs sought an accounting of all royalty payments and compensatory damages, together with punitive damages representing double the amount of royalties paid. The plaintiffs further sought rescission of all leases affecting the property and the setting aside of all related pooling agreements and quitclaims.

Bass responded by filing an exception of prematurity wherein it argued that the plaintiffs' petition was premature because the plaintiffs had failed to provide it with the thirty-day notice required under Articles 137 and 138 of the Louisiana Mineral Code. Bass did not move to have the court set for hearing its exception, however, until July of 2001 when it was faced with the plaintiffs' request for a class certification hearing. Upon motion of Bass, the trial court continued the class certification hearing without date and set Bass' exception for a hearing on 4 September 2001. By judgment dated 29 October 2001, the trial court sustained Bass' exception and dismissed, without prejudice, the plaintiffs' claims against it, finding:

> [T]his is a suit for royalty; Bass is a mineral lessee;

> as a prerequisite to suit, Bass was entitled to the notice required by Mineral Code Art. 137, La. R.S. 31:137.

In addition, the trial court designated its judgment as final and expressly found that there was no just reason for delay.

The plaintiffs now appeal that judgment.

In response to this appeal, Bass asserts that the plaintiffs' counsel did not file a written opposition to its exception, nor did the plaintiffs' counsel appear at the hearing on the exception. Instead, Bass claims that prior to the hearing, the plaintiffs' counsel notified counsel for Bass that he would not be attending the hearing and that he had no objection to the trial court deciding the exception. These assertions were memorialized in the trial court's 29 October 2001 judgment as follows:

> Counsel for plaintiffs filed no opposition to the exception. Counsel for Bass advised the Court by telephone that counsel for the plaintiffs had advised that he did not intend to appear for the hearing and had no objection to the Court's deciding the exception.

Based on the foregoing, Bass argues that pursuant to the longstanding law of Louisiana, and of this circuit in particular, the plaintiffs are now precluded from making any arguments to this court because they raised no arguments in the trial court. Bass cites a number of cases for the above proposition, including this court's recent decision in *Eastern Capital*

Holdings, Ltd. v. Marsh & McLennan of Louisiana, Inc., 2001-1852 (La. App. 4 Cir. 4/3/02), 814 So.2d 759, wherein we stated, citing Rule 1-3 of the Uniform Rules, Courts of Appeal, that courts of appeal "will review only issues which were submitted to the trial court ...., unless the interest of justice clearly requires otherwise." *Id.* at p. 5, 814 So.2d 762. Accordingly, we declined to address for the first time on appeal an argument that had not been raised at the trial court level.

We agree with Bass that the plaintiffs should be precluded from presenting arguments in opposition to the trial court's judgment sustaining Bass' exception of prematurity when it made no such arguments at the trial court level. As we recently stated in *Ventura v. Rubio*, 2000-0682, p.4 (La. App. 4 Cir. 3/16/01), 785 So.2d 880, 885, "[t]he Court of Appeal is not a court of first impression and cannot review evidence that was not before the trial court." [Citations omitted].

Accordingly, based on the record before us on appeal, we are compelled to

affirm the trial court's judgment granting Bass' exception of prematurity that dismissed the plaintiffs' suit without prejudice.

AFFIRMED