

STATE OF MICHIGAN
COURT OF APPEALS

HARRY BLACKWARD and D'ANNE
KLEINSMITH,

UNPUBLISHED
October 19, 2001

Plaintiffs-Appellants/Cross-
Appellees,

v

SIMPLEX PRODUCTS DIVISION and K2, INC.,

No. 221066
Oakland Circuit Court
LC No. 97-551584-NP

Defendants-Appellees/Cross-
Appellants.

Before: K. F. Kelly, P.J., and O'Connell and Cooper, JJ.

O'CONNELL, J. (*concurring in part and dissenting in part*).

I concur only with the majority's conclusion that MCL 600.2945(h) allows plaintiffs to sue in tort for damage to property.¹ However, I do not believe that this Court should address defendants' issue on cross-appeal because it was not decided by the trial court. Although this Court may address unpreserved questions of law where the record is factually sufficient, I would decline to do so in the present case. Whether plaintiffs' claim against defendants is barred by the release is a significant legal question that we should not address before it is subject to plenary consideration by the trial court. See, generally, *Smit v State Farm Mutual Automobile Ins Co*, 207 Mich App 674, 685; 525 NW2d 528 (1994).

/s/ Peter D. O'Connell

¹ The plain language of the statutory provision also appears to allow recovery in tort for wholly economic loss in both the consumer and commercial context.