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## No clear winners in this builder-owner wrangle

It's time to play You Be The Judge. Here's a case that highlights the contrasting expectations of buyers who want their homes to be flawless, and builders who believe they are delivering the best homes they can.

You're buying your dream home and decide to blow the budget on polished granite flooring throughout the main floor. The builder quotes \$34,500. You figure why not?

After you take possession, you notice several granite tiles are cracked, some are loose, and the grout is missing in several areas.

You file a complaint with the Ontario New Home Warranty Program (now Tarion Warranty Corp.). ONHWP's position is the "cracks" are merely "natural fissures" it deems normal in granite and marble.

Unhappy with the result, you hire a lawyer to sue the builder for damages for breaching the agreement of purchase and sale.

The case gets to trial. Over the first four days, the judge hears the evidence of the parties and two expert witnesses.

The owners' expert is a home inspector who reports evidence of cracked granite tiles and "deflections" visible in all directions. He also notes loose grout in various areas. The door sills to all adjacent rooms are missing, he says, creating a trip hazard.

The builder hires a chartered surveyor who testifies the tiles were installed and laid to normal industry standards. The micro-cracks in the grouted joints, he says, are from normal "seasonal movement in the house frame" and daily wear and tear.

As the trial judge, you are now faced with the conflicting expert evidence of two witnesses. Uncertain who to believe, you adjourn the trial for four months and order a third expert report this one from an independent expert associated with the Terrazzo, Tile and Marble Association of Canada (<http://www.ttmac.com>).

When the trial resumes, the independent expert testifies the granite tile is not defective, nor of inferior quality. Aesthetically, he says, the appearance of the floor is satisfactory, but some of the wider micro-fissures detract from the overall appearance.

He explains natural fissures or faults occur in the formation of granite and can resemble cracks. Fissures, he says, are natural in many types of stone.

The granite floor has natural fissures, says the expert, but only one cracked tile. All other cracks were micro-fissures.

In essence, the expert testifies good tiles were properly installed, but remedial work has to be done. He defines remedial work as something that should not have been needed to be done.

The facts reported here are true, except for the upgrade cost which I doubled to account for inflation since the house was built in 1991. The facts are taken from the court's decision in a case where Rocco and Margaret Smeriglio sued the builder of their Aurora dream home.

You're the judge. What do you do?

Justice Douglas Lissaman had to exercise the wisdom of Solomon. In a masterpiece of understatement, he wrote: "In my view the parties to this case became allergic to each other. The builder clearly thought the Smeriglios were being unreasonable and demanding. On the other hand, the Smeriglios thought the defendants were being sloppy and not standing behind their work."

Ultimately, the judge decided some remedial work was required, and he awarded the plaintiffs \$6,000 in damages against the total upgrade cost of \$17,250.

The money was awarded as compensation for the floor that was improperly installed and for the inconvenience of having remedial work done and having to live with the defects.

The court decision didn't say who had to pay costs, but my guess is that both parties lost money after paying their lawyers for a five-day trial.

Sometimes, nobody wins in court cases no matter what the judge decides. This case points out the need for builders and homeowners to act reasonably, realistically and responsibly in resolving their disputes.

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