SCHALLER, J. dissenting. The majority upholds the trial court's decision that the plaintiff David R. Wilcox proved his cause of action on the basis of a violation of the entry and detainer statute, General Statutes § 47a-43. On appeal, the defendants, Daniel J. Ferraina and Thomas DeFranzo, challenge the court's ruling as to both the "actual possession" and the "forcible entry" elements of the statute. I respectfully disagree with the result on the basis of my reading of the controlling case law on actual possession. The decisions of our Supreme Court and this court persuade me that the plaintiff, as a licensee of the property in question, was not in actual possession at the time the defendants prevented his entry. As a result, I would conclude that the plaintiff could not properly maintain an action for forcible entry and detainer against the defendants and would reverse the judgment of the trial court.

At the outset, I would note that the cause of action for entry and detainer is a creature of statute and is in derogation of the well established common-law rule that inherent in ownership is the right to exclude others. See W. Blackstone, Commentaries, bk. 2, ch. 1. The statute, therefore, must be narrowly construed and strictly followed. See *Vitanza* v. *Upjohn Co.*, 257 Conn. 365, 381, 778 A.2d 829 (2001) ("[i]n determining whether or not a statute abrogates or modifies a common law rule the construction must be strict, and the operation of a statute in derogation of the common law is to be limited to matters clearly brought within its scope" [internal quotation marks omitted]).

Next, I would call attention to the facts, as found by the trial court, on the issue of actual possession. On this important issue, the court made a finding as to the terms of the agreement, namely, that the plaintiff had the right during the term to enter the property to excavate and to remove material, to place necessary equipment, to screen topsoil, and to fill and to grade. The court also found that the plaintiff moved various items of large equipment onto the property and began the topsoil and gravel operation. Concerning possession, the court's sole finding was that the "plaintiff had *a presence on the property pursuant to the agreement* between the parties. The [plaintiff] had [his] equipment on the property and [was] engaged in the business of removing sand and conducting the business of removing topsoil." (Emphasis added.) On the basis of that limited finding, the court concluded that the statutory requirement of actual possession was met.

Although the court did not characterize the agreement between the parties as a license, such a determination is implicit in its findings as to the terms of the agreement granting the plaintiff certain limited

rights in the property. As we previously have stated, "[a] license in real property is a mere privilege to act on the land of another, which does not produce an interest in the property. . . . [It] does not convey a possessory interest in land . . . . " (Internal quotation marks omitted.) *Murphy, Inc.* v. *Remodeling, Etc., Inc.*, 62 Conn. App. 517, 522, 772 A.2d 154, cert. denied, 256 Conn. 916, 773 A.2d 945 (2001). Furthermore, in stating that the plaintiff "had a presence on the property pursuant to the agreement," the trial court implicitly connected the issue of possession with the legal basis for occupancy.

The defendants challenge the court's finding that the plaintiff was in actual possession of the property on two grounds. They argue, first, that the agreement is relevant in determining the nature and level of possession as it conveyed a license to the premises and not a possessory interest. The majority rejects this argument, despite the fact that the trial court tied the "presence" of the plaintiff to the nature of the agreement between the parties. The majority relies on *Orentlicherman* v. *Matarese*, 99 Conn. 122, 121 A. 275 (1923), a 1923 case with language purporting to indicate that even people without any legal right to be on the property, i.e., trespassers, are protected. The majority reasons that the legal nature of the possession and the documents authorizing it are not relevant to the inquiry.

The defendants argue, second, that the evidence did not support a finding of sufficient "dominion and control" by the plaintiff, given the limited and specific activities that the plaintiff was permitted to and did conduct on the property. The majority rejects this argument on the basis of analogous case law despite the trial court's finding that the "plaintiff had a presence on the property . . . ."

The parties, the trial court and the majority have cited and discussed all the relevant appellate case law that governs this somewhat infrequently used statute. See *Berlingo* v. *Sterling Ocean House, Inc.*, 203 Conn. 103, 523 A.2d 888 (1987); *Communiter Break Co.* v. *Scinto*, 196 Conn. 390, 493 A.2d 182 (1985); *Orentlicherman* v. *Matarese*, supra, 99 Conn. 122; *Fleming* v. *Bridgeport*, 92 Conn. App. 400, 886 A.2d 1220 (2005), cert. granted on other grounds, 277 Conn. 922, 895 A.2d 795 (2006); *Czaplicki* v. *Ogren*, 87 Conn. App. 779, 868 A.2d 61 (2005); *Evans* v. *Weissberg*, 87 Conn. App. 180, 866 A.2d 667 (2005); *Murphy, Inc.* v. *Remodeling, Etc., Inc.*, supra, 62 Conn. App. 517; *Catropa* v. *Bargas*, 17 Conn. App. 285, 551 A.2d 1282, cert. denied, 210 Conn. 811, 556 A.2d 609 (1989). I agree with the majority's succinct summary of the case law as follows: "A plaintiff suing under the forcible entry and detainer statute must prove his *actual* possession of the land or property from which he claims to have been dispossessed. . . . The question of whether the plaintiff was in actual possession

at the time of the defendant's entry is one for the trier of fact. . . . Generally, the inquiry is whether the individual has exercised the dominion and control that owners of like property usually exercise. . . . [I]t is not necessary that there be a continuous personal presence on the land by the person maintaining the action. There, however, must be exercised at least some actual physical control, with the intent and apparent purpose of asserting dominion." (Citations omitted; emphasis in original.) *Communiter Break Co.* v. *Scinto*, supra, 393–94. I would also note that "[t]he purpose of the Connecticut entry and detainer statute . . . which is part of the Landlord and Tenant Act, General Statutes § 47a-1 et seq., is to prohibit a property owner from entering his or her property in the act of taking possession thereof from one not legally entitled to such possession but who, nonetheless, maintains actual possession of such property." (Internal quotation marks omitted.) *Karantonis* v. *East Hartford*, 71 Conn. App. 859, 861, 804 A.2d 861, cert. denied, 261 Conn. 944, 808 A.2d 1137 (2002). The statute is primarily designed as a "tenants' remedy for a lock-out, an illegal or self-help eviction by the landlord or others . . . ." (Internal quotation marks omitted.) Id., 862.

A close examination of the facts of the relevant cases persuades me that the plaintiff, as a licensee, did not meet the statutory standard of actual possession necessary to maintain an action for forcible entry and detainer. An analysis of the case law reveals that, in determining actual possession, the appellate courts of this state have relied on either a possessory interest or possession in a manner similar to that of like owners through the exercise of dominion and control. Actual possession is most obviously found in cases in which there is a possessory interest. In *Czaplicki* v. *Ogren*, supra, 87 Conn. App. 782, 786–87, an entry and detainer case involving a lockout complaint, title to a shared building was held by a joint venture for the benefit of both parties. The court implicitly found actual possession in addressing whether there had been a violation of the entry and detainer statute. Id., 786–87. Similarly, in *Orentlicherman* v. *Matarese*, supra, 99 Conn. 124–25, the plaintiff had obtained a possessory interest in the subject property through adverse possession. The trial court specifically found that the plaintiff and his predecessor had been in "actual, hostile, notorious and continuous possession" of the property. (Internal quotation marks omitted.) Id., 125. Thus, the majority's reliance on this case for the proposition that those with no right of possession nevertheless have been found to be in actual possession is misplaced. Although our Supreme Court mentioned in dicta that the purpose of the statute was "to protect a person in such possession, although a trespasser, from disturbance by any but lawful and orderly means," the touchstone of the court's decision was indeed possession. Id., 126. Also, in *Communiter*

Break Co. v. *Scinto*, supra, 196 Conn. 394, the fact that the plaintiff held a lease to the subject property supported a finding of actual possession. By contrast, in *Berlingo* v. *Sterling Ocean House, Inc.*, supra, 203 Conn. 107–109, our Supreme Court reversed a decision by this court upholding the application of the entry and detainer statute, reasoning that the plaintiff did not have a right to possession because his lease already had terminated at the time of the defendant's entry. Similarly, in *Catropa* v. *Bargas*, supra, 17 Conn. App. 287, 290, we concluded that the plaintiff who had operated a golf pro shop in his employer's clubhouse as part of an at-will employment agreement did not have the requisite possessory interest in the shop to maintain an action for forcible entry and detainer once his employment had terminated. Specifically, we reasoned that the plaintiff had not leased the premises and that his rights in the premises were incidental to his employment agreement. Id., 290.

As indicated, actual possession also can be based on a determination of sufficient dominion and control over the subject property such that the use of the property is similar to that of a like owner. See *Communiter Break Co.* v. *Scinto*, supra, 196 Conn. 394. In *Communiter Break Co.*, the finding of actual possession also was upheld following a determination that the plaintiff had exercised a sufficient degree of dominion and control over two forty-eight square foot areas that he leased in the Bridgeport train station and the Bridgeport bus terminal for the operation of public video game machines. Id., 392, 394. Our Supreme Court concluded that a finding of sufficient dominion and control was supported by evidence that the plaintiff had built wooden enclosures around the machines, had installed a roll-down security gate at one of the locations and had placed a sign at another. Id., 394. Similarly, in *Evans* v. *Weissberg*, supra, 87 Conn. App. 183, we upheld a finding of actual possession on the basis of evidence establishing that the plaintiff had exercised the dominion and control of owners of like property, including evidence as to her use and maintenance of the property as well as her belief that the disputed strip of land was part of her property. In *Fleming* v. *Bridgeport*, supra, 92 Conn. App. 405, we concluded that the trial court's failure to find actual possession was clearly erroneous. In that case, the plaintiff remained in her father's apartment after he had moved out without the landlords' permission. Id., 403. We determined that "[a]lthough the plaintiff was an illegal possessor, she nonetheless was in actual possession . . . ." Id., 405. In *Murphy, Inc.* v. *Remodeling, Etc., Inc.*, supra, 62 Conn. App. 521–22, however, we determined that the plaintiff, who had a limited presence on and no physical control over the subject property, could not be said to have been in actual possession. The plaintiff was granted limited use of a building for the purposes of maintaining two adver-

tising signs on its roof. Id., 518–19. The plaintiff, however, did not have keys to the premises or to the surrounding locked gate and, therefore, relied on the defendant in order to gain access to the premises. Id., 521. We concluded that there was no evidence that the plaintiff exercised any physical control over the premises and, therefore, could not be found to have been in actual possession. Id., 522.

When I apply the case law to the facts of the present case as found by the trial court, it becomes clear that the resolution of this entry and detainer action turns on the fact that the license agreement provided the legal basis for the plaintiff's occupancy of the property. The plaintiff's rights in the property pursuant to the agreement were specifically limited to those activities necessary for the excavation, filling and screening operations conducted on the property; the plaintiff did not have a possessory interest in the property. The present case is therefore distinguishable from the existing precedent in which actual possession was found as a result of a possessory interest. See *Communiter Break Co.* v. *Scinto*, supra, 196 Conn. 394; *Orentlicherman* v. *Matarese*, supra, 99 Conn. 125; *Czaplicki* v. *Ogren*, supra, 87 Conn. App. 782, 787.

Having concluded that the plaintiff lacked a possessory interest in the property, I now turn to the question of dominion and control. The majority upholds the court's finding that the plaintiff exercised dominion and control over the property, reasoning that the evidence as to the plaintiff's presence on the property was more than sufficient to support such a finding. Such evidence included the plaintiff's physical presence on the property five or six days a week for approximately ten hours per day, the housing of equipment on the property for several years, the construction of roads and an antitracking pad on the property, as well as evidence that the plaintiff had conducted a topsoil screening business from the property and had told many people that he owned the property. In my view, the plaintiff's presence on the property as established by this evidence is consistent with the plaintiff's limited purpose in being on the property pursuant to the agreement. As in *Catropa*, in which the plaintiff's right to use the premises for the operation of a pro golf shop was determined to be incidental to his employment agreement, the plaintiff's rights with respect to the property in this case were also *incidental to* the license agreement and the purposes of excavation. In fact, testimony provided at trial suggests that the plaintiff exercised a limited physical control over the premises. The plaintiff acknowledged that there were other parties present and that there were areas of the property that he was not allowed to enter.

In upholding the trial court's finding as to dominion and control, the majority distinguishes the present case from *Murphy, Inc.* v. *Remodeling, Etc., Inc.*, supra, 62

Conn. App. 518, 522, in which we reversed a finding of actual possession, concluding that there was no evidence that the plaintiff exercised *any* physical control over the premises. The majority reasons that evidence as to the plaintiff's presence on the property indicated a higher level of access to the property and therefore supported the trial court's finding of dominion and control. Although the facts in the present case suggest a stronger degree of physical control over the property than those in *Murphy, Inc.*, the question of whether the plaintiff exercised sufficient dominion and control over the premises must be answered in light of the agreement, which provided the legal basis for occupancy. The plaintiff's activities on the property were tied to the license agreement that granted him limited rights in the property for a limited term. Furthermore, the trial court found that the plaintiff's activities on the property conformed to those set forth in the agreement. The plaintiff's engagement in specifically authorized activities on the property certainly does not constitute the same use of the property that an owner would enjoy. Notably, the facts of the present case are distinguishable from those in *Fleming* v. *Bridgeport*, supra, 92 Conn. App. 405, in which actual possession was apparently based on a determination that the plaintiff, while not a tenant, occupied the apartment as a true tenant with the right to use and enjoyment of the premises. Such ownership-like occupancy is clearly lacking from the present case. As a result, I conclude that the plaintiff's activities on the property do not support a finding of dominion and control.

For the foregoing reasons, I would conclude that the plaintiff, as a licensee, was not in actual possession because he lacked a possessory interest in and dominion and control over the property. As a consequence, I would further conclude that § 47a-43 is inapplicable to the circumstances of the present case. I would therefore reverse the judgment of the trial court.

I respectfully dissent.