MITCHELL | HAMLINE School of Law

Mitchell Hamline Law Journal of Public Policy and Practice

Volume 39 | Issue 1 Article 5

2018

The Problems of Expanding Landlord-Tenant Law in Minnesota Through Use of Legal Fiction

Alejandro Moreno

MITCHELL HAMLINE LAW JOURNAL OF PUBLIC POLICY AND PRACTICE

VOLUME 39 SPRING 2018

THE PROBLEMS OF EXPANDING LANDLORD-TENANT LAW IN MINNESOTA THROUGH USE OF LEGAL FICTION

Alejandro Moreno[*]

I. INTRODUCTION 56

II. BACKGROUND 57
A. A Quick History of Self-Help Evictions 57
B. What do Lockout Actions Look Like in Minnesota? 60
C. The Cocchiarella v. Driggs Lockout Action 62

III. ANALYSIS 64
A. Why Didn't the Court Heed the Warnings from Within Its Own Chambers? 64
B. What has the Legislature Said About Plain Meaning and the Intent of Lockout Actions? 65
C. How Often are Dictionaries Used by the Minnesota Supreme Court to Determine Plain Meaning? 67
D. Can't the Minnesota Supreme Court Just do What It Wants? 70
E. A Quick Word on Legal Fictions 73
F. So Dictionaries and Legal Fiction Aside, Why is Determining Present Legal Right of Possession a Problem? 74
G. Impact on the Practice of Landlord-Tenant Law as Seen Through Hennepin County Housing Court 77
1. Potential abuses when a tenant is about to be legally evicted. 78
2. What if the right to deliver present legal right of possession is missing? 80
a. When the tenant is unaware that present legal right of possession did not transfer to them. 80
b. When the landlord is unaware that present legal right of possession did not transfer from them. 82

IV. CONCLUSION 84

***** Alejandro Moreno is a JD Candidate at Mitchell Hamline School of Law and the current judicial law clerk for Hennepin County Housing Court.

> "Home is the place where, when you have to go there, they have to take you in."
>
> — Robert Frost, *The Death of the Hired Man*, 1914.[1]

I. INTRODUCTION

Minnesota statute defines a residential tenant as a person who is occupying a dwelling in a residential building under a written or oral lease or contract requiring the payment of money or an exchange of services.[2] In *Cocchiarella v. Driggs*,[3] the Minnesota Supreme Court expanded the statutory definition of residential tenant by finding someone occupies residential rental property by either holding actual physical possession or holding the present legal right of possession.[4] The *Cocchiarella* majority repudiated a narrower view that the plain meaning of the controlling statutes requires actual possession.[5] Two housing court referees, a trial court judge, three appeals court judges, and even two justices from the Minnesota Supreme Court disagreed with the majority's expansive interpretation.[6]

While the *Cocchiarella* majority provided a good outcome to a lockout action for one particular tenant victimized by an unscrupulous landlord, the court's opinion expanded the statutory definition of residential tenant for all types of landlord-tenant cases in Minnesota.[7] Moreover, the majority's present legal right of possession approach used legal fiction by extending the meaning of tenancy to any period of time someone holds the right to occupy residential rental property, even if they have never physically occupied the property.[8] This article (1) advocates a return to a narrower actual physical possession requirement–at least as applied to lockout actions; (2) touches on how the court's reasoning continued a perilous trend of using dictionaries to surmise plain

---

1. ROBERT FROST, NORTH OF BOSTON 20 (Henry Holt & Co., 2d ed., reprt. 1922) (1914).
2. MINN. STAT. § 504B.001, subd. 12 (2017).
3. Cocchiarella v. Driggs, 884 N.W.2d 621 (Minn. 2016).
4. *Id.* at 628.
5. *Id.*
6. *Id.* (Anderson, J., dissenting).
7. *See* Cocchiarella v. Driggs, 884 N.W.2d 621 (Minn. 2016); MINN. STAT. § 504B.001, subd. 1 (2017) (stating definitions apply to entire 504B chapter).
8. Cocchiarella, 884 N.W.2d at 631 (Anderson, J., dissenting).

meaning; and (3) explores how the legal fiction of present legal right of possession has impacted the practice of law in Minnesota by looking at selected cases from the state's busiest landlord-tenant forum, the Hennepin County Housing Court.[9]

II. BACKGROUND

In *Cocchiarella*, a tenant looking for a new apartment filled out paperwork and paid a security deposit. However, the landlord changed his mind several times about when the apartment would be ready for the new tenant to move in. Finally growing tired after two weeks of waiting, the tenant filed a lockout action claiming the landlord unlawfully excluded her from her new apartment, which the tenant had never physically occupied.

This section will begin with a brief overview of self-help evictions, discuss what lockout actions look like in Minnesota, and explore the details of the *Cocchiarella v Driggs* lockout action.

A. A Quick History of Self-Help Evictions

"A man's home is his castle – for where shall he be safe if not in his house?"[10] The home as castle dictum is often cited in support of self-defense in criminal law,[11] but its context speaks to the need to respect the privacy of others so we may all feel safe in our own

---

9. *See* JAMES W. HIBBS, ANALYSIS OF THE 2015 POPULATION AND HOUSEHOLD ESTIMATES (2016), https://mn.gov/admin/assets/analysis-2015-population-household-estimates-msdc-nov2016_tcm36-270612.pdf; *QuickFacts: Minnesota*, U.S. CENSUS BUREAU, https://www.census.gov/ quickfacts/MN (last visited Feb. 10, 2018); *QuickFacts: Hennepin County, Minnesota*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/hennepincountyminnesota/POP060210 (last visited Feb. 10, 2018) (indicating Hennepin County is home to approximately 22% of the entire population of the state of Minnesota and Hennepin County contains nearly 30% of total rental units in the state).

10. JOHN CAMPBELL, THE LIVES OF THE CHIEF JUSTICES OF ENGLAND 81 (James Cockcroft ed.,1894) (quoting Edward Coke, an English barrister and judge considered to be one of the greatest Elizabethan and Jacobean era jurists, from the *Third Institutes of the Lawes of England*, part of a set of documents which laid the foundation for the development of common law).

11. *See States That Have Stand Your Ground Laws*, FINDLAW.COM, http://criminal.findlaw.com/criminal-law-basics/states-that-have-stand-your-ground-laws.html (last visited Jan. 13, 2018).

homes.[12] The act of illegally forcing a tenant out of their home is known as lockout, ouster, illegal eviction, or self-help eviction.[13] However, what lies at the center are the illegal actions of a landlord in removing a tenant from rental property without resorting to the judicial process.[14]

Removing a tenant using illegal means can occur by many different methods.[15] These methods can include removing the tenant's belongings from the property,[16] changing the locks, removing windows or doors, or any other means a perverse mind can imagine.[17] Landlords may also illegally cut off or reduce essential services like heat, running water, hot water, electricity, or gas.[18]

Early in the legal history of England and the United States, the law was not concerned with how landlords chose to evict tenants. Self-help evictions (i.e. lockouts)[19] became a "popular and efficient method" to get rid of tenants.[20] "However, after centuries of

---

12. *The Meaning and Origin of the Expression: An Englishman's Home is His Castle*, PHRASES.ORG.UK, http://www.phrases.org.uk/meanings/an-englishmans-home-is-his-castle.html (last visited Jan. 13, 2018).

13. UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 4.107 (NAT'L CONF. OF COMM'RS ON UNIF. STATE. LAWS, 1972); *supra* note 18, at 856–57.

14. *See Id.*

15. ALVIN L. ARNOLD & MYRON KOVE, 1 REAL ESTATE LEASING PRACTICE MANUAL § 38:107 (Oct. 2017).

16. Bass v. Equity Residential Holdings, LLC, 849 N.W.2d 87, 89 (Minn. 2014) (stating that when a tenant returned from work, she discovered the landlord had thrown away all her possession into dumpsters filled with water from rain and melting snow because she had "abandoned the apartment.")

17. Craig Donofrio, *Could These Be the 6 Worst Landlords of All Time?* REALTOR.COM (Jan. 21, 2016), https://www.realtor.com/news/trends/worst-landlords-ever/ (describing one landlord with a long list of crazy rules tenants had to memorize; a landlord so bad, he inspired art; a landlord who tried to disqualify current tenants by drastically raising the income requirements; a landlord whose lead paint was so bad it formed thick clouds of toxic dust throughout the halls; a landlord who removed doors and windows during a cold Boston winter; and two landlords who terrorized tenants, including by sawing a hole through the floor of an occupied apartment from below).

18. Shannon Holmberg, Note, *Squashing the Squatting Crisis: A Proposal to Reform Summary Eviction and Improve Case Management Systems to Stop the Squatter Supply*, 65 DRAKE L. REV. 839, 857 (2017). *See also* UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 4.107.

19. Cocchiarella v. Driggs, 870 N.W.2d 103, 105 (Minn. Ct. App. 2015), *rev'd* 884. N.W.2d 621 (Minn. 2016).

20. *See* Holmberg, *supra* note 18, at 856–57 (citing *infra* note 156, at 774–76).

unregulated evictions in England, and thereafter in the United States, it became clear self-help measures contributed to severe abuses by landlords as well as breaches of the peace."[21] Landlords who resorted to self-help measures in evicting tenants generated such a great risk of confrontation and violence that, since colonial times, states' legislatures and courts have sought to minimize those risks by making it so tenants can only be removed from their homes peaceably, through the judicial process.[22]

Most states have sought to end self-help evictions by enacting statutes requiring the use of the judicial process to evict tenants.[23] "Courts refer to cases brought under those statutes as 'forcible entry and detainer' (FED) or 'unlawful detainer' (UD) actions." [24] FED/UD actions require landlords to follow a series of formalities to obtain a judicial determination allowing them to evict a tenant. [25] If a landlord does not strictly adhere to the required formalities, FED/UD actions also provide judicial remedies to tenants who are considered wrongfully ousted. [26] The judicial protections of peaceable evictions extend to those who have stopped paying rent,[27] those who hold over property after the end of a lease,[28] and even those occupying premises illegally, such as squatters or trespassers.[29]

Today, most jurisdictions in the United States do not allow for self-help evictions.[30] Many statutes require suing tenants in court, waiting for the judicial process to unfold, and waiting for the sheriff

---

21. *See* Holmberg, *supra* note 18, at 856 (citing *infra* note 156, at 776).

22. STATE OF CONN. DIV. OF CRIMINAL JUSTICE, LANDLORD/TENANT DISPUTES POLICE TRAINING MANUAL 4 (2009), http://www.ct.gov/cachm/lib/cachm/Police_manual_-_final_as_adopted_by_State%27s_Attorney.pdf.

23. *See* Holmberg, *supra* note 18, at 856.

24. *Id.*

25. *Id.*

26. *Id.*

27. Marcia Stewart, *Don't Lock Out or Freeze Out a Tenant — It's Illegal*, NOLO, http://www.nolo.com/legal-encyclopedia/lock-out-tenant-illegal-29799.html (last visited Jan. 13, 2018).

28. *Landlord-Tenant Law: An Overview*, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/landlord-tenant_law (last visited Jan. 13, 2018).

29. *See* Shannon Dunn McCarthy, *Squatting: Lifting the Heavy Burden to Evict Unwanted Company*, 9 U. MASS. L. REV. 156, 174–75. (2013).

30. *Landlord-Tenant Law, supra* note 28.

to enforce an eviction order.[31] Many jurisdictions recognize a separate tort action for unlawful ousters (i.e. self-help evictions) and/or criminalize the illegal removal of a tenant.[32] Therefore, tenants who are illegally evicted or forced out of their homes enjoy many protections against such unlawful, and often volatile, conduct.[33]

B. What do Lockout Actions Look Like in Minnesota?

The illegal act of removing a tenant from their home without resorting to the legal process is known as a lockout action in Minnesota.[34] Minnesota statutes state that a lockout occurs whenever a landlord tries to end a tenancy by: (1) intentionally removing or excluding a tenant from the rental property; (2) intentionally altering the electrical, heat, gas, or water services; or (3) intentionally removing doors, windows, or locks.[35] A tenant who has been locked out can ask a trial court for an order allowing the tenant to retake possession of the rental property.[36] A tenant starts a lockout action by filing a verified petition at the district court in the county where the property is located.[37] The petition must: (a) describe "the premises and the landlord"; (b) state the specific "facts and grounds which demonstrate the exclusion or removal was illegal"; (c) state "that no writ of recovery and order to vacate has issued"; and (d) ask for possession.[38]

Once a lockout petition is properly filed, the action becomes a summary proceeding for emergency relief.[39] "If it clearly appears from the specific grounds and facts stated" in the tenant's petition

---

31. *Landlord-Tenant Law*, *supra* note 28.
32. *See* Stewart, *supra* note 27.
33. *See* Stewart, *supra* note 27.
34. Cocchiarella, 870 N.W.2d at 105.
35. Minn. Stat. § 504B.375, subd. 1(a) (2017).
36. *Landlords and Tenants: Rights and Responsibilities*, OFF. MINN. ATT'Y GEN. LORI SWANSON, https://www.ag.state.mn.us/consumer/handbooks/lt/CH4.asp (last visited Jan. 19, 2018) [hereinafter *Rights and Responsibilities*].
37. Minn. Stat. § 504B.375, subd. 1(b).
38. *Id.*
39. *Id.* § 504B.375, subd. 5.

the exclusion was unlawful, the court immediately issues an *ex parte* order for the tenant to have possession of the premises.[40]

The *ex parte* order issued by the court can include several important and powerful clauses. Such clauses include: (1) requiring the tenant to pay security in an amount the court deems appropriate "to pay all costs and damages the landlord may sustain if the order is later found to have been obtained wrongfully";[41] (2) directing "the sheriff of the county where the premises are located" to execute "the order by making an immediate demand for possession on the landlord . . . or other person in charge of the premises";[42] (3) directing the sheriff that, "if the landlord does not comply with the demand for possession, the officer may render whatever assistance may be necessary to immediately place tenant in possession of the premises";[43] and (4) directing the sheriff that if the landlord "cannot be found, the officer shall immediately enter and place the . . . tenant in possession".[44] The *ex parte* order may also schedule an emergency hearing within a few days.[45] At that hearing, the court may grant additional relief including monetary damages up to three times the tenant's out-of-pocket costs resulting from the lockout and attorney's fees.[46]

Any appeal of the lockout order must be filed within ten days, which is one of the shortest deadlines for the filing of an appeal allowed under Minnesota law.[47] If a lease includes a provision waiving the right to file a lockout action, such provision is void.[48] The protections against unlawful lockouts extend to tenants occupying property after a mortgage foreclosure or contract-for-

40. *Id.* § 504B.375, subd. 1(c).
41. *Id.* § 504B.375, subd. 1(d).
42. *Id.* § 504B.375, subd. 1(e).
43. *Id.*
44. *Id.*
45. *See Rights and Responsibilities*, *supra* note 36.
46. *Rights and Responsibilities*, *supra* note 36.
47. *Compare* Minn. Stat. § 504B.375, subd. 3 (2017) (stating an appeal of a lockout order must be filed within 10 days), *with* Minn. R. Civ. App. P. 104.01 (providing that, unless a different time is given in the controlling statute, the usual timeline for the filing of an appeal in a civil action is 60 days).
48. Minn. Stat. § 504B.375, subd. 4 (2017).

deed cancellation.[49] Any landlord who commits a lockout is also guilty of a misdemeanor.[50]

C. The Cocchiarella v. Driggs Lockout Action

In late January 2014, Mary Cocchiarella saw a "for rent" sign and contacted Donald Driggs, who informed her three units were available to rent.[51] While viewing the units, Cocchiarella noticed Driggs had personal property inside the unit Cocchiarella was interested in renting.[52] Despite presently occupying that particular unit, Driggs agreed to rent it to Cocchiarella.[53]

On February 1, 2014, Cocchiarella met Driggs to fill out an application and ask when she could begin to move in.[54] Driggs said it would take a couple of days because he needed to varnish the floors.[55] Cocchiarella again met Driggs on February 3, 2014, and paid $2,400 in cash as her security deposit and first month's rent.[56] Driggs informed Cocchiarella the unit was not yet ready because he was ill, so he asked her to come back the next day.[57]

When Cocchiarella returned the following day, Driggs asked her to obtain a co-signer.[58] Cocchiarella returned later that same evening with a roommate, who filled out a rental application. Driggs informed them he needed a couple of days to remove his belongings before they could move in.[59] Two days later, Cocchiarella and her roommate returned to ask Driggs when they could move in.[60] Driggs became angry and demanded they leave.[61]

---

49. *Id.* § 504B.375, subdiv.at subd. 6;. *sSee also* MINN. LEGAL SERVS. COAL, TENANTS' RIGHTS IN MINNESOTA (14th ed., 2017), https://www.lawhelpmn.org/files/1765CC5E-1EC9-4FC4-65EC-957272D8A04E/attachments/070F8942-D0D5-D0CB-BEC9-6D77718B6B73/tenantsreprint-2017.pdf.
50. Minn. Stat. §§ 504B.225 (2017), . *See also* Minn. Stat. § 609.606 (2017).
51. Cocchiarella v. Driggs, 884 N.W.2d 621, 623 (Minn. 2016).
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*

On February 10, 2014, Driggs left Cocchiarella a voicemail asking her to return to the apartment so Driggs could return her money.[62] After meeting Cocchiarella, Driggs again changed his mind.[63] This time, Driggs said he needed a couple of days to remove his belongings so they could move in later that week.[64]

On February 11, 2014, Cocchiarella left Driggs a voicemail saying that unless he provided her keys for immediate move-in, she would file a lockout petition with the court.[65] Driggs did not give Cocchiarella the keys, so Cocchiarella filed a lockout petition.[66] Two different housing court referees declined to grant Cocchiarella's lockout petition for lack of standing.[67] The referees found Cocchiarella lacked standing because only a residential tenant may bring a lockout action. [68] As defined by statute, a residential tenant is a person who is occupying residential premises and Cocchiarella had never actually moved in.[69]

A district court judge reached the same conclusion and affirmed the housing court's findings.[70] A three-judge panel of the Minnesota Court of Appeals reached the same conclusion and affirmed the district court's findings.[71] Only when the case got to the Minnesota Supreme Court did the issue become murky.

The *Cocchiarella* majority found the plain meaning of residential tenant extended to anyone holding a present legal right of possession, even if they had never physically occupied the rental property. [72] The majority's interpretation relied on different dictionaries to find the plain meaning of 'occupying' blended with

62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *See generally id.* at 622–24; Petition for Hearing, Cocchiarella v. Driggs, 27-CV-HC-14-967 (Minn. Dist. Ct. 4th Dist. filed Feb. 14, 2014); Order-other, Cocchiarella v. Driggs, 27-CV-HC-14-967 (Minn. Dist. Ct. 4th Dist. filed May 1, 2014).
68. Cocchiarella, 884 N.W.2d at 623.
69. *Id.*
70. Bob Collins, *Justice is Blind, but it Can Read a Dictionary*, MPR NEWS CRIME AND JUST. BLOG (Sep. 8, 2015, 10:35 AM), http://blogs.mprnews.org/newscut/2015/09/justice-is-blind-but-it-can-read-a-dictionary/.
71. *See supra* note 70.
72. Cocchiarella, 884 N.W.2d at 627–28.

technical meaning within landlord-tenant law.[73] Because of this blended meaning, a residential tenant is now defined as anyone who either physically occupies rental premises or has a present legal right of possession.[74]

III. ANALYSIS

Minnesota statute defines a residential tenant as a person who is occupying a dwelling in a residential building under a written or oral lease or contract requiring the payment of money or an exchange of services.[75] The crux of the *Cocchiarella* case became what does it mean to 'occupy' a residential dwelling?

A. Why Didn't the Court Heed the Warnings from Within Its Own Chambers?

Writing in dissent of the *Cocchiarella* majority, Justice Anderson pointed out that Cocchiarella did not have a written lease and, more importantly, did not even have any agreement about a move-in date or the effective date of any lease agreement.[76] Under his narrower interpretation, a residential tenancy begins at actual possession.[77] This means that to occupy is defined as the moment actual physical occupancy begins. This was the same interpretation that every judicial officer below also adopted and found to be mandated by the plain meaning of the word 'occupying.'[78]

By contrast, the majority disposed of the lack of agreements by applying the presumption that, when reviewing a motion to dismiss, all facts alleged in the complaint are accepted as true and construe all reasonable inferences from those facts in favor of Cocchiarella, as the nonmoving party.[79] The dissent also concedes this presumption binds him to consider the matter as if there was an oral lease.[80] Under the majority's broader interpretation, a residential tenancy starts the moment actual physical occupancy begins and

---

73. *Id.* at 625–26.
74. *Id.*
75. Minn. Stat. § 504B.001, subd. 12 (2017).
76. Cocchiarella, 884 N.W.2d at 629 (Anderson, J., dissenting).
77. *Id.* at 631 (Anderson, J., dissenting).
78. *Id.* at 628 (Anderson, J., dissenting).
79. *Id.* at 622-24.
80. *Id.* at 629, fn. 1 (Anderson, J., dissenting).

also extends to anytime someone holds present legal right of possession even if they have never lived there.[81]

Justice Anderson warned the majority their broader interpretation can introduce a host of potential problems, especially when several people claim to hold the present legal right of possession.[82] These warnings only scratched the surface of potential problems as will be discussed in more detail later. What becomes apparent from comparing the reasoning of the *Cocchiarella* majority and dissent is that the Court was interpreting statutory language to find whether 'occupying' starts at actual possession or extends to the moment someone holds the present legal right of possession.

B. What has the Legislature Said About Plain Meaning and the Intent of Lockout Actions?

In Minnesota, Chapter 645 controls the interpretation of language contained in statutes and rules.[83] When certain words and phrases have a specific meaning written into a statute by the legislature, that definition controls.[84] A specific meaning of residential tenant was written into a statute by the legislature. Residential tenant is defined as a person who is occupying a dwelling in a residential building under a written or oral lease or contract requiring the payment of money or an exchange of services.[85] However, there is no statutory definition to the word 'occupying.'

If there is no specific meaning written into a statute by the legislature, words and phrases are construed according to rules of grammar and according to their common and approved usage.[86] However, technical words and phrases and such others as have acquired a special meaning, are construed according to such special meaning or definition.[87] Occupying was construed by the dissent and every other judicial officer below according to its common and

81. *Id.* at 631 (Anderson, J., dissenting).
82. *Id.* at 633 (Anderson J., dissenting) (noting Cocchiarella sought a similar remedy to force Driggs out).
83. Minn. Stat. ch. 645 (2017).
84. Minn. Stat. § 645.01, subd. 1 (2017).
85. Minn. Stat. § 504B.001, subd. 12 (2017).
86. Minn. Stat. § 645.08 (2017).
87. *Id.*

approved usage.[88] They believed that to occupy residential property means that you must have actual physical possession of the property. I believe this interpretation is correct because it is the meaning innately assigned to the word 'occupying,' as was evidenced by every judicial officer from the lower courts unanimously adopting such an interpretation. However, the *Cocchiarella* majority disagreed and found 'occupying' had acquired a special meaning which extended to the legal right of occupancy, even if you had no physical possession.

The object of all interpretation and construction of laws is to ascertain and effectuate the intent of the legislature and to give effect to all its provisions.[89] When the words of a law are clear and free from all ambiguity, the letter of the law is not to be disregarded under the pretext of pursuing its spirit.[90] A statute is ambiguous only when it is subject to more than one reasonable interpretation.[91] If a statute is not ambiguous, the words of the statute should be interpreted according to their plain and ordinary meaning.[92]

To support their conflicting interpretations of the word 'occupying,' all of the justices of the Minnesota Supreme Court reached for their dictionaries and found support for their particular viewpoint. However, none of the justices ever found that any part of the statute in question was ambiguous. If the statute was not found to be ambiguous, then why use dictionaries to define a word or reach a particular interpretation? This question is more vexing considering how both interpretations of 'occupying' are argued to be reasonable by the majority and the dissent of the *Cocchiarella* opinion.

The statutes involved in a lockout petition clearly state that only tenants who are occupying an apartment have standing,[93] yet there is no statutory definition of what it means to occupy. However, as Justice Anderson pointed out in dissent, the legislature did express their specific intent with regards to lockout actions.[94] The lockout statute states its specific purpose is to provide an additional and

88. Cocchiarella, 884 N.W.2d at 628, 633 (Anderson J., dissenting).
89. Minn. Stat. § 645.16 (2017).
90. *Id.*
91. Cocchiarella, 884 N.W.2d at 629 (Anderson J., dissenting).
92. *Id.*
93. *See* Minn. Stat. § 504B.001, subd. 12 (2017).
94. Cocchiarella, 884 N.W.2d at 632 (Anderson J., dissenting).

summary remedy for residential tenants unlawfully excluded or removed from rental property.[95] That means a lockout action is not the only remedy available to tenants those who lose their security deposit to unscrupulous landlords, such as Cocchiarella, because they can pursue other remedies such as a conciliation claim or a civil suit.[96] While those options may lead to a longer, more difficult road, this was the intent of the legislature.

A lockout was meant, by the legislature, as an extraordinary remedy only for those few who have been living somewhere but are unlawfully locked out by their landlords. The majority's broad interpretation renders the purpose of the lockout statute meaningless. More confoundingly, the majority argues legislative intent cannot be explored because the statute is not ambiguous,[97] yet the majority also engages in interpretation of the statute's language, which should only be done to resolve an ambiguity.[98]

C. How Often are Dictionaries Used by the Minnesota Supreme Court to Determine Plain Meaning?

Judge Harold Leventhal once said, and Justice Scalia has repeated, the use of legislative history is "the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends," allowing judges to pick the evidence that best supports their policy preferences.[99] The use of dictionaries, too, can be manipulated in this manner as the problems include arbitrary and arguably even biased selection of dictionaries by judges, lack of determination about the qualifications of a particular dictionary, and failure to account for context when using a dictionary to define a single term.[100] The renowned jurist Judge Learned Hand once cautioned about using dictionaries in judicial decision-making:

> Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract,

---

95. *See* Minn. Stat. § 504B.375, subd. 5 (2017).
96. Cocchiarella, 884 N.W.2d at 633 (Anderson J., dissenting).
97. *Id.* at 628, fn. 5.
98. *Id.* at 624.
99. Phillip Rubin, *War of the Words: How Courts Can Use Dictionaries in Accordance With Textualist Principles*, 60 DUKE L.J. 167,168 (2010).
100. *See supra* note 99.

> or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.[101]

No matter how well respected a jurist, nor how noble a warning, Judge Hand's eloquent words of wisdom have fallen upon deaf ears. Over the last three decades, the United States Supreme Court's use of dictionaries in its published opinions has increased dramatically.[102] Although the Court has consulted dictionaries almost since its inception, before 1864, the Court used dictionaries as authorities only three times.[103] In the quarter-century between 1958 and 1983, the Court cited dictionaries 125 times—an average of only five times per term.[104]

By alarming contrast, in the six Terms between 1987 and 1992, the Court has never cited dictionaries fewer than fifteen times per term, hitting a high point of thirty-two references during the 1992 Term alone.[105] Dictionary definitions appeared in twenty-eight percent of the 107 Supreme Court cases decided by published opinion in the 1992 Term—a fourteen-fold increase over the 1981 Term.[106] The Court has referred to twenty-seven different dictionaries since 1988 in cases involving not only statutes, but also constitutional provisions and administrative codes.[107]

Closer to home, our local court of last resort, the Minnesota Supreme Court, used dictionaries in 30[108] out of 108 published opinions in 2015,[109] in 30[110] out of 124 published opinions in

---

101. Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945).

102. *See supra* note 99 p. 168 (citing infra note 104 pp. 1438–42 (detailing the increased reliance by the Supreme Court on dictionaries, focusing in particular on the 1988–1992 Terms)).

103. *See supra* note 99 p.168.

104. Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1438 (1994).

105. *Id.*

106. *Id.*

107. *Id. at* 1438-9.

108. https://1.next.westlaw.com (search "dictionary" then apply filter for Minnesota Supreme Court then sort by date) (last visited Jan. 13, 2018).

109. 2015 MINN. JUD. BRANCH. ANN. REP. 52.

110. *See supra* note 108.

2016,[111] and in 29[112] out of 104 published opinions in 2017.[113] These statistics illustrate the Minnesota Supreme Court uses dictionaries to support its reasoning in 25-30% of its written opinions.[114] This ratio falls closely in line with the United States Supreme Court's use of dictionaries.[115]

Even just within the *Cocchiarella* opinion, the majority used two dictionaries to support their conclusions while the dissent used five, including a newer version of one dictionary cited by the majority.[116] As discussed earlier, all of the justices reached for their dictionaries to find support for their conflicting interpretations of the word 'occupying.' Importantly, the justices did so without declaring any statutory language to be ambiguous, even though they advanced two distinct definitions which each side argued to be more reasonable than the other.

The legislature requires that when the words of a law are not explicit, the intent of the legislature may be ascertained by considering (1) the occasion and necessity for the law; (2) the circumstances under which it was enacted; (3) the mischief to be remedied; (4) the object to be attained; (5) the former law, if any; (6) the consequences of a particular interpretation; (7) the contemporaneous legislative history; and (8) the legislative and administrative interpretations of the statute.[117] Notably missing from this list are dictionaries. There is nothing wrong, per se, with using dictionaries to identify the general outlines of word meanings and then relying on contextual arguments from text, structure, history, or policy to determine which meaning is appropriate.[118]

---

111. 2016 MINN. JUD. BRANCH. ANN. REP. 53.

112. *See supra* note 108.

113. 2017 MINN. JUD. BRANCH. ANN. REP. 54.

114. Calculated using only the numbers cited in the sentence immediately preceding this one.

115. *See supra* note 104.

116. *Compare* Cocchiarella, 884 N.W.2d at 625-6 (pointing to the American Heritage Dictionary of the English Language (4th ed. 2000) and Black's Law Dictionary (10th ed. 2014)), *with* Cocchiarella, 884 N.W.2d at 629-31 (Anderson J., dissenting) (pointing to a newer edition of the American Heritage Dictionary of the English Language (5th ed. 2011), amongst others)).

117. Minn. Stat. § 645.16 (2017).

118. *See supra* note 104 at 1452.

However, the use of dictionaries should be at the beginning, rather than at the end of the interpretive process.[119]

To be fair, the majority correctly went further in their analysis than the dictionary definitions. However, as Justice Anderson points out in dissent, 'occupying' is hardly a technical or legalistic word, whose common and ordinary meaning is easily discerned.[120] More troubling, the majority incorrectly relied on a common law meaning and the dictionary definition of 'tenancy' to support its broader interpretation that 'occupying' had acquired a technical meaning.[121] Because residential tenant is defined by statute, the court needed to look no further than the statutory definition, as the lower courts correctly restrained themselves to do, to determine whether a residential tenancy exists, including what it means to 'occupy.'[122] The only exception is when a particular term was found to be ambiguous, which no justice found to be the case in *Cocchiarella*.

D. Can't the Minnesota Supreme Court Just do What It Wants?

As a court of last resort, the Minnesota Supreme Court possesses powers not delegated to courts below.[123] However, even the powers of the highest court in Minnesota are bound by rules, such as those which inform others of when the court may hear a case.[124] In *Cocchiarella*, there were no differences of opinion below which required the Minnesota Supreme Court's guidance, whether at the housing court, the reviewing district court, or the court of appeals.[125] The Court is empowered to hear cases under broad authority because it serves as the final guardian of the state constitution.[126] However, at least in *Cocchiarella*, the Court did not make it clear why this case was reviewed. If the Court wanted to provide

---

119. *Id.*
120. Cocchiarella, 884 N.W.2d at 630-31 (Anderson J., dissenting).
121. *Id.* at 631 (Anderson J., dissenting).
122. *Id.*
123. Minn. Const. art. VI § 2.
124. Minn. R. Civ. App. P. 117, subd. 2.
125. Cocchiarella, 884 N.W.2d at 628 (Anderson J., dissenting).
126. Minnesota Supreme Court, MNCOURTS.GOV, Informational Brochure, January 2018, http://www.mncourts.gov/mncourtsgov/media/CIOMediaLibrary/DocumentLibrary/SupremeCourt.pdf53. https://biotech.law.lsu.edu/map/TheImportanceofPrecedent.html. (last visited Mar. 31, 2018).

Cocchiarella with a fair outcome, why not just come out and say so? The Court has tools at their disposal to help it support a narrow decision, such as relying on their constitutional authority as a co-equal branch of government to interpret what the laws mean[127] or by issuing an order opinion.[128]

No matter what their purpose was, the opinion of the five members of the *Cocchiarella* majority trumped that of three district court judicial officers, three appellate court judicial officers, and two supreme court judicial officers with similar backgrounds, training, and experience who had also looked at the same laws and found there was no standing unless you had physically occupied the premises.[129] Of particular note is that amongst these were two housing court referees, experts in landlord-tenant law and related issues, who both reached the same conclusion.[130]

The direction coming from courts of review should be clear and consistent, so all below can anticipate how future controversies will be resolved.[131] Trial courts are bound by the same principle to a lesser extent since their decisions are not binding precedent for other courts. Trial courts also depend on courts of review to provide solid, detailed reasoning. This is because lower courts are duty-bound to give full effect to opinions descending from higher courts and there is often no mechanism delineated for implementation of the higher court's opinion. Moreover, the words from a court of review opinion are carefully parsed by attorneys, litigants, the media, and the public. The higher courts' opinions will impact the practice of law before the lower court where the case on review originated. The

---

127. *See* Nicollet Restoration, Inc. v. Turnham, 486 N.W.2d 753 (Minn. 1992) (ruling, en banc without oral argument, that a statute was unconstitutional because it encroached on the judiciary's power to decide who may properly practice law before the courts of this state, a power vested solely upon the judiciary by the Minnesota Constitution).

128. Minn. R. Civ. App. P. 136, subd. 1.

129. *See* Cocchiarella, 884 N.W.2d at 628-33. (5-2 decision) (Anderson, J. dissenting).

130. *See* Minn. Stat. § 484.013, subd. 1(a) (2017) (stating that the purpose of the housing court program is to ensure continuity and consistency in the disposition of landlord-tenant law cases); *see also Id.*, subd. 3 (requiring a housing court referees to be learned in landlord-tenant law).

131. Edward Richards, *The Importance of Precedent*, LSU LAW CENTER, (last visited Jan. 13, 2018), https://biotech.law.lsu.edu/map/TheImportanceofPrecedent.html.

more uncertain the reasoning of a court of review opinion, the greater the potential for harm in trying to implement those opinions in courts below.

There were several alternatives to using dictionaries which would have provided more solid reasoning. For example, the Court could have found current Minnesota law doesn't resolve the question before the Court, but other states have resolved similar questions and adopted their reasoning.[132] The Court could have also relied on national resources such as URLTA[133] which aim to standardize housing laws. There is greater predictability achieved by these alternatives because we can look to other stable sources of law and search them for support in adopting a new legal principle in Minnesota.

To be fair, Minnesota is not the only state to define occupancy as either actual possession or present legal right of possession.[134] But one of the greater problems with the reasoning in *Cocchiarella* is not only the direction the law was moved but also the way it was moved and its effect on predictability. In the past, the Minnesota Supreme Court has not been coy about adopting new legal principles from model codes but rejecting specific provisions,[135]

---

132. *See* Fritz v. Warthen, 213 N.W.2d 339 (Minn. 1973) (analyzing how other jurisdictions handled an issue which was of first impression before the Minnesota Supreme Court in what turned out to be a landmark landlord-tenant opinion which still strongly anchors housing law practice today regarding the covenants of habitability and when a tenant is excused from owing rent).

133. *See* UNIF. RESIDENTIAL LANDLORD AND TENANT ACT §§ 1.301 (defining tenant), 2.103 (comment), (last visited Jan. 13, 2018), http://www.uniformlaws.org/shared/docs/residential%20landlord%20and%20tenant/urlta%201974.pdf (providing support for the conclusions the *Cocchiarella* majority ultimately reached by defining tenant as "a person entitled under a rental agreement to occupy a dwelling unit to the exclusion of others" and by explaining it is possible both landlord and tenant may have the [simultaneous] right of action against third parties wrongfully in possession of premises by summary proceedings, where appropriate).

134. P.A. Agabin, Annotation, *Right of Landlord Legally Entitled to Possession to Dispossess Tenant Without Legal Process IV. Remedies of Tenant*, 6 A.L.R.3d 177 (Originally published in 1966).

135. *See* Ted Sampsell-Jones, *Mens Rea in Minnesota and the Model Penal Code*, (2013) *Symposium: 50th Anniversary of the Minnesota Criminal Code-Looking Back and Looking Forward*. Paper 4. (discussing how the 1963 Model Penal Code's *mens rea* section was one of its most significant innovations, yet Minnesota has refused to adopt it).

adopting other states' legal principles but carving out nuances,[136] or rejecting its long-standing legal principles.[137] However, in those opinions, the Court gave well-founded reasons for each movement of the law. By contrast, the majority's reasoning in *Cocchiarella* was squarely anchored on dictionaries to justify the introduction of a new legal fiction — that someone who never lived in an apartment is still occupying that apartment.

E. A Quick Word on Legal Fictions

To borrow reasoning from the *Cocchiarella* majority, Merriam-Webster defines legal fiction as "something assumed in law to be fact irrespective of the truth or accuracy of that assumption."[138] However, Encyclopedia Britannica Online gives a more contextual definition: "legal fiction is a rule assuming as true something that is clearly false. A fiction is often used to get around the provisions of constitutions and legal codes that legislators are hesitant to change . . ."[139] Black's Law Dictionary is not as helpful, but cites some interesting literature:

> "I . . . employ the expression 'Legal Fiction' to signify any assumption which conceals . . . the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified . . . it is not difficult to understand why fictions in all their forms are particularly congenial to the infancy of society. They satisfy the desire for improvement, which is not quite wanting, at the same time that they do not offend the superstitious disrelish for change which is always present." Henry S. Maine, *Ancient Law* 21–22 (17th ed. 1901).
>
> "Legal fiction is the mask that progress must wear to pass the faithful but blear-eyed watchers of our ancient legal treasures. But though

---

136. *See* Dickhoff ex rel. Dickhoff v. Green, 836 N.W.2d 321 (Minn. 2013) (adopting loss of chance doctrine as a measure of damages, rather than through relaxed causation, after seemingly rejecting the same doctrine outright— in any form— just 10 years earlier in Fabio v. Bellomo, 504 N.W.2d 758 (Minn. 1993)).

137. *See* Bode v. Minn. Dep't of Natural Res., 612 N.W.2d 862 (Minn. 2000) (rejecting the long-standing requirement that a court must dismiss a case for lack of subject matter jurisdiction in favor of a "modern view").

138. Legal Fiction, Merriam-Webster Online, https://www.merriam-webster.com/legal/legal%20fiction (last visited on Feb. 8. 2018).

139. Legal Fiction, Encyclopedia Brittanica Online, https://www.britannica.com/topic/legal-fiction (last visited on Mar. 31. 2018).

> legal fictions are useful in thus mitigating or absorbing the shock of innovation, they work havoc in the form of intellectual confusion." Morris R. Cohen, *Law and the Social Order* 126 (1933).[140]

Professor Peter J. Smith defines legal fictions as false statements by a court, not intended to deceive, but necessary in the age of common law to temper the disruptive effect of changes in legal doctrine.[141] The new legal fiction adopted by the majority's reasoning in *Cocchiarella* — that someone who never lived in an apartment is still occupying that apartment — was also not meant to deceive. However, many of the latent purposes for employing the use of legal fiction enumerated in this section seem to apply.

F. So Dictionaries and Legal Fiction Aside, Why is Determining Present Legal Right of Possession a Problem?

The process involved in determining present legal right of possession in a lockout action requires trial courts to read the petition and make an immediate determination.[142] This initial determination must be without hearing or testimony.[143] The Court must find whether the landlord or the tenant currently holds the present legal right to control/occupy the rental property.[144] At first glance, this process seems similar to the steps trial courts are already performing in their most common type of landlord-tenant cases: eviction actions.[145] However, lockout actions are markedly different from eviction actions in at least one significant way. Eviction actions start with the issuance of a summons[146] which must be served on the opposing parties following strict compliance with

---

140. Legal Fiction, Black's Law Dictionary (10th ed.2014).

141. Peter J. Smith, Faculty Scholarship, *New Legal Fiction*, 95 GEO L. J. 1435, 1437 (2007) (providing an excellent analysis of the modern use of legal fictions in an age of positive law).

142. Minn. Stat. § 504B.375, subd. 1(c) (2017).

143. *Id.*

144. *Id.*

145. *See* Minn. Stat. § 504B.001, subd. 4 (2017) (defining eviction as a summary proceeding whose sole purpose trial court's interpret to be to determine only the extant possessory rights to property).

146. *See Id.*

procedures[147] and then the parties must wait for an initial hearing before the merits of the case will be weighed. By contrast, lockout actions start by weighing the merits of the case, before service or opportunity to be heard is given to the opposing party.[148]

While trial court judicial officers are trained, skilled, and experienced in making such difficult, immediate decisions, even trial courts need to moor all decision-making upon solid ground for "public institutions and the State are legitimate to the extent that their decisions are justified by reasons."[149] To help illustrate the time limitations placed on judicial officers in making such decisions, here is a joke.

Three judges go on a duck hunt together: an appellate court judge, a Supreme Court justice, and a trial court judge. First, the appellate court judge sees what looks like a bird approaching. Before taking a shot, the appellate court judge wanted to look at a treatise to be sure it was a duck — but by the time he found the answer, the duck was out of range. The Supreme Court justice saw the next bird, but wanted to confer with colleagues and research the available precedents before shooting — unfortunately, by then the duck was long gone. Suddenly, the trial court judge heard what he thought was a bird and immediately aimed and fired. "I sure hope that was a duck!" he exclaimed.[150]

Some say there is a grain of truth to every joke. One of the truths the duck joke illustrates is that trial courts, by design, make decisions much faster than courts of review and, often, without as much time to contemplate each case or anyone's citation to legal precedent.[151] Embedded within the fast proceedings of trial courts,

---

147. Koski v. Johnson, 837 N.W.2d 739, (Minn. Ct. App. 2013) (review denied) (finding statute governing service of process in eviction actions requires strict compliance, not merely substantial compliance).

148. Minn. Stat. § 504B.375, subd. 1(c).

149. See Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483. 485 (2015) (delving deeply into the underlying analyses, contrasting philosophies, and practical problems judges face when choosing whether and how much to explain).

150. Judge Mel Dickstein, *How Judges Make Decisions*, MinnPost (Sep. 9, 2014), https://www.minnpost.com/community-voices/2014/09/how-judges-make-decisions.

151. *See supra* note 150. *See also* supra note 111 pp. 26, 51, 53 (reporting 1,292,494 cases were filed in trial courts throughout Minnesota's 87 counties and decided by their 346 judicial officers; 1,963 petitions for review were filed in the

certain specialized (or ad hoc) courts were created to address specific subject matters.[152] In 1989,[153] two such specialized courts were created in each of Minnesota's two most populous counties[154] to expeditiously resolve housing issues using summary proceedings.[155] Both the creation and use of ad-hoc courts and summary proceedings to quickly resolve landlord-tenant cases follows a modern nationwide trend.[156] This modern trend emerged to disincentivize landlords from pursuing self-help evictions.[157]

Minnesota's two specialized housing courts serve Hennepin and Ramsey Counties[158] and together handle about half of the state's landlord-tenant law cases.[159] The two housing courts operate under a special subset of court rules (known as the housing court rules) which only apply to landlord-tenant proceedings held in those two ad-hoc courts.[160] In order to expedited housing court cases further, the housing court rules waive many rules of court and civil procedure, such as allowing non-attorney agents to represent others

---

state's single court of appeals and decided by its 19 judges; and 765 petitions for review were filed in the state's single supreme court and decided by its 7 officers); Sep. 2017 MINN. JUD. BRANCH. PERFORMANCE MEASURES ANN. REP. (reporting how quickly the three levels of Minnesota courts disposed of their cases); but see *Minnesota Court of Appeals*, MINN. JUD. BRANCH http://www.mncourts.gov/CourtOfAppeals.aspx (last visited Feb. 10, 2018) (explaining the 90-day deadline for Court of Appeals opinions is the shortest deadline imposed on any appellate court in the nation).

152. Minn. Stat. ch. 484 (2017) (controlling district court operations and creating, for example, an expedited child support hearing process, family courts, housing courts, and misdemeanor violation bureaus).

153. Rachel S. Lipkin, *When the Poor Face Housing Court*, CENTER FOR URBAN AND REGIONAL AFFAIRS, 7, (last visited Jan. 20, 2018), http://www.cura.umn.edu/sites/cura.advantagelabs.com/files/publications/23-4-Lipkin.pdf.

154. Minnesota State Demographic Center, *Key Findings*, MN.GOV (Apr. 1, 201), https://mn.gov/admin/demography/data-by-topic/population-data/our-estimates/ (last visited Jan. 13, 2017).

155. Minn. Stat. § 484.013, subd. 3 (2017).

156. Randy Gerchick, Comment, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. REV. 759, 785-6 (1994).

157. *Id.*

158. Minn. Stat. § 484.013, subd. 1 (2017); Minn. Gen. R. Prac. 601.

159. *See 2x4 Report, March 2016*, MINN. HOUSING P'SHIP, http://www.mhponline.org/images/stories/docs/research/2x4/2x4-Tabloid-2016_Letter_Final.pdf.

160. *See* Minn. Gen. R. Prac. 601-612.

and allowing any motion to be made orally, including on the day of trial.[161] Owing in no small part to the use of ad-hoc courts, summary proceedings, and the housing court rules, most housing court cases are closed within 14 days of filing.[162] More than 90% of housing court cases are consistently closed within 30 days, 97% within 60, and 99% within 120.[163] Such lightning-quick litigation, embedded within the already fast proceedings of Minnesota's trial courts,[164] stretches the strength of the *Cocchiarella* majority's reasoning to its limits.

G. Impact on the Practice of Landlord-Tenant Law as Seen Through Hennepin County Housing Court

Hennepin County Housing Court serves as the forum for landlord-tenant cases in Minnesota's most populous county.[165] Not surprisingly, Hennepin County also contains the most residential housing rental units of any county in the state.[166] "Housing market analysts generally consider a vacancy rate of 5% of rental units to be a healthy level, allowing for sufficient choice for renters and allowing turnover to proceed smoothly at a normal rate. Vacancy rates in a majority of Minnesota communities are below this level, even falling below 1% in some markets."[167] In the second quarter of 2015, the apartment vacancy rate in the Minneapolis metropolitan area was 2.7 percent and the average asking rent was $1,077 per

161. *See Id.* 603, 610.
162. 2016 MINNEAPOLIS INNOVATION EVICTIONS REP. 21.
163. *Id.*
164. Bill Hudson, *Cameras Capture the Fast Pace of Minn. Housing Court*, WCCO CBS MINNESOTA (May 23, 2012, 6:48 PM), http://minnesota.cbslocal.com/2012/05/23/cameras-capture-the-fast-pace-of-minn-housing-court/.
165. *See supra* note 159 (reporting 18,280 evictions filed in Minnesota in 2015); 2017 SECOND JUD. D. HOUSING CT. REP. OF OPPORTUNITIES AND RECOMMENDATIONS 1 (reporting an average of 3,000 evictions per year have been filed in recent years in Ramsey County); *See also* supra note 162 p. 22 (reporting 6,061 eviction cases were filed in Hennepin County in 2015).
166. *Id.*
167. Karen Spitzfaden, *Review and Summary of Local Housing Studies*, (Dec. 2014) MINN. HOUSING FINANCE AGENCY. Discussion paper. http://www.mnhousing.gov/wcs/Satellite?c=Page&cid=1358904870907&pagename=External%2FPage%2FEXTStandardLayout.

month.[168] Affordable housing, in particular, is in desperately short supply and the problem has worsened.[169] Therefore, the residential rental market in Hennepin County is primed with incentives to keep rental properties occupied, costs be damned.

1. Potential abuses when a tenant is about to be legally evicted.

A tenant will lose the present legal right of possession if they do not prevail in an eviction action. There are many reasons landlords could file eviction actions and the possible defenses greatly outnumber the basis for eviction actions.[170] However, evictions alleging nonpayment of rent are by far the most common.[171]

In a nonpayment of rent eviction action, a tenant has a right to pay the money owed to the landlord, or redeem the tenancy, at any time before possession is legally delivered to the landlord.[172] The Minnesota courts of review have found the right of a tenant to redeem the tenancy is foreclosed upon issuance of an order for writ of recovery.[173] This means a tenant may no longer redeem the tenancy once a writ has been issued by the court. This principle creates a situation where a tenant is still occupying the property, the tenant has lost the right to redeem the tenancy, but the clock is ticking until the sheriff executes the writ of recovery and restores landlord to actual possession of the property. While this principle

---

168. Gabriel Labovitz, *Housing Market Profiles*, (July 1, 2015), U.S. DEP'T OF HOUSING AND URBAN DEV. https://www.huduser.gov/periodicals/USHMC/reg/MinneapolisMN_HMP_July15.pdf.

169. Kelly Smith, New Effort Aims to Save Affordable Housing in Hennepin County, Metro Area, STAR TRIBUNE (June 18, 2016, 1:12 PM), http://www.startribune.com/new-effort-aims-to-save-affordable-housing-in-hennepin-county-metro-area/383489061/ (last visited Feb. 8, 2018).

170. Lawrence McDonough, *Residential Eviction Defense and Tenant Claims in Minnesota, Sixteenth Edition*, (Jan. 2018), http://povertylaw.homestead.com/files/Reading/Residential_Eviction_Defense_in_Minnesota.htm (providing an exhaustive and excellent resource for understanding which defenses are apposite to the different basis for evictions).

171. Alan F. Pendleton, *Housing Court-Evictions: 12 Basic Rules Every Judge Must Know*, MINN. JUD. TRAINING UPDATE (Nov. 21 2014), https://blogpendleton.files.wordpress.com/2014/11/judicial-training-update-14-22.pdf.

172. Minn. Stat. § 504B.291, subd. 1(a) (2017).

173. Paul McCusker and Associates, Inc. v. Omodt, 359 N.W.2d 747, 748 (Minn. Ct. App. 1985) (review denied).

only speaks directly to a tenant's right to redeem the tenancy, does this also mean a tenant loses present legal right of possession after a writ of recovery is issued? More importantly, doesn't this principle place tenants at risk of being victimized by vindictive landlords[174] who may argue that such a tenant may have lost present legal right of possession?[175]

This was the set of circumstances presented by the case of *Jones v. Meldahl*.[176] In *Jones v. Meldahl*, a tenant filed an emergency petition under the tenant remedies act[177] alleging the landlord shut off the heat to force her to move out of the unit.[178] When the tenant's attorney contacted the landlord, the landlord denied knowing the tenant or that she lived there.[179] During the initial hearing, Landlord's attorney moved for dismissal on the basis tenant no longer had a present legal right of possession because a Writ of Recovery had issued on October 30, 2017, in an eviction action.[180] Landlord relied on the premise that "possession is delivered . . . when the court issues an order dispossessing the tenant and permitting reentry by the landlord."[181] While the court did not find landlord's argument persuasive,[182] and ultimately found landlord's conduct was unlawful because he did not resort to the judicial process to terminate tenant's leasehold interest,[183] this illustrates just one of the many ways savvy attorneys will wield the words passed down to us from courts of review in ways that will help their clients.

---

174. *See supra* note 17.
175. *Id.*
176. Jones v. Meldahl, 27-CV-HC-17-5286 (Minn. Dist. Ct. 4th Dist. filed Nov. 6, 2017).
177. Minn. Stat. § 504B.381 (2017).
178. Petition for Emergency Relief Under Tenant Remedies Act at 2, Jones v. Meldahl, 27-CV-HC-17-5286 (Minn. Dist. Ct. 4th Dist. filed Nov. 6, 2017).
179. *Id.*
180. Decision and Order on Petition for Emergency Relief Under Minn. Stat. § 504B.381 at 3, Jones v. Meldahl, 27-CV-HC-17-5286 (Minn. Dist. Ct. 4th Dist. filed Nov. 22, 2017).
181. *Id.* (citing Omodt, 359 N.W.2d at 748).
182. Decision and Order on Petition for Emergency Relief Under Minn. Stat. § 504B.381 at 4, Jones v. Meldahl, 27-CV-HC-17-5286 (Minn. Dist. Ct. 4th Dist. filed Nov. 22, 2017).
183. *Id.* at 5, (citing Berg v. Wiley, 264 N.W.2d 145, 151 (Minn. 1978)).

2. What if the right to deliver present legal right of possession is missing?

Sometimes a landlord does not actually hold present legal right of possession to deliver to a tenant, but the tenant does not know that and sometimes neither does the landlord.

a. When the tenant is unaware that present legal right of possession did not transfer to them.

In *Wilson v. Doe*,[184] a landlord filed an eviction against two unknown occupants of a rental dwelling alleging no lease between the parties ever existed.[185] The tenant filed an answer alleging she did not know the plaintiff to be the landlord of the property and the real landlord had provided her with a written lease and receipts of rent paid.[186] Following a court trial, the court found: (1) plaintiff was the actual owner of the property, had listed it for sale, and installed a lock box with a key;[187] (2) the code for the lockbox was given out to approximately 20 agents for showings;[188] (3) the tenant entered a lease agreement with Heraldo Salinas, an unknown individual, who claimed ownership of the property;[189] (4) Mr. Salinas was not an owner, manager, or agent of the property and had no authority to rent the property;[190] (5) tenant claimed Mr. Salinas delivered the keys, a lease, and receipts to her upon signing a lease agreement[191] and paying him 2-months' rent;[192] (6) tenant was

184. Wilson v. Doe, 27-CV-HC-17-5278 (Minn. Dist. Ct. 4th Dist. filed Nov. 3, 2017).
185. Eviction Action Complaint at 2, Wilson v. Doe, 27-CV-HC-17-5278 (Minn. Dist. Ct. 4th Dist. filed Nov. 3, 2017).
186. Answer at 3, Wilson v. Doe, 27-CV-HC-17-5278 (Minn. Dist. Ct. 4th Dist. filed Nov. 15, 2017).
187. Eviction Action Findings of Fact, Conclusions of Law, Order and Judgment at 1, Wilson v. Doe, 27-CV-HC-17-5278 (Minn. Dist. Ct. 4th Dist. filed Dec. 26, 2017).
188. *Id.* at 2.
189. *Id.*
190. *Id.*
191. Defendant Jane Doe's Closing Argument and Affidavit at 1, Wilson v. Doe, 27-CV-HC-17-5278 (Minn. Dist. Ct. 4th Dist. filed Nov. 20, 2017).
192. *Id.* at 3.

never able to contact Mr. Salinas again;[193] (7) tenant was defrauded by an unknown person;[194] and (8) tenant had unlawfully or forcibly occupied or taken possession of real property and never held present legal right of possession.[195] The court determined the tenant never had a valid lease agreement with the lawful owners of the property[196] and the tenant was therefore evicted.[197]

This case never involved a lockout petition.[198] However, if the tenant had been locked out by the real owner, the tenant could have then filed a lockout petition. The tenant could have included a copy of the lease given to her by the impostor landlord. Under such set of facts, the court would have issued an *ex parte* order[199] directing the sheriff to ensure possession was restored to the tenant.[200] Such an *ex parte* order would be valid in spite of the tenant never holding present legal right of possession. While the court could later correct the issue of possession, this particular set of facts would have been problematic under either the majority's present legal right of possession approach or the dissent's actual-possession approach. This set of facts also illustrates why the extraordinary remedies available through the lockout statute should only be cautiously dispensed to those who can claim actual possession and not made readily available to anyone who only claims to hold present legal right of possession.[201]

---

193. Eviction Action Findings of Fact, Conclusions of Law, Order and Judgment at 2, Wilson v. Doe, 27-CV-HC-17-5278 (Minn. Dist. Ct. 4th Dist. filed Dec. 26, 2017).

194. *Id.*

195. *Id.* at 3.

196. *Id.*

197. *Id.*at 4.

198. *But see* Police Report at 1-3, Wilson v. Doe, 27-CV-HC-17-5278 (Minn. Dist. Ct. 4th Dist. filed Nov. 15, 2017) (stating police responded to a call of a burglary in progress once landlord's realtor realized there were unauthorized occupants inside the house).

199. *See* Minn. Stat. § 504B.375, subd. 1(c) (2017) (stating that if it clearly appears from the specific grounds and facts stated in the petition that the exclusion or removal was unlawful, the court shall immediately order that the residential tenant have possession of the premises).

200. *Id.*

201. *See* Cocchiarella, 884 N.W.2d at 633 (Anderson J., dissenting) (offering that such controversies are better suited for a civil lawsuit where both parties may be heard and the relevant disputes resolved).

b. When the landlord is unaware that present legal right of possession did not transfer from them.

In three separate tenant remedies actions,[202] hundreds of tenants are in danger of simultaneous eviction because their landlords' rental licenses were revoked [203] or denied [204] by the City of Minneapolis. In each of these cases, the plaintiffs asked the court to appoint an administrator to step in and act as a temporary landlord.[205] The plaintiffs claim the City of Minneapolis is willing to issue a provisional rental license to an administrator in order to keep tenants in their apartments. If an administrator is not appointed, a Minneapolis landlord who lacks a valid rental license may not allow any rental building to be occupied and cannot collect, accept, or retain rent from any unlicensed rental buildings.[206] Any unlicensed rental buildings must be ordered to be vacated by the City of Minneapolis.[207] However, some of the landlords claim to still hold valid rental licenses, although the City of Minneapolis clearly claims otherwise.

---

202. Aguilar & Violante v. Misco Holdings, LLC, 27-CV-HC-17-5281 (Minn. Dist. Ct. 4th Dist. filed Nov. 3, 2017); IX of Minneapolis v. Khan, 27-CV-HC-17-5608 (Minn. Dist. Ct. 4th Dist. filed Nov. 21, 2017); City of Minneapolis v. Equity Residential Holdings, LLC, et al, 27-CV-HC-17-6130 (Minn. Dist. Ct. 4th Dist. filed Dec. 22, 2017).

203. Max Nesterak, *Lack of Affordable Housing has Tenants Fighting to Stay in Problem Landlord's Properties*, MPR NEWS (Dec. 22, 2017, 11:06 AM), https://www.mprnews.org/story/2017/12/22/lack-of-affordable-housing-has-tenants-fighting-to-stay (last visited Jan. 18, 2018) (reporting the landlord lost his license to all 42 of his rental properties and the city is forced to vacate all affected buildings by Feb. 28).

204. Randy Furst, *Minneapolis Denies Rental Licenses for 16 Apartment Buildings*, STAR TRIBUNE (Nov. 8, 2017, 10:20 AM), http://www.startribune.com/minneapolis-is-refusing-to-grant-rental-licenses-for-16-apartment-buildings-sold-by-steve-frenz/456210543/ (last visited Jan. 18, 2018).

205. *See Petition*, Aguilar & Violante v. Misco Holdings, LLC, 27-CV-HC-17-5281 (Minn. Dist. Ct. 4th Dist. filed Nov. 3, 2017); *See Petition*, IX of Minneapolis v. Khan, 27-CV-HC-17-5608 (Minn. Dist. Ct. 4th Dist. filed Nov. 21, 2017); *See Petition*, City of Minneapolis v. Equity Residential Holdings, LLC, et al, 27-CV-HC-17-6130 (Minn. Dist. Ct. 4th Dist. filed Dec. 22, 2017).

206. MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 12, ch. 244, art. XVI, § 244.1810 (a) (Dec. 11, 2017).

207. *Id.* at § 244.1970.

The lack of a valid rental license bars landlords from allowing rental buildings to be occupied—effectively preventing them from delivering actual possession or granting present legal right of possession to any tenants—because an unlicensed landlord does not have the ability to create a legal tenancy during any period of time they lack a rental license.[208] A Minneapolis landlord who lacks a valid rental license may not even allow any rental building to be occupied by a tenancy at will—where the tenant holds possession by permission of the landlord but without a fixed end date—because the Minneapolis code bars a landlord who lacks a valid rental license from allowing any rental building to be occupied.[209]

What if Driggs did not have a valid rental license, but he did not know it, and neither did Cocchiarella? Cocchiarella's petition, under the majority's new definition, would likely be granted and she would have an *ex parte* order to place her in possession of the property. The court does not have enough information, at the petition stage, to know that Driggs could not legally transfer either present legal right of possession nor actual possession.

Any tenant who contracts with a landlord who lacks a rental license cannot hold either actual possession or a present legal right of possession, at least in Minneapolis. [210] However, the fact remains there are hundreds of tenants currently occupying unlicensed rental buildings. If their tenancies were created by contracting with unlicensed landlords, then neither the right to hold present legal right of possession nor actual possession could legally transfer to the tenants. Many other cities and counties around the state have similar provisions requiring landlords to obtain either a rental license or to register rental property,[211] so this potential concern is widespread.

Both the majority and the dissent discussed several hypotheticals to either support their interpretation or illustrate why the other interpretation was flawed. Notably, their hypotheticals were limited only to different lockout scenarios. However, the new sweeping definition of how residential tenants occupy property applies to all types of landlord-tenant actions. As the few cases I

---

208. *Id.* at § 244.1810 (a).

209. Minn. Stat. § 504B.001, subd. 13 (2017).

210. MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 12, ch. 244, art. XVI, § 244.1970 (Dec. 11, 2017).

211. *See supra* note 36.

discussed illustrate, truth is not only much stranger than fiction, but also infinitely more complex. Trial courts must determine the truth quickly and, for lockouts and other emergency tenant actions, *ex parte*. The *Cocchiarella* opinion, by relying on dictionaries to create a new legal fiction, left the waters very murky for trial courts, landlords, and tenants to navigate through quickly.[212]

IV. CONCLUSION

To say someone who never lived in an apartment is still occupying an apartment once their move-in date has passed defies what it means to have something. An actual-possession definition sets aside all concerns about move-in or move-out dates and places the focus on who currently lives there. At least for lockout actions, where the relief is meant to be extraordinary, such a restrained definition makes sense. For any others, there are still other types of actions available.

While courts heavily rely on traditions to promote consistency and trust, the overarching principle of achieving justice needs to be foremost. This means the courts' traditions must bend and adapt, not to the whims and will of the people, but in response to their needs. But as cases move up the levels of courts, the impact of the court's decisions shift dramatically, as they did through *Cocchiarella*. If the court expanded a definition to help achieve a just outcome for this case, it did so at the cost of shifting the ground for all landlords and tenants throughout the entire state involved in all kinds of landlord-tenant actions. Whatever their motivations, this change was not needed, was too broad, and its reasoning too uncertain for courts to implement effectively.

And what became of Mary Cocchiarella after this ordeal? Much like the duck joke I mentioned earlier, by the time the Minnesota Supreme Court announced their land-shifting decision, she had long-found another place to live.[213]

"'Home,' he mocked gently.
'Yes, what else but home?

---

212. *See supra* note 164.

213. Order for Dismissal, Cocchiarella v. Driggs, 27-CV-HC-14-967 (Minn. Dist. Ct. 4th Dist. filed Dec. 20, 2016).

It all depends on what you mean by home.
Of course he's nothing to us, any more than was the hound that came a stranger to us out of the woods, worn out upon the trail.'
'Home is the place where, when you have to go there, they have to take you in.'
'I should have called it something you somehow haven't to deserve.'"

— Robert Frost, *The Death of the Hired Man*, 1914.[214]

---

214. *See supra* note 1.

875 Summit Avenue, Saint Paul, MN 55105
mitchellhamline.edu