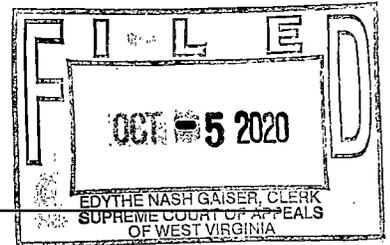


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Docket No. 20-0488



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON

John Keener d/b/a Mountaineer Inspection Services, LLC, Petitioner,

vs.

Dale W. Steager, as State Tax Commissioner of West Virginia, Respondent.

(Circuit Court of Taylor County Civil Action No. 18-P-57)

FROM THE CIRCUIT COURT OF TAYLOR COUNTY, WEST VIRGINIA
THE HONORABLE SHAWN D. NINES

**BRIEF OF PETITIONER, JOHN KEENER D/B/A
MOUNTAINEER INSPECTION SERVICES, LLC,
IN SUPPORT OF PETITION FOR APPEAL**

Ronald G. Kramer (WV State Bar #12374)
Rkram5600@gmail.com
Kramer Legal Group, PLLC
P.O. Box 882
Bridgeport, WV 26330-0882
Telephone: (304) 777-8502
Facsimile: (304) 884-4259

Allison S. McClure (WV State Bar #10785)
allison@mcclurelawwv.com
McClure Law PLLC
215 S. 3rd Street, Suite 902
Clarksburg, WV 26301
Telephone: (304) 627-1373
Facsimile: (304) 405-2868

Counsel for Petitioner

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FROM THE CIRCUIT COURT OF TAYLOR COUNTY, WEST VIRGINIA
THE HONORABLE SHAWN D. NINES

**BRIEF OF PETITIONER, JOHN KEENER D/B/A
MOUNTAINEER INSPECTION SERVICES, LLC,
IN SUPPORT OF PETITION FOR APPEAL**

ASSIGNMENTS OF ERROR

- (1) The Circuit Court of Taylor County, West Virginia, committed reversible error when it held that the Respondent's four-year degree rule was a permissible exercise of its gap-filling, rule-making authority.
- (2) The Circuit Court of Taylor County, West Virginia, committed reversible error when it held that the language of West Virginia Code of State Rules § 110-15-8.1.1.1 (1993) is a mandatory four-part test.
- (3) The Circuit Court of Taylor County, West Virginia, committed reversible error when it held that home inspector services do not qualify as professional services pursuant to the non-exclusive factors set forth in West Virginia Code of State Rules § 110-15-8.1.1.1 (1993).

STATEMENT OF THE CASE

At all times relevant, Mountaineer Inspection Services was a single-member West Virginia limited liability company with its principle place of business located in Taylor County, West Virginia. A.R. 242. John Keener, Mountaineer Inspection Services' member, is certified by the West Virginia State Fire Marshal to perform home inspection services. A.R. 009, 242. To obtain this certification from the West Virginia State Fire Marshal, an applicant must (1) pass the National Home Inspector Examination offered by the Examination Board of Professional Home Inspectors; (2) complete at least eighty (80) hours of instruction, which, as determined by the West Virginia State Fire Marshal, directly relate to the performance of professional home inspections; (3) complete high school or its equivalent; (4) present proof of and maintain at least two hundred fifty thousand dollars (\$250,000.00) of general liability insurance; (5) provide fingerprints for examination by the West Virginia State Police Criminal Investigation Bureau and the Federal Bureau of Investigation; (6) complete sixteen (16) hours of continuing education each year; and, (7) have a valid West Virginia business license issued by the West Virginia Department of Tax and Revenue. A.R. 243. *See also* W. Va. Code St. R., §§ 87-5-1 *et seq.* Mr. Keener completed eighty (80) classroom hours on home inspection. A.R. 006, 010. He is a licensed radon tester and completed a sixteen (16) hour course on measuring radon. A.R. 007-008. Mr. Keener is a certified envelope professional, building analyst professional, and infrared thermographer. A.R. 011.

Mountaineer Inspection Services did not collect and remit consumer sales tax from January 1, 2011 to September 30, 2015 and was issued a tax assessment by the West Virginia Tax Department's Auditing Division for the consumer sales tax for these years in the amount of \$31,137.96 plus interest of \$5,048.24, for a total of \$36,186.20. A.R. 002, 242. On February 5, 2016, Mountaineer Inspection Services filed a petition for reassessment with the West Virginia

Office of Tax Appeals (“OTA”). A.R. 002-12, 242. The parties agreed that instead of an evidentiary hearing, they would submit the case to the OTA by filing briefs. A.R. 242. Mountaineer Inspection Services’ position throughout this proceeding has been that it was exempt from collecting consumer sales and service tax because it provided a professional service.

Briefing before the OTA concluded on June 18, 2018, and, on October 4, 2018, the OTA issued its Final Decision, affirming the tax assessment. A.R. 241-253. Both parties appealed the decision to the Circuit Court system, with Mr. Keener appealing to the Circuit Court of Taylor County and the Respondent appealing to the Circuit Court of Kanawha County. A.R. 254-266, 284-300. Respondent’s appeal questioned the OTA’s ruling that the subject statute is not a mandatory four-part test and that there is no four-year degree requirement. A.R. 285-286. The parties thereafter agreed to consolidate the two appeals into one before the Circuit Court of Taylor County. A.R. 315-316. A briefing schedule was set, and after the briefing schedule closed, the Circuit Court heard oral arguments from counsel. A.R. 317-318, 401. The Circuit Court then entered an Order denying Mr. Keener’s appeal and granting the Respondent’s appeal, affirming in part and reversing in part the OTA’s Final Decision. A.R. 437-466. It is from this decision that Mr. Keener now appeals.

SUMMARY OF ARGUMENT

Mountaineer Inspection Services provides a professional service, exempt from the collection of consumer sales and service tax, because it is an occupation regulated by the State of West Virginia with standards of conduct imposed by the West Virginia Legislature, including initial education requirements, passage of a national exam, experience prior to the promulgation of the rule or instruction on the performance of home inspections following the promulgation of the rule, maintenance of professional liability insurance, and continuing education. Though home

inspection services are not set forth within the Code of State Rules as being a professional service exempt from the collection of sales and service tax, home inspection services have been recognized as professional services in other states and also should be classified as professional services when considering the factors set forth West Virginia Code of State Rules § 110-15-8.1.1.1. The Respondent and, thereafter, the Circuit Court have improperly applied a mandatory four-factor test and imposed a requirement of a four-year degree in determining whether home inspectors provide a professional service. The Circuit Court's Order affirming the Respondent's impermissible rule-making and improper application of the statute should be reversed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 20(a) of the Rules of Appellate Procedure for the West Virginia Supreme Court of Appeals, Mr. Keener believes that this matter is suitable for oral argument because it involves an issues of first-impression, namely whether a home inspector is a "professional" exempt from the imposition of sales tax, whether the applicable statute is a mandatory four-part test, and whether the applicable statute requires that an individual have a four-year degree before the individual can be considered a professional exempt from sales tax.

ARGUMENT

I. Standard of Review

This Court has held that

[i]n an administrative appeal from the decision of the West Virginia Office of Tax Appeals, this Court will review the final order of the circuit court pursuant to the standards of review in the State Administrative Procedures Act set forth in W. Va. Code, 29A-5-4(g) [1988]. Findings of fact of the administrative law judge will not be set aside or vacated unless clearly wrong, and, although administrative interpretation of State tax provisions will be afforded sound consideration, this Court will review questions of law *de novo*.

Syl. Pt. 1, Ashland Specialty Co. v. Steager, 241 W. Va. 1, 818 S.E.2d 827 (2018) (*quoting* Syl. Pt. 1, Griffith v. ConAgra Brands, Inc., 229 W. Va. 190, 728 S.E.2d 74 (2012)). The reviewing court may affirm the order or decision or remand the case for further proceedings; however, it shall reverse, vacate or modify the decision if the substantive rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W. Va. Code § 29A-5-4(g) (1998).

II. The Circuit Court of Taylor County, West Virginia, committed reversible error when it held that the Respondent's four-year degree rule was a permissible exercise of its rule-making authority.

The sales tax imposed by West Virginia Code § 11-15-1 applies to the provision of all services except professional and personal services. W. Va. Code § 11-15-8 (2003). "Professional services" are not defined within the section. *See* W. Va. Code § 11-15-2 (2008). This Honorable Court has stated that

[t]he professional services which are excepted from the payment of the Consumer Sales and Service Tax, *W. Va. Code*, 11-15-1, *et seq.*, are not limited to services performed in the practice of law, theology or medicine or in pursuit of occupations specifically recognized as professions by *W. Va. Code*, Chapter 30, but any other profession must be clearly established as a profession by the one who asserts that services rendered in connection therewith are professional services excepted from taxation.

Syl. Pt. 1, Wooddell v. Dailey, 160 W. Va. 65, 230 S.E.2d 466 (1976). The individual asserting that he or she is providing professional services should establish the claim by showing membership

in a discipline with widely-accepted standards of required study or specified attainments in special knowledge, as distinguished from mere skill; general acceptance of the occupation as a profession either in this state or elsewhere; or, cases holding that the occupation is a profession. *See Id.* at 70. Wooddell noted that the absence of definitions for “professional services” and “nonprofessional activities” renders the statute ambiguous, meaning that it must be construed. *See Id.* at 68. Further, when there is doubt regarding the meaning of tax laws, they should be construed in favor of the taxpayer, except when an exemption is claimed, in which case the tax law should be strictly construed against the taxpayer. *Id.*

The Code of State Rules does, however, define “professional services” as

an activity recognized as professional under common law, its natural and logical derivatives, an activity determined by the State Tax Division to be professional, and any activity determined by the West Virginia Legislature in W. Va. Code § 11-15-1 et seq. to be professional. *See* Section 8.1.1 of these regulations.

W. Va. Code St. R. § 110-15-2.65. Section 8.1.1.1 provides that

[p]rofessional services, as defined in Section 2 of these regulations, are rendered by physicians, dentists, lawyers, certified public accountants, public accountants, optometrists, architects, professional engineers, registered professional nurses, veterinarians, licensed physical therapists, ophthalmologists, chiropractors, podiatrists, embalmers, osteopathic physicians and surgeons, registered sanitarians, pharmacists, psychiatrists, psychoanalysts, psychologists, landscape architects, registered professional court reporters, licensed social workers, enrolled agents, professional foresters, licensed real estate appraisers and certified real estate appraisers licensed in accordance with W. Va. Code § 37-14-1 et seq., nursing home administrators, licensed professional counselors and real estate brokers. Persons who provide services classified as nonprofessional for consumers sales and service tax purposes include interior decorators, private detectives/investigators, security guards, bookkeepers, foresters, truck driving schools, hearing aid dealers/fitters, contractors, electricians, musicians, and hospital administrators; the foregoing listing is not all-inclusive but intended as containing examples of trades and occupations. The determination as to whether other activities are “professional” in nature will be determined by the State Tax Division on a case-by-case basis unless the Legislature amends W. Va. Code § 11-15-1 et seq. to provide that a specified activity is “professional.” When making a determination as to whether other activities fall within the “professional” classification, *the Tax Department will consider such things as the level of education required for the activity, the nature*

and extent of nationally recognized standards for performance, licensing requirements on the State and national level, and the extent of continuing education requirements.

W. Va. Code St. R. § 110-15-8.1.1.1 (emphasis added). Thus, § 110-15-8.1.1.1 of the Code of State Rules provides guidelines for the determination of whether an occupation is a “professional service,” but “the failure to meet the guidelines is not ultimately determinative of whether an individual may be classified as a ‘professional.’” W. Va. Tax Dec. 90-4709 CS, 1996 WL 490339, *3 (W. Va. Off. Hrg. App., Jan. 1, 1996).

The Respondent has asserted that

[Mountaineer Inspection Services] fails to meet the educational prong of the four-part test. [Mountaineer Inspection Services] states that applicants to become a home inspector must have a high school diploma and complete 80 hours of instruction, but this does not culminate in a formal degree from a college or university....A high school degree and either 80 hours of instruction or business experience is [sic] insufficient for home inspection to be considered a professional service because it does not meet the minimum standards required.

A.R. 138-139. The Circuit Court confirmed this reasoning, concluding that the application of a four-year degree requirement was permissible under the Respondent’s rule-making authority. A.R. 437-465. The four-year degree requirement imposed by the Respondent and affirmed by the Circuit Court is contrary to the plain language of § 110-15-8.1.1.1 of the Code of State Rules and is arbitrary.

There are three (3) types of administrative rules – legislative, interpretive, and procedural. W. Va. Code § 29A-1-2(j) (2015). A legislative rule has the force of law, supplies a basis for civil or criminal liability, or grants or denies a benefit. Chico Dairy Co. v. W. Va. Human Rights Comm’n, 181 W. Va. 238, 244, 383 S.E.2d 75, 81 (1989). A court reviewing an agency’s construction of a statute reviews the construction of the statute under two separate questions: whether the Legislature’s intent is clear and whether the agency’s construction of the statute is

permissible. Appalachian Power Co. v. State Tax Dept., 195 W. Va. 573, 583, 466 S.E.2d 424, 434 (1995) (*quoting* Sniffin v. Cline, 193 W. Va. 370, 373-374, 456 S.E.2d 451, 454-455 (1995)). If the Legislature has spoken directly to the precise issue in question, the review ends. Id. If the Legislature's intent is unclear, then the court moves to considering whether the construction is permissible. Id. Courts should "presume that a legislature says in a statute what it means and means in a statute what it says." Id. (*quoting* Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 312, 465 S.E.2d 399, 414 (1995)). If there is a gap in the legislature's enactments on a particular issue, then an agency may fill the gap, but the agency's gap-filling rulemaking should not stand if it is arbitrary, capricious, or manifestly contrary to the statute. Id. at 589, 440.

Here, the rule in question is a legislative rule, so the analysis of Appalachian Power applies to the issue of the four-year degree requirement asserted by the Respondent. The Legislature has spoken to the issue – that the Tax Department will consider the level of education required of an occupation before determining whether it is a profession – and the legislative enactment should be presumed to "say what it means and mean what it says" insofar as the legislative enactment says education must be considered but does not say what level of education is required. Because there is no ambiguity in the enactment, the analysis of the construction should stop there. And because there is no four-year degree requirement contained within the enactment, the Respondent's decision to impose that requirement is directly contrary to the language of the unambiguous statute.

Assuming *arguendo* that the enactment is ambiguous – that there is a gap to be filled – the Respondent's four-year-degree rule is an impermissible exercise of its gap-filling authority because the imposition of a four-year-degree requirement is arbitrary and directly contrary to the language of the provision. The rule is arbitrary and contrary to the language of the statute because the statute recognizes a variety of occupations with varying levels of required education and

because the statute does not state a required level of education. West Virginia real estate brokers, considered professionals under the statute, are not required to have a college degree. *See* W. Va. Code § 30-40-14 (2002). *See also* <https://rec.wv.gov/License-Info/Pages/Broker.aspx>. Licensed real estate appraisers do not need a college degree, either. *See* W. Va. Code St. R. § 190-2-1 *et seq.* Embalmers also do not have to have a four-year degree – only an associate degree or at least sixty (60) hours of college credits. W. Va. Code St. R. § 6-1-3.1.2.a. On the opposite end of the spectrum are doctors, lawyers, and others whose occupations require post-graduate education. Thus, if the level of education required by your occupation is equivalent to that of real estate brokers, real estate appraisers or embalmers but does not require a college degree, and your occupation is not enumerated in the statute, then you cannot be considered a professional even if the other requirements placed on you by your occupation are just as or more stringent than those occupations enumerated in the statute. If the Legislature intended that no occupations other than those requiring college degrees be considered professionals, then the Legislature would not have included occupations that do not require college degrees in its list and would have said a four-year degree is one of the factors that must be considered as part of the analysis of whether an occupation is a profession.

Because the statute is not ambiguous – because the Legislature said what it meant and meant what it said when it did not include a college degree as one of the factors for someone to be considered a professional – the Respondent’s application of a four-year-degree requirement is improper. Assuming *arguendo* that the statute is ambiguous, the Respondent’s use of a four-year-degree requirement is an improper exercise of its gap-filling rulemaking authority because the requirement is arbitrary and contrary to the plain language of the statute. Therefore, this Court should enter an Order reversing the Circuit Court’s decision to the contrary.

III. The Circuit Court of Taylor County, West Virginia, committed reversible error when it held that the language of West Virginia Code of State Rules § 110-15-8.1.1.1 (1993) is a mandatory four-part test.

The Statute provides that

When making a determination as to whether other activities fall within the “professional” classification, the Tax Department will consider such things as the level of education required for the activity, the nature and extent of nationally recognized standards for performance, licensing requirements on the State and national level, and the extent of continuing education requirements.

W. Va. Code St. R. § 110-15-8.1.1.1 (emphasis added). The rules of statutory construction should apply to the determination of whether the Statute provides for a four-part test or simply lists factors for consideration. A court, when considering a statute, should give (1) effect to the spirit, purpose and intent of the lawmakers without limiting the interpretation in such a manner as to defeat the underlying purpose of the statute; (2) effect to each word of the statute, construing it in accordance with the import of its language; (3) ordinary meaning to any undefined words; and, (4) strict meaning to any technical words. Wooddell, 160 W. Va. at 68-69, 230 S.E.2d at 469.

The use of the phrase “will consider such things as” clearly indicates that the statute is not a four-part test but instead simply lists factors for consideration. If it were a four-part test, one would think the statute would be written to clearly indicate the factors were required, perhaps by the use of “including but not limited to” or “shall.” The OTA’s decisions certainly support that the statute is not a four-part test but is instead a list of factors because the OTA has established that “the failure to meet the guidelines is not ultimately determinative of whether an individual may be classified as a ‘professional.’” W. Va. Tax Dec. 90-4709 CS, 1996 WL 490339, *3.

The statute in question was constructed as a non-exclusive list of factors, not a four-part elemental rule. Had it been intended to be a four-part elemental rule, it could have been written as such. The rules of statutory construction, when applied to the statute, do not support the

Respondent's position or the Circuit Court's holding that the Statute is a mandatory four-part rule. Therefore, this Court should enter an Order reversing the Circuit Court's decision finding and concluding that the statute is a four-part rule.

IV. The Circuit Court of Taylor County, West Virginia, committed reversible error when it held that home inspector services do not qualify as professional services pursuant to the non-exclusive factors set forth in West Virginia Code of State Rules § 110-15-8.1.1.1 (1993).

To become a certified home inspector, applicants must (1) pass the National Home Inspector Examination offered by the Examination Board of Professional Home Inspectors or other comparable examination, as determined by the State Fire Marshal; (2) present proof of having conducted business as a home inspector for three (3) years prior to the effective date of the rule or proof of satisfactory completion of at least eighty (80) hours of instruction directly relating to the performance of home inspections; (3) have a high school degree or its equivalent; (4) present proof of and maintain general liability insurance of at least \$250,000; and, (5) provide fingerprints for examination by the West Virginia State Police and the Federal Bureau of Investigation. W. Va. Code St. R. § 87-5-4. If the applicant meets all of the qualifications to become certified, the applicant must also present a copy of a valid West Virginia business license issued by the West Virginia Department of Tax and Revenue prior to the issuance of certification. W. Va. Code St. R. § 87-5-5. To maintain and renew the certification, the home inspector must complete sixteen (16) hours of continuing education each year related directly to health, life safety, construction and maintenance of residential properties. W. Va. Code St. R. § 87-5-6.4. The requirement of certification, along with the other requirements in the relevant series, make clear that there exists in the State of West Virginia an established standard of conduct with which home inspectors are expected to comply. *See* Syl. Pt. 5, Finch v. Inspectech, LLC, 229 W. Va. 147, 727 S.E.2d 823

(2012) (holding that because West Virginia Code of State Rules § 87-5-1 *et seq.* imposes a standard of conduct on home inspectors for the provision of home inspections and reports, home inspectors cannot include within their contracts a limit of liability provision, anticipatory release, or exculpatory clause, as the same is contrary to West Virginia public policy).

Further, other jurisdictions have held that home inspectors provide professional services. *See, e.g., Auto-Owners Ins. Co. v. E.N.D. Services, Inc.*, 506 Fed. Appx. 920 (11th Cir. 2013) (holding a professional services exclusion in a commercial general liability policy excluded coverage for a faulty home inspection and viewing Florida's decision to formally regulate the home inspection industry as an acknowledgement of the industry's preexisting character as one that provides services that are professional in nature); *Retherford v. Castro*, 378 S.W.3d 29 (Tex. App. 2012) (holding that a real estate inspector was a professional and, thus, qualified for a professional services exemption to liability under the Deceptive Trade Practices Act unless otherwise excepted); *Lucier v. Williams*, 366 N.J. Super. 485, 495-496, 841 A.2d 901, 913-914 (2004) (holding a limitation of liability clause in a home inspection contract to be a violation of public policy because it would permit the home inspector, who was providing a professional service, to circumvent certain industry standards and finding the state's requirement of liability coverage for licensure further supported that the clause violated public policy); *Russell v. Bray*, 116 S.W.3d 1, 6 (Tenn. Ct. App. 2003) (finding that home inspectors are professionals because, like many professionals, they "sell their expert analysis and opinion").

Here, home inspectors are clearly professionals, not only because they are recognized as professionals by other jurisdictions but also because of the stringent requirements imposed upon them. They must pass a national exam, similar to the boards and bar exams that doctors and lawyers must contend with after completing their degrees. To be certified, they must have

conducted a home inspection business for at least three (3) years prior to the enactment of the regulation or have completed eight (80) hours of instruction in the field, roughly equivalent to between two and three years of college credit hours. A certified inspector must complete sixteen (16) hours of continuing education each year – more than the continuing education required of the lawyers in this case. In fact, when either considering the yearly continuing education requirements or averaging term requirements over an annual basis, home inspectors are required to have more continuing education hours each year than are architects, lawyers, embalmers, professional engineers, landscape architects, physical therapists, psychologists, professional foresters, real estate appraisers, real estate brokers, and sanitarians. *See* W. Va. Code St. R. §§ 2-1-8.4.1, 6-1-18.3.1, 7-1-10.1, 9-2-3.2, 16-1-10.2, 17-3-20.5-20.6, 20-4-5.6, 174-1-8.4, 190-3-4.1, 200-1-10.1.

The State's decision to regulate the certification of home inspectors indicates that home inspectors are engaged in a profession, not just an occupation. *See* Auto-Owners Ins. Co., 506 Fed. Appx. 920. Home inspectors are professionals because they have industry and state standards of conduct with which they must comply and cannot limit their liability through their contracts because such a provision would violate public policy. *See* Syl. Pt. 5, Finch, 229 W. Va. 147, 727 S.E.2d 823; Lucier, 366 N.J. Super. at 495-496, 841 A.2d at 913-914. Each day across this State home buyers rely on home inspectors' "expert analysis and opinion," rendering the home inspector industry a profession. *See* Russell, 116 S.W.3d at 6. It is easy, apparently, to be dismissive of the occupation being a profession until one considers that home sales, including buyers' willingness to continue with potential contracts and banks' willingness to lend funds for the transactions, largely hinge on the outcome of a home inspection. Any home buyer who was saved from purchasing a home with latent defects and any bank that has come close to loaning money for a home with major structural issues or health hazards would likely beg to differ that a home inspector

is not a professional. The analysis and opinion provided by inspectors is akin to that of attorneys guiding their clients through litigation. Attorneys read and argue the law every day and appear in court frequently, or even on a daily basis; clients rely on attorneys' education, experience, and professional judgment to decide what to do about monumental issues in life, issues that will affect the client for years to come. Similarly, home inspectors look at wiring, plumbing, foundations, and support structures every day and study the field of home inspection; clients rely on the inspectors' education, training, experience, and judgment to decide whether to make arguably the biggest purchase of their life and one that will affect them day in and day out for years to come. It is absurd to say that this field cannot be a profession simply because it does not require a four-year degree when this State's citizens and its banking institutions rely on inspectors' knowledge, skill, and expertise to guide their real estate transactions.

Therefore, because home inspectors are regulated by this State, because the regulations pertaining to certified home inspectors impose such stringent requirements, and because clients and banks rely on inspectors' expert analysis and opinion, home inspectors are professionals under West Virginia Code of State Rules § 110-15-8.1.1.1 (1993), and this Court should reverse the Circuit Court's Order to the contrary.

CONCLUSION

Mr. Keener is a professional by every stretch of the imagination. A high school degree or its equivalent is required. In addition to the high school degree, those entering the profession now are required to complete at least eighty (80) hours of instruction in the field. Mr. Keener had to pass a national exam. Mr. Keener must maintain general liability insurance. He must be licensed to conduct business by the State. He must complete sixteen (16) hours of continuing education in the home inspection field every year. The State regulates the profession – provides a standard of

conduct with which he and others must comply. He cannot contractually limit his liability because he is required to comply with these standards. His clients and their lenders rely on his reports – a home inspection can make or break a real estate transaction and find problems in a structure that could create significant liability down the line. If he were in another state, such as Florida, Texas, New Jersey, or even a couple of states away in Tennessee, he would be considered a professional, and West Virginia should certainly follow suit.

To say that an occupation relied upon by this State's citizens for arguably the citizens' most important purchases and relied upon by this State's banking institutions in determining whether to loan money for a real estate transaction is not a profession because the occupation does not require a college degree is asinine. If it were not a profession, then buyers should be able to select any Tom, Dick, or Harry off the street with a bit of construction know-how to perform the home inspection required for the purchase of a home. To say that the home inspector occupation cannot be considered a profession without a college degree when embalmers, real estate brokers, and real estate appraisers can is illogical.

The Legislature said what it meant and meant what it said when it listed factors such as education level required, nationally-recognized standards, licensing requirements at the State and national level, and the extent of continuing education requirements as considerations for the determination of whether an occupation is a profession. If the Legislature intended a hard-and-fast, rigid, elemental test requiring a four-year degree to be used to determine whether a profession is an occupation, then the statute would have been written that way. The Respondent's rule to the contrary flies in the face of the plain language of the statute and is arbitrary.

The Respondent's use of a four-part "test," its requirement of a college degree, and its determination that Mr. Keener is not a professional were improper in the face of the applicable

statute, and the Circuit Court's Order to the contrary is erroneous. This Honorable Court should reverse the Circuit Court's decision ruling that Mr. Keener is not a professional because he does not have a college degree and, therefore, did not meet the requirements of the "four-part test" imposed by the Respondent.

WHEREFORE, based upon all the foregoing reasons, the Petitioner, John Keener d/b/a Mountaineer Inspection Services, LLC, respectfully requests this Honorable Court enter an Order reversing the Circuit Court of Taylor County's Final Order Denying Mountaineer Inspection's Petition for Appeal, Granting the Tax Department's Cross Assignments of Error, Affirming the Decision of the Office of Tax Appeals, in Part, and Reversing the Decision of the Office of Tax Appeals, in Part.

Respectfully submitted this 3rd day of October, 2020.

**Petitioner,
JOHN KEENER d/b/a
MOUNTAINEER INSPECTION
SERVICES, LLC, By Counsel:**


Ronald G. Kramer (WV State Bar #12374)

Rkram5600@gmail.com

Kramer Legal Group, PLLC

P.O. Box 882

Bridgeport, WV 26330-0882

Telephone: (304) 777-8502

Facsimile: (304) 884-4259

Allison S. McClure (WV State Bar #10785)

allison@mcclurelawwv.com

McClure Law PLLC

215 S. 3rd Street, Suite 902

Clarksburg, WV 26301

Telephone: (304) 627-1373

Facsimile: (304) 405-2868

Docket No. 20-0488

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON

John Keener d/b/a Mountaineer Inspection Services, LLC, Petitioner,

vs.

Dale W. Steager, as State Tax Commissioner of West Virginia, Respondent.
(Circuit Court of Taylor County Civil Action No. 18-P-57)

FROM THE CIRCUIT COURT OF TAYLOR COUNTY, WEST VIRGINIA
THE HONORABLE SHAWN D. NINES

CERTIFICATE OF SERVICE

This is to certify that on this 3rd day of October, 2020, the undersigned counsel served the foregoing *“Brief of Petitioner, John Keener d/b/a Mountaineer Inspection Services, LLC, in Support of Petition for Appeal”* upon the following via U.S. Mail, postage prepaid, in envelopes addressed as follows:

L. Wayne Williams, Esq.
State Capitol Complex
1900 Kanawha Blvd., East
Building 1, Room W-435
Charleston, WV 25305

Ronald G. Kramer, Esq.
P.O. Box 882
Bridgeport, WV 26330-0882

Henry R. Glass, III, Esq.
5215 MacCorkle Avenue, S.W.
South Charleston, WV 25309


Allison S. McClure (WV State Bar #10785)