

TESTIMONY BEFORE
HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE

By Joseph P. Viola
Associate General Counsel
Hawaiian Electric Company, Inc.

2:00 p.m., January 30, 2008

House Bill 2997
Relating to Torts

Chair Herkes, Vice Chair McKelvey, and members of the Committee:

My testimony is presented on behalf of Hawaiian Electric Company (“HECO”) and its subsidiaries, Hawaii Electric Light Company (“HELCO”) and Maui Electric Company (MECO”). For ease of reference, I will refer to all three companies collectively as “HECO.”

I.

HECO cannot support HB 2997 unless it is amended. HECO utilizes the public highways to provide electricity to the public. If joint and several liability in highway cases is abolished for design professionals as provided in the Bill, then, in fairness, it should be abolished for HECO and other public utilities to the same extent. Otherwise, design professionals will be protected at the potential great expense of public utilities. Therefore, we respectfully request that the Committee either:

1. Amend the Bill to provide similar protections to public utilities that locate their facilities within the public highways, or
2. Hold HB 2997 without further action.

II.

This Bill would impact HECO in highway motor vehicle accident cases involving utility poles. In those cases, plaintiffs may sue HECO and the professionals that designed the highway upon which the pole is located.¹ Plaintiffs have argued that utility pole location is part of the highway design, and, on that basis, seek to hold the utility companies and other defendants jointly and severally liable for all damages.² However, under HB 2997, design professionals could *not* be held jointly and severally liable for

¹ The State or County that owns the highway may also be sued, along with other joint pole owners, which may include Hawaiian Telecom Company and the State or City and County.

² See Hawaii Revised Statutes (“HRS”) § 663-10.9(4) (joint and several liability preserved in tort actions relating to highway maintenance and design, which includes “utility poles” (text attached)).

highway design unless the professional's negligence was 25% or more. That would shift undue risk to HECO.

Because of the way joint and several liability works, defendants who have the ability to pay -- such as the government, public utilities and professionals -- are at risk to pay far more than any proportionate share of liability they may be assigned. Therefore, by limiting the design professionals' liability, the Bill would effectively shift greater liability exposure in highway cases to the other so-called "deep pockets" -- including the public utilities. However, there is no justification for increasing the utilities' risk in these cases. Public utilities do not plan, design or build the highways. Indeed, governmental rules, regulations and design play a significant role in determining where utilities may locate their poles and facilities within the highways.

So, any reasons justifying limitations on joint and several liability for design professionals in highway cases should apply equally to the public utilities.

A more fair result can be accomplished by amending HB 2997 to add a new section 2 as follows:

SECTION 2. Chapter 663, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§663- Liability of public utility companies limited in highway cases. Notwithstanding section 663-10.9, 663-11 to 663-13, 663-16 and 663-31, public utility companies that place and maintain their facilities on or within public highways shall not be held jointly and severally liable for recovery of economic or non-economic damages in motor vehicle accidents involving tort actions relating to maintenance and design of highways unless the public utility's degree of negligence is twenty-five percent or more. For purposes of this section, "public utility" shall have the meaning set forth in section 269-1, and the liability of a public utility shall include its vicarious liability for the acts or omissions of its officers and employees."

Otherwise, this Bill should be held without further action.

Thank you for the opportunity to testify on this matter.

Hawaii Revised Statutes § 663-10.9 (Underscore added):

§663-10.9 Abolition of joint and several liability; exceptions. Joint and several liability for joint tortfeasors as defined in section 663-11 is abolished except in the following circumstances:

(1) For the recovery of economic damages against joint tortfeasors in actions involving injury or death to persons;

(2) For the recovery of economic and noneconomic damages against joint tortfeasors in actions involving:

(A) Intentional torts;

(B) Torts relating to environmental pollution;

(C) Toxic and asbestos-related torts;

(D) Torts relating to aircraft accidents;

(E) Strict and products liability torts; or

(F) Torts relating to motor vehicle accidents except as provided in paragraph (4);

(3) For the recovery of noneconomic damages in actions, other than those enumerated in paragraph (2), involving injury or death to persons against those tortfeasors whose individual degree of negligence is found to be twenty-five per cent or more under section 663-31. Where a tortfeasor's degree of negligence is less than twenty-five per cent, then the amount recoverable against that tortfeasor for noneconomic damages shall be in direct proportion to the degree of negligence assigned; and

(4) For recovery of noneconomic damages in motor vehicle accidents involving tort actions relating to the maintenance and design of highways including actions involving guardrails, utility poles, street and directional signs, and any other highway-related device upon a showing that the affected joint tortfeasor was given reasonable prior notice of a prior occurrence under similar circumstances to the occurrence upon which the tort claim is based. In actions in which the affected joint tortfeasor has not been shown to have had such reasonable prior notice, the recovery of noneconomic damages shall be as provided in paragraph (3).

(5) Provided, however, that joint and several liability for economic and noneconomic damages for claims against design professionals, as defined in chapter 672, and certified public accountants, as defined in chapter 466, is abolished in actions not involving physical injury or death to persons.

**COALITION OF HAWAII ENGINEERING AND ARCHITECTURAL
PROFESSIONALS**

Email to: CPCTestimony@Capitol.hawaii.gov

Hearing Date: Wednesday, January 30, 2007, 2:00 pm, CR 325

Honorable Representatives Robert N. Herkes, Chair, Representative Angus L.K. McKelvey, Vice Chair and Members of the House Committee on Consumer Protection & Commerce

Subject: HB 2997 - Relating to Torts

Coalition of Hawaii Engineering & Architectural Professionals represents several professional Engineering and Architectural organizations including American Council of Engineering Companies Hawaii; American Institute of Architects; Hawaii Chapter of the American Society of Civil Engineers; American Public Works Association Hawaii Chapter; Structural Engineering Association of Hawaii; and the Hawaii Society of Professional Engineers.

Our coalition is in **STRONG Support** of **HB 2997 Relating to Torts**. This bill addresses a specific problem area for design professionals: joint and several liability relating to highway accidents. Under current tort law design professionals and contractors have been the primary targets for any and all highway accidents. Design professionals involved in the design or construction phase services have had to pay up to the full amount of their liability insurance policies in mediated settlements. Hawaii's current Joint and Several Law requires Design Professionals (with no or very small percentage responsibility for the cause of the accident) to pay out up to our full insurance typically \$1 million, plus attorney costs for our defense and the private attorney costs for the defense of the State Department of Transportation (DOT).

What happened to personal responsibility and accountability for the person or persons that chose to cause the accident by drunk driving, speeding, and/or being reckless or un-attentive. Design professionals very carefully design highways according to the current State and Federal codes and our design & construction is closely scrutinized by the State DOT. We are unfairly the "deep pocket" in every public highway accident case. Most of the small firms can no longer afford to work on highway projects, leaving only a select few firms to design and construct our local highways.

We urge you to support HB 2997 - Relating to Torts. Mahalo for this opportunity to express our business concerns and for your consideration of this important bill.

Sincerely,
Coalition of Hawaii Engineering & Architectural Professionals
Lester H. Fukuda, P.E., FACEC

ASCE American Society of Civil Engineers

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Honolulu, HI 96808-0917

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January 29, 2008

Honorable Robert N. Herkes, Chair
Honorable Angus L.K. McKelvey, Vice Chair
Honorable Members of the House Committee on Consumer Protection & Commerce

I am testifying on behalf of the Hawaii Section of the American Society of Civil Engineers which supports House Bill 2997 Relating to Torts

The American Society of Civil Engineers was established in 1852 and is the oldest professional engineering organization in the United States. The Hawaii Section of ASCE was established in 1937 and is comprised of nearly 1,000 civil engineers from both the public and private sectors of our state.

At the national level, the ASCE Board of Direction has adopted official Policy Statements on major technical, professional and educational issues of interest to the civil engineering community. Policy Statement 318 urges the passage of legislation at the state level for tort reform to reduce the filing of frivolous lawsuits. A copy of the Policy Statement is attached.

Our members regularly seal construction drawings certifying that the plans were prepared under their direction. The potential liability for these plans may be substantial and engineers can be held personally liable for their actions. The need to rationalize the legal system for collecting for damages and personal injury has been an issue at both the state and national level. While the medical practice has been receiving much of the focus for reform, the engineering design profession faces similar issues and seek relief from the unreasonable and unfair awards resulting from existing statutes.

Professional engineers are aware of their responsibility to prepare designs and supervise construction of safe, secure facilities. Should they be negligent in their work they must bear the responsibility for those faults. We believe HB 2997, which abolishes joint and several liability for design professionals except when their negligence is 25% or more will assist in achieving tort reform.

We recommend your passage of House Bill 2997. Thank you for your consideration.

Sincerely yours,



Owen Miyamoto
Local Legislative Affairs Liaison

Attachment



Civil Engineers – Designers and Builders of the Quality of Life



KAI HAWAII
STRUCTURAL & FORENSIC ENGINEERS

Ken K. Hayashida, P.E.
Michael P. Hunnemann, P.E.

January 29, 2008

e-mail testimony to: CPCtestimony@Capitol.hawaii.gov

Hearing on HB2997, Relating to Torts
Before the House Committee on Consumer Protection & Commerce
on Wednesday, Jan. 30, 2008 at 2p.m. in Conference Room 325

Dear Chair Herkes, Vice Chair McKelvey, and members of the Committee:

KAI Hawaii Inc. is a locally owned and managed small business firm in business for twelve years. **We are in strong support of HB2997, Relating to Torts.**

This bill is about personal responsibility and accountability. Currently under the tort law when there is an accident on a public highway, the design professional who worked on the project, must cover one hundred percent (100%) of the liability. This is true even if the design professional is not negligent or nominally negligent. For example, even if a design professional may be five percent (5%) negligent, his/her insurance company will settle for the design professional's insurance policies limits, generally a million dollars, versus going to trial. Simply because under the current law there is no incentive for the design professional to go to trial because if he is found to be five percent (5%) negligent, or even one or two percent (1 or 2%) negligent under joint and several he would be responsible for 100% of the liability because he is the "deep pocket".

Needless to say, this is unfair and not good public policy because it does not encourage personal responsibility and accountability. Generally, when there is an accident on a public highway, it is usually contributed to, at least in part, by the fact that a driver has **chosen** to drive drunk, speed, and/or be reckless. Thus, the driver who has **chosen** to drive while drunk, speed and/or be reckless should be responsible for his/her share of the liability.

HB2997 offers a compromise solution. HB2997 would limit the design professional's liability to no more than its percentage share of the damage if the design professional is less than twenty-five percent (25%) liable. If the design professional is twenty-five percent (25%) or more liable, joint and several would apply.

This will help resolve some of our firm's concern about being the "deep pocket" in every public highway accident case. Our firm has been so concerned about being the "deep pocket" that we have had to think twice before we take on any public highway contract. At times, we have had to make the difficult decision to not take a public highway contract because we simply cannot afford the potential liability, even absent any negligence on our part, because it could mean the end of our small local business.

Most design professionals are small local businesses and they are faced with this difficult decision every day. Currently, the only firms that can afford to absorb this unfair proportion of liability are huge firms, many times Mainland firms. This is not good for the State because it means that it is taking away jobs and income from the local economy. It also means that with less design professional bidding for public highway jobs, the State may not always get the best design professional for the job.

KAI Hawaii Inc. appreciates the continuing efforts of your committee and the members of the House to improve the business climate for small business in Hawaii because we are truly the backbone of the Hawaii economy. Thank you for the opportunity to testify in support of this important measure, HB2997.



ALPHA ENGINEERS, INC.

Consulting Civil Engineers

January 29, 2008

e-mail testimony to: CPCtestimony@Capitol.hawaii.gov

Hearing on HB2997, Relating to Torts
Before the House Committee on Consumer Protection & Commerce
on Wednesday, Jan. 30, 2008 at 2p.m. in Conference Room 325

Dear Chair Herkes, Vice Chair McKelvey, and members of the Committee:

Alpha Engineers, Inc. is a locally owned and managed small business consulting engineering firm in business for seven (7) years. **We are in strong support of HB2997, Relating to Torts.**

This bill is about personal responsibility and accountability. Currently under the tort law when there is an accident on a public highway, the design professional who worked on the project, must cover one hundred percent (100%) of the liability. This is true even if the design professional is not negligent or nominally negligent. For example, even if a design professional may be five percent (5%) negligent, his/her insurance company will settle for the design professional's insurance policies limits, generally a million dollars, versus going to trial. Simply because under the current law there is no incentive for the design professional to go to trial because if he is found to be five percent (5%) negligent, or even one or two percent (1 or 2%) negligent under joint and several he would be responsible for 100% of the liability because he is the "deep pocket".

Needless to say, this is unfair and not good public policy because it does not encourage personal responsibility and accountability. Generally, when there is an accident on a public highway, it is usually contributed to, at least in part, by the fact that a driver has **chosen** to drive drunk, speed, and/or be reckless. Thus, the driver who has **chosen** to drive while drunk, speed and/or be reckless should be responsible for his/her share of the liability.

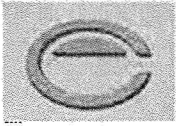
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highway contract. At times, we have had to make the difficult decision to not take a public highway contract because we simply cannot afford the potential liability, even absent any negligence on our part, because it could mean the end of our small local business.

Most design professionals are small local businesses and they are faced with this difficult decision every day. Currently, the only firms that can afford to absorb this unfair proportion of liability are huge firms, many times Mainland firms. This is not good for the State because it means that it is taking away jobs and income from the local economy. It also means that with less design professional bidding for public highway jobs, the State may not always get the best design professional for the job.

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ENGINEERING CONCEPTS, INC.

Consulting Engineers

January 29, 2008

Hearing on HB2997, Relating to Torts
Before the House Committee on Consumer Protection & Commerce
on Wednesday, Jan. 30, 2008 at 2p.m. in Conference Room 325

Dear Chair Herkes, Vice Chair McKelvey, and members of the Committee:

Engineering Concepts, Inc. is a locally owned and managed small business engineering firm in business for 22 years. **We are in strong support of HB2997, Relating to Torts.**

This bill is about personal responsibility and accountability. Currently under the tort law when there is an accident on a public highway, the design professional who worked on the project, must cover one hundred percent (100%) of the liability. This is true even if the design professional is not negligent or nominally negligent. For example, even if a design professional may be five percent (5%) negligent, his/her insurance company will settle for the design professional's insurance policies limits, generally a million dollars, versus going to trial. Simply because under the current law there is no incentive for the design professional to go to trial because if he is found to be five percent (5%) negligent, or even one or two percent (1 or 2%) negligent under joint and several he would be responsible for 100% of the liability because he is the "deep pocket".

Needless to say, this is unfair and not good public policy because it does not encourage personal responsibility and accountability. Generally, when there is an accident on a public highway, it is usually contributed to, at least in part, by the fact that a driver has **chosen** to drive drunk, speed, and/or be reckless. Thus, the driver who has **chosen** to drive while drunk, speed and/or be reckless should be responsible for his/her share of the liability.

HB2997 offers a compromise solution. HB2997 would limit the design professional's liability to no more than its percentage share of the damage if the design professional is less than twenty-five percent (25%) liable. If the design professional is twenty-five percent (25%) or more liable, joint and several would apply.

This will help resolve some of our firm's concern about being the "deep pocket" in every public highway accident case. Our firm has been so concerned about being the "deep pocket" that we have had to think twice before we take on any public highway contract. At times, we have had to make the difficult decision to not take a public highway contract because we simply cannot afford the potential liability, even absent any negligence on our part, because it could mean the end of our small local business.

ENGINEERING CONCEPTS, INC.

Most design professionals are small local businesses and they are faced with this difficult decision every day. Currently, the only firms that can afford to absorb this unfair proportion of liability are huge firms, many times Mainland firms. This is not good for the State because it means that it is taking away jobs and income from the local economy. It also means that with less design professional bidding for public highway jobs, the State may not always get the best design professional for the job.

Engineering Concepts, Inc. appreciates the continuing efforts of your committee and the members of the House to improve the business climate for small business in Hawaii because we are truly the backbone of the Hawaii economy. Thank you for the opportunity to testify in support of this important measure, HB2997.

MASA FUJIOKA & ASSOCIATES

Environmental, Geotechnical, and Hydrogeological Consultants

98-021 Kamehameha Hwy, Suite 337, Aiea, Hawaii 96701-4914

Telephone: 808.484.5366 Facsimile: 808.484.0007

January 29, 2008

EMAILED TESTIMONY TO: CPCtestimony@Capitol.hawaii.gov (5 copies requested)

Hearing Date: Wednesday, January 30, 2 p.m., Conference Room 325

Honorable Representatives Robert N. Herkes, Chair, Angus L.K. McKelvey, Vice Chair, and Members of the House Committee on Consumer Protection and Commerce

Subject: **HB 2997, Relating to Torts**

Dear Chair Herkes, Vice Chair McKelvey, and Committee Members,

Masa Fujioka & Associates, a Hawaii-owned and –operated small business engineering firm, **is in strong support of HB 2997, Relating to Torts.**

As a small business owner and design professional, my potential professional and personal liability is at the forefront of my mind in almost every project I consider working on. While a certain amount of risk is a reality of doing business, the current situation under joint and several liability seems very unfair. My professional and personal liability outlasts my retirement and the risks under joint and several liability far outweigh the potential profit from these projects.

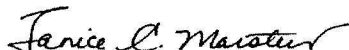
Under the current law, a design professional who may be found to be only one percent (1%) liable for damages in a lawsuit related to a highway accident may be forced to pay far more than his/her share of damages (even up to 100% of the damages if other parties are unable to pay). And this situation does not account for personal responsibility of an accident party who may have been drinking, speeding, or reckless. As a small business firm, typically a subcontractor on State projects, our fee is typically less than \$20,000 (with a profit of less than \$2,000). As you can see, the risk of million dollar settlements is far out of proportion to our potential gain from these projects. Clearly, the State and its citizens benefit far more by the design of these projects, and some protection for design professionals is warranted.

HB 2997 provides for more fairness in allocation of risk. Design professionals who are found less than 25% at fault would be responsible only for the percentage of damages attributed to them, and not be subject to joint and several liability. If the design professional is twenty-five percent (25%) or more liable, joint and several liability would still apply.

This will help resolve some of our firm's concern about being the potential "deep pocket" in every public highway accident case. Our firm has been so concerned about being the "deep pocket" that we have turned down work that we consider risky, including State contracts. We feel that fear on the part of small business design professionals limits the available pool of highly qualified consultants available to conduct State projects.

MFA appreciates the continuing efforts of your committee and the members of the House to improve the business climate for small business in Hawaii. Thank you for the opportunity to testify in support of HB 2997.

Kind Regards,



Janice C. Marsters
Principal

**TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE CONSUMER
LAWYERS OF HAWAII (CLH) IN OPPOSITION TO H.B. NO. 2997**

January 30, 2008

To: Chairman Robert Herkes and Members of the House Committee on Consumer Protection and Commerce:

My name is Bob Toyofuku and I am presenting this testimony on behalf of the Consumer Lawyers of Hawaii (CLH) in strong opposition to H.B. No. 2997.

The purpose of this bill is an attempt to materially change the statute that was passed in 1986 and absolve design professionals as defined in this bill from joint and several liability for damages suffered by a person injured through their negligence.

Under current law joint and several liability for joint tortfeasors is retained for claims relating to the maintenance and design of public highways. This measure would exempt design professionals from joint and several liability while retaining joint and several liability for all others involved in the design, construction and maintenance of roads and highways. There is no justification for treating design professionals differently than all others involved in the design, construction and maintenance of roads and highways, as currently mandated by H.R.S. Section 663-10.9.

The effect of this measure must also be considered in connection with governmental joint and several liability for highway maintenance and design pursuant to H.R.S. Section 663-10.5. The State is generally exempt from joint and several liability, except for cases involving highway maintenance and design. H.R.S. Section 663-10.5 specifically states: "provided that joint and several liability shall be retained for tort claims relating to the maintenance and design of highways pursuant to Section 663-10.9." Because the State is subject to joint and several liability for highway maintenance and design cases, the abolition of joint and several liability for

design professionals would shift liability currently covered by insurance for design professionals to the State and subject the State to additional liability. The extent of this additional liability that would be shifted to the State is enormous because of the numerous design professionals involved in the design, construction and maintenance of roads and highways. There are typically numerous design professionals involved in highway construction including architects, mechanical engineers, surveyors, electrical engineers, landscape architects, environmental engineers and structural engineers. The potential void that may be created by granting these design professionals with immunity from joint and several liability is substantial given the importance of their functions in the design, construction and maintenance of roads and highways. The failure of a freeway overpass or elevated sections of highways such as the H-3 has the potential for liability in the many millions of dollars. That is why these design professionals are required to purchase substantial insurance coverage as a condition of working on government construction projects. This measure has the potential of eliminating the coverage from those insurance policies and shifting the financial burden to State government.

Public policy is not served by affording design professionals special treatment when there is no imperative need for such action that would shift liability currently covered by private insurance for design professionals to State tax payers and limit the right of citizens injured by design professional negligence.

Current law strikes a fair balance between the rights and obligations of design professionals, the State and those injured by the negligence of design professionals. Because of these reasons, CLH strongly opposes this measure and requests that it not pass out of this committee. Thank you very much for the opportunity to testify on this measure.

KELSO ARCHITECTS mikekelso@hawaii.rr.com

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January 29, 2008

e-mail testimony to: CPCtestimony@Capitol.hawaii.gov

Hearing on HB2997, Relating to Torts
Before the House Committee on Consumer Protection & Commerce
on Wednesday, Jan. 30, 2008 at 2p.m. in Conference Room 325

Dear Chair Herkes, Vice Chair McKelvey, and members of the Committee:

Kelso Architects, inc. is a locally owned and managed small business architectural firm in business for 15 years. **We are in strong support of HB2997, Relating to Torts.**

This bill is about personal responsibility and accountability. Currently under the tort law when there is an accident on a public highway, the design professional who worked on the project, must cover one hundred percent (100%) of the liability. This is true even if the design professional is not negligent or nominally negligent. For example, even if a design professional may be five percent (5%) negligent, his/her insurance company will settle for the design professional's insurance policies limits, generally a million dollars, versus going to trial. Simply because under the current law there is no incentive for the design professional to go to trial because if he is found to be five percent (5%) negligent, or even one or two percent (1 or 2%) negligent under joint and several he would be responsible for 100% of the liability because he is the "deep pocket".

Needless to say, this is unfair and not good public policy because it does not encourage personal responsibility and accountability. Generally, when there is an accident on a public highway, it is usually contributed to, at least in part, by the fact that a driver has **chosen** to drive drunk, speed, and/or be reckless. Thus, the driver who has **chosen** to drive while drunk, speed and/or be reckless should be responsible for his/her share of the liability.

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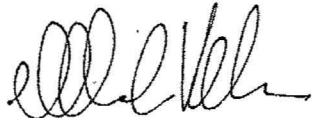
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Sincerely,

Kelso Architects, inc.

A handwritten signature in black ink, appearing to read "Michael Kelso". The signature is fluid and cursive, with the first name being more prominent.

Michael Kelso , its President, Secretary

A handwritten signature in black ink, appearing to read "Lisa Kelso". The signature is fluid and cursive, with the first name being more prominent.

Lisa Kelso, its Vice President, Treasurer

January 29, 2008

SUBJECT:

Hearing on HB2997, Relating to Torts
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Bill Chang Architect LLC is a locally owned and managed small business architectural firm in business for 12 years. **We are in strong support of HB2997, Relating to Torts.**

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Needless to say, this is unfair and not good public policy because it does not encourage personal responsibility and accountability. Generally, when there is an accident on a public highway, it is usually contributed to, at least in part, by the fact that a driver has **chosen** to drive drunk, speed, and/or be reckless. Thus, the driver who has **chosen** to drive while drunk, speed and/or be reckless should be responsible for his/her share of the liability.

HB2997 offers a compromise solution. HB2997 would limit the design professional's liability to no more than its percentage share of the damage if the design professional is less than twenty-five percent (25%) liable. If the design professional is twenty-five percent (25%) or more liable, joint and several would apply.

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contract because we simply cannot afford the potential liability, even absent any negligence on our part, because it could mean the end of our small local business.

Most design professionals are small local businesses and they are faced with this difficult decision every day. Currently, the only firms that can afford to absorb this unfair proportion of liability are huge firms, many times Mainland firms. This is not good for the State because it means that it is taking away jobs and income from the local economy. It also means that with less design professional bidding for public highway jobs, the State may not always get the best design professional for the job.

Bill Chang Architect LLC appreciates the continuing efforts of your committee and the members of the House to improve the business climate for small business in Hawaii because we are truly the backbone of the Hawaii economy. Mahalo for the opportunity to testify in support of this important measure, HB2997.

Aloha,

A handwritten signature in black ink, appearing to read 'W. Chang', with a long horizontal flourish extending to the right.

William WL Chang, AIA, Principal
Bill Chang Architect LLC

ACEC

American Council of Engineering Companies
of Hawaii

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Fukunaga & Assoc.
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Website: www.acechawaii.org

January 29, 2008

EMAILED TESTIMONY TO: CPCtestimony@Capitol.hawaii.gov (5 copies requested)

Hearing Date: Wednesday, January 30, 2 p.m., Conference Room 325

Honorable Representatives Robert N. Herkes, Chair, Angus L.K. McKelvey, Vice Chair, and Members of the House Committee on Consumer Protection and Commerce

Subject: HB 2997, Relating to Torts

Dear Chair Herkes, Vice Chair McKelvey, and Committee Members,

The American Council of Engineering Companies of Hawaii (ACECH), representing more than 70 consulting engineering firms in Hawaii, **is in strong support of HB 2997, Relating to Torts.**

HB 2997 attempts to bring fairness to the judicial system for design professionals, who are responsible for the design of beneficial public works projects that greatly improve the quality of life for the State's citizens. However, for most firms, the professional liability risk for design professionals far outweighs their potential profit from these projects. Because professional liability has no sunset date, the potential personal risk is staggering.

Under joint and several liability, a design professional who may be found to be only one percent (1%) liable for damages in a lawsuit related to a highway accident may be forced to pay far more than his/her share of damages (even up to 100% of the damages if other parties are unable to pay). This situation does not allow for personal responsibility of the accident party who may have been drinking, speeding, or reckless.

Even before going to trial, insurance companies settle for the design professional's insurance policies limits, because of the risk of large rewards at trial. Because of the risk and escalating professional liability insurance premiums associated with doing highway work, many of our small firms no longer participate in these projects, reducing the pool of qualified consultants.

HB 2997 provides for more fairness in allocation of risk. Design professionals who are found less than 25% at fault would be responsible only for the percentage of damages attributed to them, and not be subject to joint and several liability. If the design professional is twenty-five percent (25%) or more liable, joint and several liability would still apply.

We have looked at tort reform legislation in other states and feel HB 2997 is a reasonable and fair compromise to the full abolition of joint and several liability enacted in a number of states.

ACECH appreciates the continuing efforts of your committee and the members of the House to improve the business climate for small business in Hawaii. Thank you for the opportunity to testify in support of HB 2997.

Kind Regards,

 (National Director) for

Jon Nishimura, P.E.
President

January 29, 2008

e-mail testimony to: CPCtestimony@Capitol.hawaii.gov

Hearing on HB2997, Relating to Torts

Before the House Committee on Consumer Protection & Commerce

on Wednesday, Jan. 30, 2008 at 2p.m. in Conference Room 325

Dear Chair Herkes, Vice Chair McKelvey, and members of the Committee:

Mechanical Engineers of Hawaii Corporation is a locally owned and managed small business engineering firm in business for 30 years. **We are in strong support of HB2997, Relating to Torts.**

This bill is about personal responsibility and accountability. Currently under the tort law when there is an accident on a public highway, the design professional who worked on the project, must cover one hundred percent (100%) of the liability. This is true even if the design professional is not negligent or nominally negligent. For example, even if a design professional may be five percent (5%) negligent, his/her insurance company will settle for the design professional's insurance policies limits, generally a million dollars, versus going to trial. Simply because under the current law there is no incentive for the design professional to go to trial because if he is found to be five percent (5%) negligent, or even one or two percent (1 or 2%) negligent under joint and several he would be responsible for 100% of the liability because he is the "deep pocket".

Needless to say, this is unfair and not good public policy because it does not encourage personal responsibility and accountability. Generally, when there is an accident on a public highway, it is usually contributed to, at least in part, by the fact that a driver has **chosen** to drive drunk, speed, and/or be reckless. Thus, the driver who has **chosen** to drive while drunk, speed and/or be reckless should be responsible for his/her share of the liability.

HB2997 offers a compromise solution. HB2997 would limit the design professional's liability to no more than its percentage share of the damage if the design professional is less than twenty-five percent (25%) liable. If the design professional is twenty-five percent (25%) or more liable, joint and several would apply.

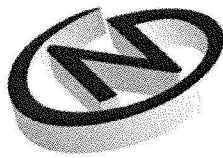
This will help resolve some of our firm's concern about being the "deep pocket" in every public highway accident case. Our firm has been so concerned about being the "deep pocket" that we have had to think twice before we take on any public highway contract. At times, we have had to make the difficult decision to not take a public highway contract because we simply cannot afford the potential liability, even absent any negligence on our part, because it could mean the end of our small local business.

Most design professionals are small local businesses and they are faced with this difficult decision every day. Currently, the only firms that can afford to absorb this unfair proportion of liability are huge firms, many times Mainland firms. This is not good for the State because it means that it is taking away jobs and income from the local economy. It also means that with less design professional bidding for public highway jobs, the State may not always get the best design professional for the job.

Mechanical Engineers of Hawaii Corporation appreciates the continuing efforts of your committee and the members of the House to improve the business climate for small business in Hawaii because we are

1/30/2008

truly the backbone of the Hawaii economy. Thank you for the opportunity to testify in support of this important measure, HB2997.



NEXT DESIGN

January 29, 2008

e-mail testimony to: CPCtestimony@Capitol.hawaii.gov

Hearing on HB2997, Relating to Torts
Before the House Committee on Consumer Protection & Commerce
on Wednesday, Jan. 30, 2008 at 2p.m. in Conference Room 325

Dear Chair Herkes, Vice Chair McKelvey, and members of the Committee:

Next Design LLC is a locally owned and managed small business **Architectural** firm in business for **9** years. **We are in strong support of HB2997, Relating to Torts.**

This bill is about personal responsibility and accountability. Currently under the tort law when there is an accident on a public highway, the design professional who worked on the project, must cover one hundred percent (100%) of the liability. This is true even if the design professional is not negligent or nominally negligent. For example, even if a design professional may be five percent (5%) negligent, his/her insurance company will settle for the design professional's insurance policies limits, generally a million dollars, versus going to trial. Simply because under the current law there is no incentive for the design professional to go to trial because if he is found to be five percent (5%) negligent, or even one or two percent (1 or 2%) negligent under joint and several he would be responsible for 100% of the liability because he is the "deep pocket".

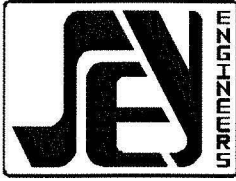
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Next Design LLC appreciates the continuing efforts of your committee and the members of the House to improve the business climate for small business in Hawaii because we are truly the backbone of the Hawaii economy. Thank you for the opportunity to testify in support of this important measure, HB2997.



SHIMABUKURO, ENDO & YOSHIZAKI, INC.

Civil, Environmental & Structural Engineers

1126 12th Avenue, Room 309

Honolulu, Hawaii 96816-3715

Ph.: (808) 737-1875 FAX: (808) 734-5516

E-mail: seyeng@lava.net

January 29, 2008

e-mail testimony to: CPCtestimony@Capitol.hawaii.gov

Hearing on HB2997, Relating to Torts
Before the House Committee on Consumer Protection & Commerce
on Wednesday, Jan. 30, 2008 at 2p.m. in Conference Room 325

Dear Chair Herkes, Vice Chair McKelvey, and members of the Committee:

Shimabukuro, Endo & Yoshizaki, Inc. dba SEY Engineers is a locally owned and managed small business civil engineering firm in business for over 45 years. **We are in strong support of HB2997, Relating to Torts.**

This bill is about personal responsibility and accountability. Currently under the tort law when there is an accident on a public highway, the design professional who worked on the project, must cover one hundred percent (100%) of the liability. This is true even if the design professional is not negligent or nominally negligent. For example, even if a design professional may be five percent (5%) negligent, his/her insurance company will settle for the design professional's insurance policies limits, generally a million dollars, versus going to trial. Simply there is no incentive under the current law for the design professional to go to trial because if he is found to be five percent (5%) negligent, or even one or two percent (1 or 2%) negligent under joint and several he would be responsible for 100% of the liability and he is the "deep pocket."

Needless to say, this is unfair and not good public policy because it does not encourage personal responsibility and accountability. Generally, when there is an accident on a public highway, it is usually contributed to, at least in part, by the fact that a driver has **chosen** to drive drunk, speed, and/or be reckless. Thus, the driver who has **chosen** to drive while drunk, speed and/or be reckless should be responsible for his/her share of the liability.

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January 29, 2008
e-testimony
Page 2

This bill will help resolve some of our firm's concern about being the "deep pocket" in every public highway accident case. Our firm has been so concerned about being the "deep pocket" that we think twice before we take on any public highway contract. At times, we make the difficult decision to not pursue a public highway contract because we simply cannot afford the potential liability, even absent any negligence on our part, because it could mean the end of our small local business.

Most design professionals are small local businesses and they are faced with this difficult decision every day. Currently, the only firms that can afford to absorb this unfair proportion of liability are huge firms, many times Mainland firms. This is not good for the State because it takes away jobs and income from the local economy. It also means that with less design professional pursuing public highway jobs, the State may not always get the best design professional for the job.

Shimabukuro, Endo & Yoshizaki, Inc., dba SEY Engineers appreciates the continuing efforts of your committee and the members of the House to improve the business climate for small businesses in Hawaii, the backbone of Hawaii's economy. Thank you for the opportunity to testify in support of this important measure, HB2997.

Very truly yours,

A handwritten signature in cursive script that reads "Howard K. Endo".

Howard K. Endo, Ph.D., P.E.
President

HKE:sno



Gray • Hong • Nojima & Associates, Inc.
CONSULTING ENGINEERS

Daniel S.C. Hong, P.E.
Michael H. Nojima, P.E.
Sheryl E. Nojima, Ph.D., P.E.
Paul T. Matsuda, P.E.
Mily D. Loo, P.E.
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January 29, 2008

e-mail testimony to: CPCtestimony@Capitol.hawaii.gov

Hearing on HB2997, Relating to Torts
Before the House Committee on Consumer Protection & Commerce
on Wednesday, Jan. 30, 2008 at 2 p.m. in Conference Room 325

Dear Chair Herkes, Vice Chair McKelvey, and members of the Committee:

Gray, Hong, Nojima & Associates, Inc. is a locally owned and managed small business. We have been in the civil engineering consulting business for more than 35 years. **We are in strong support of HB2997, Relating to Torts.**

This bill is about personal responsibility and accountability. Currently under the tort law when there is an accident on a public highway, the design professional who worked on the project, must cover one hundred percent (100%) of the liability. This is true even if the design professional is not negligent or nominally negligent. For example, even if a design professional may be five percent (5%) negligent, his/her insurance company will settle for the design professional's insurance policies limits, generally a million dollars, versus going to trial. Simply because under the current law there is no incentive for the design professional to go to trial because if he is found to be five percent (5%) negligent, or even one or two percent (1 or 2%) negligent under joint and several he would be responsible for 100% of the liability because he is the "deep pocket."

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Sincerely,

GRAY, HONG, NOJIMA & ASSOCIATES, INC.

Sheryl E. Nojima, Ph.D., P.E.



January 29, 2008

e-mail testimony to: CPCtestimony@Capitol.hawaii.gov

Hearing on HB2997, Relating to Torts
Before the House Committee on Consumer Protection & Commerce
on Wednesday, Jan. 30, 2008 at 2p.m. in Conference Room 325

Dear Chair Herkes, Vice Chair McKelvey, and members of the Committee:

MK Engineers, Ltd. is a locally owned and managed electrical engineering consulting firm that has been in business in Hawaii for thirty years. **We are in strong support of HB2997, Relating to Torts.**

This bill is about personal responsibility and accountability. Currently under the tort law when there is an accident on a public highway, the design professional who worked on the project, must cover one hundred percent (100%) of the liability. This is true even if the design professional is not negligent or nominally negligent. For example, even if a design professional may be five percent (5%) negligent, his/her insurance company will settle for the design professional's insurance policies limits, generally a million dollars, versus going to trial. Simply because under the current law there is no incentive for the design professional to go to trial because if he is found to be five percent (5%) negligent, or even one or two percent (1 or 2%) negligent under joint and several he would be responsible for 100% of the liability because he is the "deep pocket".

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Page 2

January 29, 2008

e-mail testimony to: CPCtestimony@Capitol.hawaii.gov

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MK Engineers, Ltd. appreciates the continuing efforts of your committee and the members of the House to improve the business climate for small business in Hawaii because we are truly the backbone of the Hawaii economy. Thank you for the opportunity to testify in support of this important measure, HB2997.



AIA Hawaii State Council

A Council of The American Institute of Architects

To CPC Vice-Chair
CPC 1/30/08
2:00 pm
Notice did not say how
many copies

January 30, 2008

Honorable Robert N. Herkes, Chair
House Committee on Consumer Protection & Commerce

Re: **House Bill 2997**
Relating to Torts

Dear Chair Herkes Members of the Committees,

My name is Daniel Chun, Government Affairs Chair of The American Institute of Architects (AIA). AIA is in **STRONG SUPPORT** of HB 2997 that will bring a better balance between personal responsibility of the consumer and personal liability of design professionals.

The current tort situation where architects, engineers, and landscape architects may be 100 percent joint and severally liable for actions of others that occur on highways and other public ways has the following negative consequences:

- It has architect's personal risk at the point where our design professional business is increasingly economically unsustainable.
- It sends a message that Hawaii continues to be an anti-business state where no wise investor would seek to create a business and more local jobs.

The current goal of the state of Hawaii to improve future economic conditions through less reliance on land development is **NEVER** going to succeed until a more balanced tort climate is achieved through legislation like HB 2997. Right now Hawaii has a "plantation mentality" with respect to joint and several liability. There is no personal responsibility for outcome: it is always the fault of someone else who is thought to have deeper pockets full of money.

There is a simple reason why Hawaii's economy is land development based. It is captive to land because no business that is not land-based will consider locating its economic activity in this state due to Hawaii's anti-business climate.

HB 2997 is a compromise proposal and not a shirking of our legitimate professional responsibility. Thank you for this opportunity to present **STRONGLY SUPPORTING** testimony for HB 2997.

KAUAHIKAUA & CHUN / ARCHITECTS

DWIGHT PAUHI KAUAHIKAUA, AIA
DANIEL GARY CHUN, FAIA

To CPC Vice-Chair
CPC 1/30/08
2:00 pm
Notice did not say how
many copies

January 30, 2008

Honorable Robert N. Herkes, Chair
House Committee on Consumer Protection & Commerce

Re: **House Bill 2997**
Relating to Torts

Dear Chair Herkes Members of the Committees,

My name is Dwight Kauahikaua. I own a small business that has provided architectural services for projects in Hawaii for the past 26 years. I am in **STRONG SUPPORT** of HB 2997 that will bring a better balance between personal responsibility of the consumer and personal liability of design professionals.

The current tort situation where architects, engineers, and landscape architects can be 100 percent joint and severally liable for actions of others that occur on highways and other public ways is unfair due to the often reckless situations that consumers put themselves in.

HB 2997 is a compromise proposal and not a shirking of my legitimate professional responsibility. I urge you to pass this measure out of your Committee. Thank you for this opportunity to present **STRONGLY SUPPORTING** testimony for HB 2997.



KAWAIAHAO PLAZA HALE MAUKA
567 SO. KING STREET, SUITE 108
HONOLULU, HAWAII 96813

JAN-29-2008 02:06PM FAX: 808 599 4723

ID:REP MCKELVEY

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