

JUDtestimony

From: Jon Nishimura (fainc) [jnishimura@fainc.org]
Sent: Friday, February 15, 2008 4:50 PM
To: JUDtestimony
Subject: HB2997, Relating to Torts



February 15, 2008

EMAILED TESTIMONY TO: JUDtestimony@capitol.hawaii.gov

Hearing Date: Tuesday, February 19, 3:30pm, Conference Room 325

Honorable Representatives Tommy Waters, Chair, Blake Oshiro, Vice Chair, and Members of the House Committee on the Judiciary

Subject: HB 2997, Relating to Torts

Dear Chair Waters, Vice Chair Oshiro, 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.

HB 2997 provides that 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 passed in other states and feel SB 2893 is a reasonable and fair compromise to the full abolition of joint and several liability enacted in a number of states.

ACECH believes that this limited concession to design professionals for highway projects is warranted because their work is conducted for the greater good of the State's citizens, a public benefit that far exceeds the reward to the design professional. Projects are conducted to design standards and codes and are reviewed and approved by government agencies. Many of Hawaii's design professionals are small businesses, and small firms with minimal involvement in a highway project are still subject to the same joint and several liability risks.

HB 2997 provides for more fairness in allocation of risk. 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).

C00010

2/19/2008

For most firms, the professional liability risk for design professionals far outweighs their earnings from these projects. Many small business firms earn less than \$20,000 for their work on a highway project, but face enormous financial risks under joint and several liability. 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. Thus the design professional, who may not have any negligence on a project, can be forced to pay many times more than his earnings on the project. If the settlement exceeds the design professional's insurance coverage, the design professional would be personally liable. This situation is punitive to a design professional doing good works for the State, while not accounting for the personal responsibility of the accident party who may have been drinking, speeding, or reckless.

Because of the risk and escalating professional liability insurance premiums associated with doing highway work, many of our small firms can no longer participate in these projects, reducing the pool of qualified consultants. This results in a delay of awarding of these projects and increase in traffic woes in the State.

We stress that we are not seeking to escape our responsibilities. Design professionals who are found liable would still be required to pay their share of the damages, and those greater than 25% liable would still be subject to joint and several liability. This bill, however, would provide particular relief for our small business firms.

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

Very truly yours,
Jon Nishimura, P.E.
President
American Council of Engineering Companies of Hawaii
P.O. Box 88840
Honolulu, HI 96830
Ph: (808) 944-1821
Fx: (808) 946-9339
Email: jnishimura@fainc.org
Website: www.acechawaii.org

C00011

ASCE American Society of Civil Engineers

Hawaii Section
PO Box 917
Honolulu, HI 96808-0917

2008 Hawaii Section Officers

PRESIDENT

Ron Iwamoto

Iwamoto & Associates, LLC
98-029 Hekaha Street, Suite #37
Aiea, Hawaii 96701
(808) 486-5202, Fax: (808) 486-5208
e-mail: ron@iwamotolc.com

PRESIDENT-ELECT

Michael Hunnemann

KAI Hawaii Inc.
31 North Pauahi Street, 2nd Floor
Honolulu, Hawaii 96817
(808) 533-2210, Fax: (808) 533-2688
e-mail: mike@kaihawaii.com

VICE-PRESIDENT

Jeffrey Kalani

Yogi Kwong Engineers, LLC
615 Piikoi Street, Suite 1605
Honolulu, Hawaii 96814
(808) 596-2928, Fax: (808) 596-2409
e-mail: jeff@yogikwong.com

SECRETARY

Roger Babcock

University of Hawaii at Manoa
Dept. of Civil and Environmental Engrg.
2540 Dole Street, Holmes Hall #383
Honolulu, Hawaii 96822
(808) 956-7298, Fax: (808) 956-5014
e-mail: rbabcock@hawaii.edu

TREASURER

Dawn Barsana

CH2M HILL
1132 Bishop Street, Suite 1100
Honolulu, Hawaii 96813
(808) 440-0254, Fax: (808) 538-8254
e-mail: dawn.barsana@CH2M.com

PAST PRESIDENT

Lori Fong

Sato & Associates, Inc.
2046 South King Street
Honolulu, Hawaii 96828
(808) 955-4441, Fax: (808) 942-2027
e-mail: lfong@ascehawaii.org

YOUNGER MEMBER FORUM

PRESIDENT

Lisa Takushi

Community Planning and Engineering, Inc.
1100 Alakea, Sixth Floor
Honolulu, Hawaii 96813
(808) 531-4252 ext.14, FAX: (808) 526-2476
e-mail: ltakushi@ascehawaii.org

February 18, 2008

Honorable Tommy Waters, Chair
Honorable Blake K. Oshiro, Vice Chair
Honorable Members of the House Committee on Judiciary

I am testifying in support for House Bill 2997 Relating to Torts, on behalf of the Hawaii Section of the American Society of Civil Engineers.

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 achieve reform in cases where the designer should not be liable for the damages that may have occurred.

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

000012

POLICY STATEMENT 318**Professional Liability Reform**

Approved by the Committee on Government Affairs on March 7, 2001.

Approved by the Board Policy Team on March 12, 2001.

Adopted by the Board of Direction on April 26, 2001.

Policy

The American Society of Civil Engineers (ASCE) endorses comprehensive tort reform, that includes these elements:

- Limits on non-economic damages;
- Limits on joint and several liability;
- Limits on attorneys' contingency fees;
- Limits on application of the collateral source rule;
- Periodic payments for large awards;
- Use of alternative dispute resolution techniques;
- Reasonable access to insurance industry data;
- Reasonable statutes of limitations or repose; and,
- Use of Certificate of Merit procedures to discourage frivolous suits.

Issue

The U.S. legal system has evolved to a point where excessive litigation, including frivolous lawsuits, is often encouraged. Moreover, findings of liability increasingly bear no relationship to the proportion of fault in a case, and astronomical damage awards for unquantifiable claims are frequently granted. The exponential growth in litigation against businesses and professionals, coupled with excessive and unreasonable jury awards, has led to dramatic increases in insurance premiums, reduced policy coverage, and even outright cancellations of professional liability insurance coverage. A growing number of professional engineers, including those with little or no history of litigation ever brought against them, have found that professional liability insurance is a substantial cost of doing business. In addition, efforts to advance innovation, new products and designs are inhibited by the current legal climate.

Rationale

ASCE is very concerned about the adverse economic impact of the nation's litigation crisis and escalating liability insurance costs on the civil engineering profession. These adverse economic impacts effect the availability and affordability of professional liability insurance needed for the orderly and responsible conduct of business, including engineering services, in the United States.

C00013

**COALITION OF HAWAII ENGINEERING AND ARCHITECTURAL
PROFESSIONALS**

Email to: JUDtestimony@Capitol.hawaii.gov

Hearing Date: Tuesday, February 19, 2008, 3:30 pm, CR 325

Honorable Representatives Tommy Waters, Chair, Representative Blake Oshiro, Vice Chair and Members of the House Committee on the Judiciary

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).

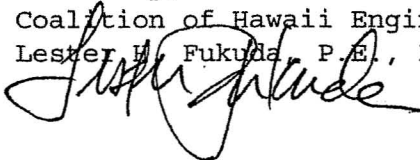
What happened to personal responsibility and accountability for the person or persons that chose to cause the accident by drunk driving, speeding, and/or being reckless or un-attentive. Design professionals very carefully design highways according to the current State and Federal codes and our design & 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



000014

JUDtestimony

From: Roy Yamashiro [ryamashiro@consultingstructuralhawaii.com]
Sent: Monday, February 18, 2008 9:58 AM
To: JUDtestimony
Subject: HB 2997, Relating to Torts Testimony Supporting

February 18, 2008

EMAILED TESTIMONY TO: **JUDtestimony@capitol.hawaii.gov**

Hearing Date: Tuesday, February 19, 3:30pm, Conference Room 325

Honorable Representatives Tommy Waters, Chair, Blake Oshiro, Vice Chair, and Members of the House Committee on the Judiciary

Subject: HB 2997, Relating to Torts

Dear Chair Waters, Vice Chair Oshiro, and Committee Members,

Consulting Structural Hawaii, Inc. is a locally owned small business structural engineering firm, in business since 1987. We are 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 taking. While a certain amount of risk is a reality of doing business, the current situation under joint and several liability seems very unfair, especially for small firms. This is particularly so for bridge and highway related projects, where the claims and awards can be large, creating risks under joint and several liability that far outweigh my professional fees.

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.

HB 2997 provides that 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 passed 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.

We believe that this limited concession to design professionals for highway projects is warranted because their work is conducted for the greater good of the State's citizens, a public benefit that far exceeds the reward to the design professional. Projects are conducted to design standards and codes and are reviewed and approved by government agencies. Many of Hawaii's design professionals are small businesses, and small firms with minimal involvement in a highway project are still subject to the same joint and several liability risks.

HB 2997 provides for more fairness in allocation of risk. 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).

C00015

2/19/2008

We appreciate the continuing efforts of your committee and the members of the State Legislature to improve the business climate for small business in Hawaii. Thank you for the opportunity to testify in support of HB 2997.

Very truly yours,
Roy K. Yamashiro, P.E.
Principal, Consulting Structural Hawaii, Inc.

C00016

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

February 19, 2008

To: Chairman Tommy Waters and Members of the House Committee on Judiciary:

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

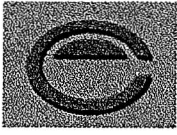
C00017

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.

C00018



ENGINEERING CONCEPTS, INC.

Consulting Engineers

February 16, 2008

EMAILED TESTIMONY TO: testimony@capitol.hawaii.gov

Hearing Date: Tuesday, February 19, 3:30 a.m., Conference Room 325

Honorable Representatives Tommy Waters, Chair, Blake Oshiro, Vice Chair, and Members of the House Committee on the Judiciary

Subject: HB 2997, Relating to Torts

Dear Chair Waters, Vice Chair Oshiro, and Committee Members,

Engineering Concepts, Inc. is a Hawaii-owned and managed small business civil & environmental engineering firm operating in Hawaii since 1986. **We are 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.

HB 2997 provides that 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 passed 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.

We believe that this limited concession to design professionals for highway projects is warranted because their work is conducted for the greater good of the State's citizens, a public benefit that far exceeds the reward to the design professional. Projects are conducted to design standards and codes and are reviewed and approved by government agencies. Many of Hawaii's design professionals are small businesses, and small firms with minimal involvement in a highway project are still subject to the same joint and several liability risks.

HB 2997 provides for more fairness in allocation of risk. 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).

For most firms, the professional liability risk for design professionals far outweighs their earnings from these projects. Many small business firms earn less than \$20,000 for their work on a highway project, but face enormous financial risks under joint and several liability. 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. Thus the design professional, who may not have any negligence on a project, can be forced to pay many times more than his earnings on the project. If the settlement exceeds the design professional's insurance coverage, the design professional would be personally liable. This situation is punitive to a design professional doing good works for the State, while not accounting for the personal responsibility of the accident party who may

ENGINEERING CONCEPTS, INC.

February 16, 2008

Page 2

have been drinking, speeding, or reckless.

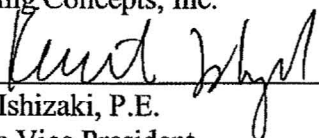
Because of the risk and escalating professional liability insurance premiums associated with doing highway work, many of our small firms no longer participate in these projects, reducing the pool of qualified consultants. This results in a delay of awarding of these projects and increase in traffic woes in the State.

We stress that we are not seeking to escape our responsibilities. Design professionals who are found liable would still be required to pay their share of the damages, and those greater than 25% liable would still be subject to joint and several liability. This bill, however, would provide particular relief for our small business firms.

We appreciate the continuing efforts of your committee and the members of the State Legislature to improve the business climate for small business in Hawaii. Thank you for the opportunity to testify in support of HB 2997.

Very truly yours,

Engineering Concepts, Inc.



Kenneth Ishizaki, P.E.
Executive Vice President

000020



ENGINEERING SOLUTIONS, INC.
Civil / Sanitary / Structural Engineers

98-1268 Kaahumanu Street, Suite C-7 • Pearl City, Hawaii 98782 • Phone: (808) 488-0477 • Fax: (808) 488-3776

February 18, 2008

FAXED TESTIMONY TO:

Fax No. 586-945⁶ (40 copies)

Hearing Date: Tuesday, February 19, 2008, 3:30 p.m., Conference Room 325

Honorable Representative Tommy Waters, Chair; Blake K. Oshiro, Vice Chair; and Members of the House Judiciary Committee

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

We are writing to request your support of HB 2997. Engineering Solutions, Inc. is a locally owned and managed small business civil engineering firm. Our firm is an active member of the American Council of Engineering Companies of Hawaii (ACECH) and various local professional organizations. As a small business engineering firm in Hawaii, we strongly support SB 2893, Relating to Torts.

Current tort law is decidedly unfair to individuals and companies that have little, if any, responsibility for an accident, yet are being required to pay full damages for another's actions. Joint and several liability should be changed to eliminate liability for individuals and companies with only minor or no responsibility for an action.

As a small business, Engineering Solutions appreciates the continuing efforts of your committee and the members of the Senate to improve the business climate in Hawaii. **We strongly recommend that HB2997 be passed.** Thank you for an opportunity to express our views and concerns regarding this bill.

Sincerely,
ENGINEERING SOLUTIONS, INC.



Richard E. Frey
Vice President

000021

TESTIMONY BEFORE
HOUSE COMMITTEE ON JUDICIARY

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

3:30 p.m., February 19, 2008

House Bill 2997
Relating to Torts

Chair Waters, Vice Chair Oshiro, 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 does not oppose granting protection to the design professionals. However, doing so will shift liability exposure to HECO. Thus, HECO respectfully requests that HB 2997 be amended to provide similar protection to the utilities.

II.

For purposes of joint and several liability in highway cases, utility poles are considered part of the road design.¹ Thus, in highway motor vehicle accident cases involving utility poles, plaintiffs may sue HECO and the professionals that designed the highway upon which the pole is located.² However, under HB 2997, design professionals could not be held jointly and severally liable for highway design unless the professionals’ negligence was 25% or more. That would shift risk to HECO and other defendants.

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

¹ 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)).

² 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.

000022

public utilities. We respectfully submit that it is inequitable to increase 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.

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

A better 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."

Thank you for the opportunity to testify on this matter.

000023²

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

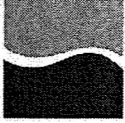
(F) Torts relating to motor vehicle accidents except as provided in paragraph (4);

(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.

0000231



KAI HAWAII
STRUCTURAL & FORENSIC ENGINEERS

February 15, 2008

EMAILED TESTIMONY TO: JUDtestimony@capitol.hawaii.gov

Hearing Date: Tuesday, February 19, 3:30pm, Conference Room 325

Honorable Representatives Tommy Waters, Chair, Blake Oshiro, Vice Chair, and Members of the House Committee on the Judiciary

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

Dear Chair Waters, Vice Chair Oshiro, and Committee Members,

KAI Hawaii Inc. is a locally owned and managed small business engineering firm in business for 12 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.

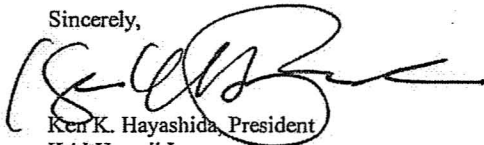
HB 2997 offers a compromise solution. HB 2997 would limit the design professional's liability to no more than its percentage share of the damage if the design professional is less than twenty-five percent (25%) liable. If the design professional is twenty-five percent (25%) or more liable, joint and 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.

Sincerely,



Ken K. Hayashida, President
KAI Hawaii Inc.

000025

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

February 18, 2008

EMAILED TESTIMONY TO: JUDtestimony@Capitol.hawaii.gov

Hearing Date: Tuesday, February 19th, 3:30 p.m., Conference Room 325

Honorable Representatives Tommy Waters, Chair, Blake K. Oshiro, Vice Chair, and Members of the House Committee on Judiciary

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

Dear Chair Waters, Vice Chair Oshiro, 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 taking. While a certain amount of risk is a reality of doing business, the current situation under joint and several liability seems very unfair, especially for small firms. This is particularly so for highway cases, where the claims and awards can be large, creating risks under joint and several liability that far outweigh my potential profit.

It is unfair that my personal financial future should be so at risk because of my minor involvement in a public works project, especially if I am not in any way negligent. Engineering work on such projects is performed to State and Federal design standards and codes, and are reviewed and approved by government agencies. However, under the current law, a design professional who is pulled into a claim (even frivolously), but who may be found by a jury to be only one percent (1%) liable for damages, could be forced to pay far more than his/her share of damages if other parties are unable to pay.

As a small business geotechnical/environmental firm, serving as a subcontractor on State projects, our fee is typically less than \$20,000 (profit of less than \$2,000). 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 small business design professionals is warranted. As a professional, I do not enjoy the same protections as contractors and State agencies; my personal assets are at stake.

In addressing tort reform, there is always mention of “innocent victims”. I would want the ability to make a claim against a design professional who is negligent and whose negligence caused me injury. However, if I, as a design professional, have a claim brought against me by someone drunk, speeding or reckless, even if I have not been negligent but just by virtue of working on a project, I suggest that I am the “innocent victim”. While my firm has not been sued, I hear many stories from colleagues and am so concerned that I have refused State highway projects.

000026

MASA FUJIOKA & ASSOCIATES

Environmental, Geotechnical, and Hydrogeological Consultants

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

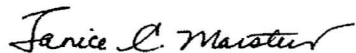
Telephone: 808.484.5366 Facsimile: 808.484.0007

HB 2997 provides for more fairness in allocation of risk, but certainly does not allow us to escape our responsibilities. Design professionals who are found less than 25% at fault would be responsible only for the percentage of damages attributed to them, and would 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.

HB 2997 will help alleviate 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. With the many infrastructure projects coming up, the impact of having small business firms decline to work for the DOT is to have this work go to large, predominately mainland firms, who choose to essentially self-insure and are able to absorb more risk, but who take their profits out of the state.

MFA appreciates the continuing efforts of your committee and the members of the Senate to assist small businesses in Hawaii. Thank you for the opportunity to testify in support of HB 2997.

Kind Regards,



Janice C. Marsters
Principal

000027