

TESTIMONY BEFORE  
SENATE COMMITTEE ON COMMERCE, CONSUMER PROTECTION, AND  
AFFORDABLE HOUSING

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

**9:00 a.m., February 7, 2008**

**Senate Bill 2893**  
Relating to Torts

Chair Kokubun, Vice Chair Ige, 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 sympathizes with the design professionals’ concerns, but HECO cannot support SB 2893 unless it is amended to provide similar protection to the utilities.

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 SB 2893 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.<sup>1</sup> Plaintiffs have argued that utility pole location is part of the highway design, and, on that basis, seek to hold the utility

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<sup>1</sup> 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.

companies and other defendants jointly and severally liable for all damages.<sup>2</sup> However, under SB 2893, design professionals could *not* be held jointly and severally liable for highway design unless the professional's negligence was 25% or more. That would shift undue 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 public utilities. However, we respectfully submit that 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.

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 more fair result can be accomplished by amending SB 2893 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.

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<sup>2</sup> 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)).

**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.

a/7

**TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE CONSUMER  
LAWYERS OF HAWAII (CLH) IN OPPOSITION TO S.B. NO. 2893**

February 7, 2008

To: Chairman Russell Kokubun and Members of the Senate Committee on Commerce,  
Consumer Protection and Affordable Housing:

My name is Bob Toyofuku and I am presenting this testimony on behalf of the Consumer  
Lawyers of Hawaii (CLH) in strong opposition to S.B. No. 2893.

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.

Design professionals argue that this measure will assist them by lowering their insurance premiums. Yet there is no confirmation provided by insurance companies that this measure will have any effect on insurance premiums, or the amount of reduction that will result if there is any. A rational decision to weigh the benefit of this measure on the impact of insurance cost cannot be made without this data. It is incumbent upon those justifying this measure on the cost of

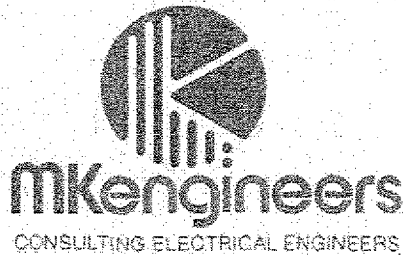
insurance to show that insurance will in fact be reduced by this measure and the amount of such claimed reduction

It is claimed that this measure is necessary because architects and engineers may be liable for defective workmanship many years after they perform the work. In fact, however, design professionals already enjoy special protections that limit their future liability for their work. Hawaii Revised Statutes Section 657-8 provides that design professionals may not be held responsible for deficiencies in their work unless a claim is commenced within two years after the deficiency is discovered, “but in any event not more than ten years after the date of completion of the improvement.” This limitation applies to road work, as well as to buildings, homes and other construction improvements. This is a special exception to the general rule that professionals normally remain responsible for their malpractice. An attorney who prepares a will for someone who later dies 30 years after the will was prepared remains responsible for any malpractice in drafting the will that is discovered upon the death 30 years later. The special ten year limitation does not apply to professionals like lawyers. Second, professionals have insurance coverage to protect them against liability for defective workmanship that is discovered after they retire. Professional liability insurance policies typically include free retirement coverage (known as tail coverage) for those who maintain the policy in effect for a period of time (typically five years or more), or provide the retirement coverage as a low cost option after retirement.

Finally, it is argued that joint and several liability should be abolished because it spreads the financial liability among joint tortfeasors who may be partially but not primarily responsible for the damages. Yet the other side of the coin of the practical advantage that this risk spreading provides is not discussed. A positive feature of joint and several liability is the spreading of risk

among all those who are partially responsible and who participated in the project so as to minimize the financial impact on any one design professional. The practical result is that the insurance coverage available for all design professionals who are partially responsible generally provides adequate coverage to resolve claims. Without this pool of insurance coverage provided by joint and several liability, individual design professionals may find that their own coverage is insufficient and will risk their own personal assets to cover judgments and claims that are now being covered by the availability of other insurance from other design professionals that are partially responsible. While design professionals feel it is unfair to them when they are responsible for a smaller portion of the liability, they forget that it is of tremendous benefit to them in situations where they have a larger share of the responsibility and yet do not risk their own personal assets because joint and several liability helps to spread the cost among other available insurance coverage that would otherwise not be available without joint and several liability.

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.



February 7, 2008

Fax testimony to 586-6659

e-mail testimony to: [testimony@capitol.hawaii.gov](mailto:testimony@capitol.hawaii.gov)

Hearing on SB2893, Relating to Torts  
Before the Senate Committee on Commerce, Consumer Protection, and  
Affordable Housing  
on Thursday, Feb. 7, 2008 at 9a.m. in Conference Room 229

Dear Chair Kokubun, Vice Chair Ige, and members of the Committee:

MK Engineers, Ltd. is a locally owned and managed small consulting electrical engineering business firm that in business for over thirty years. **We are in strong support of SB2893, 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.

SB 2893 offers a compromise solution. SB 2893 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.

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, SB2893.



## ENGINEERING SOLUTIONS, INC.

Civil / Sanitary / Structural Engineers

98-1268 Kaahumanu Street, Suite C-7 • Pearl City, Hawaii 96782 • Phone: (808) 488-0477 • Fax: (808) 488-3776

February 2, 2006

### FAXED TESTIMONY TO:

Senate Sgt.-at-Arms Fax No. 586-6659 (30 copies)

Hearing Date: Thursday, February 7, 2007, 9:00 a.m., Conference Room 229

Honorable Senators Russell S. Kokubun, Chair; David Y. Ige, Vice Chair; and Members of the Senate Committee on Commerce, Consumer Protection and Affordable Housing

Subject: **SB 2893, Relating to Torts**

**We are writing to request your support of SB 2893.** 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 SB2893 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

# **ASCE** American Society of Civil Engineers

Hawaii Section

PO Box 917

Honolulu, HI 96808-0917

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February 4, 2008

Honorable Russell S. Kokubun, Chair  
Honorable David Y. Ige, Vice Chair  
Honorable Members of the Senate Committee on Commerce, Consumer Protection,  
and Affordable Housing

I am testifying in support for Senate Bill 2893 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.

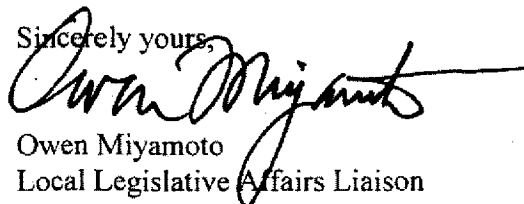
At the national level, the ASCE Board of Direction has adopted official Policy Statements on major technical, professional and educational issues of interest to the civil engineering community. Policy Statement 318 urges the passage of legislation at the state level for tort reform to reduce the filing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

We recommend your passage of Senate Bill 2893. Thank you for your consideration.

Sincerely yours,



Owen Miyamoto  
Local Legislative Affairs Liaison

Attachment



## 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.



**KAI HAWAII**  
STRUCTURAL & FORENSIC ENGINEERS

February 7, 2008

Fax testimony to 586-8659

e-mail testimony to: [testimony@capitol.hawaii.gov](mailto:testimony@capitol.hawaii.gov)

Hearing on SB2893, Relating to Torts  
Before the Senate Committee on Commerce, Consumer Protection, and Affordable Housing  
on Thursday, Feb. 7, 2008 at 9a.m. in Conference Room 229

Dear Chair Kokubun, Vice Chair Ige, and members of the Committee:

KAI Hawaii Inc. is a locally owned and managed small business engineering firm in business for 12 years. **We are in strong support of SB2893, 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.

SB 2893 offers a compromise solution. SB 2893 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, SB2893.

Sincerely,

  
Ken K. Hayashida, President  
KAI Hawaii Inc.



## AIA Hawaii State Council

A Council of The American Institute of Architects

CPH  
2/7/08  
9:00 am

February 7, 2008

Honorable Russell S. Kokubun, Chair  
Senate Committee on Consumer Protection & Affordable Housing

Re: **Senate Bill 2893**  
**Relating to Torts**

Dear Chair Kokubun and 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 SB 2893 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 SB 2893. 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.

SB 2893 is a compromise proposal and not a shirking of our legitimate professional responsibility. Thank you for this opportunity to present **STRONGLY SUPPORTING** testimony for SB 2893.

# KAUAIHIKAUA & CHUN / ARCHITECTS

DWIGHT PAUHI KAUAIHIKAUA, AIA  
DANIEL GARY CHUN, FAIA

CPH  
2/7/08  
9:00 am

February 7, 2008

Honorable Russell S. Kokubun, Chair  
Senate Committee on Consumer Protection & Affordable Housing

Re: **Senate Bill 2893**  
**Relating to Torts**

Dear Chair Kokubun and Members of the Committee,

My name is Dwight Kauahikaua. I own a small design professional business that has provided architectural services for projects in Hawaii for the past 26 years. I am in **STRONG SUPPORT** of SB 2893 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 reckless situations that consumers can voluntarily put themselves into –

- **Speeding**
- **Drunk driving**
- **Inattention to traffic situations**

SB 2893 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 SB 2893.

**COALITION OF HAWAII ENGINEERING AND ARCHITECTURAL  
PROFESSIONALS**

Email to: testimony@capitol.hawaii.gov

Hearing Date: Thursday, February 7, 2008 9:00am, CR 229

Honorable Senator Russell S. Kokubun, Chair, Senator David Y. Ige, Vice  
Chair and Members of the Senate Committee on Commerce, Consumer  
Protection & Affordable Housing

**Subject: SB 2893 - 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 SB 2893 Relating to Torts. This bill addresses a specific problem 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 exposes Design Professionals to enormous damages on highway accidents. In most cases the DP has no or very small percentage responsibility for the cause of the accident and mediated settlements forces DP's 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 that chose to cause the accident by drunk driving, speeding, and/or being reckless or un-attentive. DP's are required to design highways according to the current State and Federal codes (which is scrutinized by the State DOT at every stage). DP's 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.

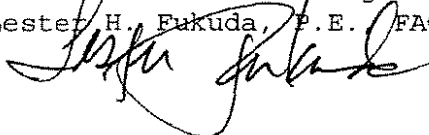
We urge you to Support SB 2893 - Relating to Torts. Mahalo for this opportunity to express our business concerns and for your consideration of this important bill.

Sincerely,

*Mahalo!*

Coalition of Hawaii Engineering & Architectural Professionals

Lester H. Fukuda, P.E. FACEC







**Pacific Geotechnical Engineers, Inc.**

*Soils & Foundation Engineering Consultants*

429-B Waiakamilo Road  
Honolulu, Hawaii 96817  
Telephone: (808) 841-8024  
Facsimile: (808) 848-5102  
Email: pge@pacificgeotechnical.com

February 5, 2008

E-MAIL TESTIMONY TO:

testimony@capitol.hawaii.gov

Honorable Senator Russell S. Kokubun, Chair, Senator David Y. Ige, Vice Chair and Members of the Senate Committee on Commerce, Consumer Protection & Affordable Housing

**Subject: SB 2893 - Relating to Torts**

**Hearing Date: Thursday, February 7, 2008, 9:00 a.m., Conference Room 229**

Dear Chair Kokubun, Vice Chair Ige, and Committee Members,

Pacific Geotechnical Engineers, Inc. is a locally owned and managed geotechnical engineering consulting 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 firm in Hawaii, we are faced with numerous business challenges, including onerous tort laws and increasing insurance costs.

**We strongly support SB 2893 Relating to Torts.** This bill addresses a major problem with joint and several liability for design professionals who have worked on highway projects. Under the current tort law, the design professional and other parties involved in the design and construction of a highway or freeway have been the target of repeated claims for accidents. Even when the main cause of the accident was due to the plaintiff's negligence, the design professional and their insurance company have had to pay large settlements that in some cases have been equal to the limits of the design professional's liability insurance policy.

As our highways and freeways become more congested by the day, the risk of accidents involving injury or death will increase at an alarming rate. Because of these conditions and the onerous joint and several liability provisions in the current tort law, our firm has had to turn down numerous highway contracts. The risk of doing highway or freeway work is much too great for a small business like our firm. One claim could jeopardize the existence of our firm and the livelihood of our employees.

**We urge you to support SB 2893 Relating to Torts** to improve the business climate for small business in Hawaii. Thank you for an opportunity to express our views and for your consideration of this important bill.

Sincerely,

Pacific Geotechnical Engineers, Inc.

Glen Y.F. Lau, P.E.

President



KENNETH K. KUROKAWA, PE  
LAMBERT J. YAMASHITA, PE  
DONOHUE M. FUJII, PE  
STANLEY T. WATANABE  
TERRANCE S. ARASHIRO, PE

February 7, 2008

Fax testimony to 586-6659

e-mail testimony to: [testimony@capitol.hawaii.gov](mailto:testimony@capitol.hawaii.gov)

**Hearing on SB2893, Relating to Torts**

Before the Senate Committee on Commerce, Consumer Protection, and Affordable Housing  
on Thursday, Feb. 7, 2008 at 9a.m. in Conference Room 229.

Dear Chair Kokubun, Vice Chair Ige, and members of the Committee:

Austin, Tsutsumi & Associates, Inc. is a locally owned and managed small business civil engineering firm in business for over 70 years. **We are in strong support of SB2893, Relating to Torts.**

In 2007, we were named in a claim filed on behalf of plaintiff who had been injured in a serious vehicular accident which occurred as a result of the individual falling asleep at the wheel and hitting a guardrail. The guardrail kept the vehicle from going over an embankment. Our firm's role was limited to providing a roadway circulation report over 25 years ago. Based on a reference to the State Department of Transportation's standard guardrail types at that time, we were named as co-defendants in the case. At no time had we been involved in any aspect of the design, construction, inspection, or safety analysis of the road.

Under current tort law when there is an accident on a highway, the design professional who may have been involved in a project on the highway, may be required to cover one hundred percent (100%) of the liability, even though the design professional is not negligent or nominally negligent. Even if only 5% or less liable, the design professional's insurance company will settle for up to the insurance policies limits, generally a million dollars, simply because under the current law, there is no incentive for the design professional to go to trial when under joint and several he could be responsible for 100% of the liability. Needless to say, this is unfair and not good public policy, because it does not place responsibility with the proper parties, and allows persons to seek out the "deep pockets," even when the accident is caused by an uninsured motorist who is themselves negligent or grossly at fault.

SB 2893 offers a compromise solution. SB 2893 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.

Austin, Tsutsumi & Associates, Inc. appreciates the continuing efforts of your committee and the members of the House to improve the business climate for small business in Hawaii. We trust that this letter will make a difference and thank you for the opportunity to testify in **support of SB2893.**

Sincerely,

Terrance S. Arashiro, PE  
Vice President,  
Austin, Tsutsumi & Associates, Inc.

**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 5, 2008

EMAILED TESTIMONY TO: [testimony@capitol.hawaii.gov](mailto:testimony@capitol.hawaii.gov)

**Hearing Date: Thursday, February 7<sup>th</sup>, 9 a.m., Conference Room 229**

**Honorable Senators Russell Kokubun, Chair, David Ige, Vice Chair, and Members of the Senate Committee on Commerce, Consumer Protection and Affordable Housing**

Subject: **SB 2893, Relating to Torts**

Dear Chair Kokubun, Vice Chair Ige, and Committee Members,

Masa Fujioka & Associates, a Hawaii-owned and –operated small business engineering firm, **is in strong support of SB 2893, 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 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 professional, I do not enjoy the same protections as contractors and State agencies; my personal assets are at stake.

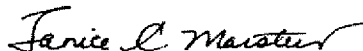
As a small business geotechnical/environmental firm, serving as a subcontractor on State projects, our fee is typically less than \$20,000 (profit of less than \$2,000). The risk of million dollar settlements is far out of proportion to our potential gain from these projects. Clearly, the State and its citizens benefit far more by the design of these projects, and some protection for small business design professionals is warranted.

SB 2893 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.

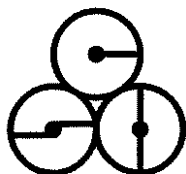
SB 2893 will help alleviate some of our firm's concern about being the potential "deep pocket" in every public highway accident case. Our firm has been so concerned about being the "deep pocket" that we have turned down work that we consider risky, including State contracts. We feel that fear on the part of small business design professionals limits the available pool of highly qualified consultants available to conduct State projects.

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 SB 2893.

Kind Regards,



Janice C. Marsters  
Principal



**CONSULTING  
STRUCTURAL HAWAII, INC.**  
931 Hausten Street, Suite 200  
Honolulu, Hawaii 96826  
Phone: (808) 945-0198 • Fax: (808) 944-1177  
e-mail: [csh@consultingstructuralhawaii.com](mailto:csh@consultingstructuralhawaii.com)

February 6, 2008

EMAILED TESTIMONY TO: [testimony@capitol.hawaii.gov](mailto:testimony@capitol.hawaii.gov)

**Hearing Date: Thursday, February 7<sup>th</sup>, 9 a.m., Conference Room 229**

**Honorable Senators Russell Kokubun, Chair, David Ige, Vice Chair, and Members of the Senate Committee on Commerce, Consumer Protection and Affordable Housing**

Subject: **SB 2893, Relating to Torts**

Dear Chair Kokubun, Vice Chair Ige, 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 SB 2893, 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 condominium, subdivision, bridge, highway related and residential projects, where the claims and awards can be large, creating risks under joint and several liability that far outweigh my potential profit. We have been involved in litigation for several of these projects, and thankfully have been absolved of any responsibility and liability. However, the treat of tort remains. As a result, Consulting Structural Hawaii, Inc. has recently declined the structural design of several condominium projects because of the liability and claims associated with these projects.

SB 2893 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.

SB 2893 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.

Consulting Structural Hawaii, Inc. 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 SB 2893.

Again, we are in **strong support of SB 2893, Relating to Torts.**

Respectfully submitted,  
Roy K. Yamashiro, P.E.  
Principal



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

Daniel S.G. Hong, P.E.  
Michael H. Nojima, P.E.  
Sheryl E. Nojima, Ph.D., P.E.  
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February 6, 2008

EMAILED TESTIMONY TO: [testimony@capitol.hawaii.gov](mailto:testimony@capitol.hawaii.gov)

Hearing Date: Thursday, February 7<sup>th</sup>, 9 a.m., Conference Room 229

Honorable Senators Russell Kokubun, Chair, David Ige, Vice Chair, and Members of the Senate Committee on Commerce, Consumer Protection and Affordable Housing

Subject: **SB 2893, Relating to Torts**

Dear Chair Kokubun, Vice Chair Ige, and Committee Members,

Gray, Hong, Nojima & Associates (GHN), a Hawaii-owned and -operated small business engineering firm, is in **strong support of SB 2893, 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 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 professional, I do not enjoy the same protections as contractors and State agencies; my personal assets are at stake.

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.

SB 2893 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.

SB 2893 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.

GHN 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 SB 2893.

Kind Regards,

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

**testimony**

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**From:** David Bills [dbills@billsengineering.com]  
**Sent:** Wednesday, February 06, 2008 1:47 PM  
**To:** testimony  
**Subject:** Testimony - SB 2893, Relating to Torts

February 6, 2008

EMAILED TESTIMONY TO: [testimony@capitol.hawaii.gov](mailto:testimony@capitol.hawaii.gov)

**Hearing Date: Thursday, February 7<sup>th</sup>, 9 a.m., Conference Room 229**

**Honorable Senators Russell Kokubun, Chair, David Ige, Vice Chair, and Members of the Senate Committee on Commerce, Consumer Protection and Affordable Housing**

**Subject: SB 2893, Relating to Torts**

Dear Chair Kokubun, Vice Chair Ige, and Committee Members:

Bills Engineering Inc., a Hawai'i-owned and –operated small business engineering firm, **is in strong support of SB 2893, Relating to Torts.**

As a small business owner and design professional, I must consider my professional and personal liability for 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 firm's potential profit.

It is unfair that my firm's financial future should be so at risk because of our minor involvement in a public works project, especially if we are not, in any way, negligent. Engineering work on such projects is performed in accordance with strict State and Federal design standards and codes, and is reviewed and approved by those governmental 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 their share of damages if other parties are unable to pay. As a professional, I do not enjoy the same protections as Federal and State agencies; my personal assets are at stake.

SB 2893 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 this State's citizens.

SB 2893 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

2/6/2008

highly qualified consultants available to conduct State projects. 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.

Bills Engineering Inc. appreciates the continuing efforts of your committee and the members of the Senate to assist small businesses in Hawai'i. Thank you for the opportunity to testify in support of SB 2893.

Very truly yours,

BILLS ENGINEERING INC.

By:   
David B. Bills, President

David B. Bills  
Bills Engineering Inc.  
1124 Fort Street Mall, Suite 200  
Honolulu, Hawaii 96813  
Phone: 808.792.2022  
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February 6, 2008

EMAILED TESTIMONY TO: [testimony@capitol.hawaii.gov](mailto:testimony@capitol.hawaii.gov)

**Hearing Date: Thursday, February 7, 9 a.m., Conference Room 229**

**Honorable Senators Russell Kokubun, Chair, David Ige, Vice Chair, and Members of the Senate Committee on Commerce, Consumer Protection and Affordable Housing**

**Subject: SB 2893, Relating to Torts**

Dear Chair Kokubun, Vice Chair Ige, and Committee Members,

My name is Michael Street and I am a design professional who **is in strong support of SB 2893, Relating to Torts.**

SB 2893 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.

SB 2893 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.

This limited concession to design professionals for highway projects is warranted because our 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.

SB 2893 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 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.

I stress that design professionals are not seeking to escape their 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.

I appreciate the continuing efforts of your committee and the members of the Senate to improve the business climate for small business in Hawaii. Thank you for the opportunity to testify in support of SB 2893.



THE LIMTIACO CONSULTING GROUP  
CIVIL, ENGINEERING AND ENVIRONMENTAL CONSULTANTS  
660 IWIPI ROAD, SUITE 208 · HONOLULU, HAWAII 96817

February 6, 2008

EMAILED TESTIMONY TO: [testimony@capitol.hawaii.gov](mailto:testimony@capitol.hawaii.gov)

Hearing Date: Thursday, February 7<sup>th</sup>, 9 a.m., Conference Room 229

Honorable Senators Russell Kokubun, Chair, David Ige, Vice Chair, and Members of the Senate

Committee on Commerce, Consumer Protection and Affordable Housing

**Subject: Strong Support of SB 2893, Relating to Torts**

Dear Chair Kokubun, Vice Chair Ige, and Committee Members,

The Limtiaco Consulting Group, a local small business engineering firm, is in strong support of SB 2893, Relating to Torts.

Risk is a reality of doing business. However, the current joint and several liability provision is 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 outweighs *potential* profit.

Being a professional engineer and business owner, it is unfair to jeopardize my family's wellbeing particularly when negligence is not determined. Engineering work is generally performed to State and federal design standards and codes, and are reviewed and approved by government agencies. Under current law, a design professional may be pulled into a claim (even frivolously) and found by jury to be only one percent (1%) liable for damages while being forced to pay more than their share of damages if other parties are unable to pay. As you may know, design professionals are often considered "deep pockets" and are targeted as such to our dismay. This results in higher cost of business (insurance premiums and attorney fees) and risk of personnel assets.

SB 2893 provides for more fairness in allocation of risk, yet requires the design professional to be responsible. Professionals 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. This allows damages relative to error or negligence.

As a small business owner in Hawaii, I deeply appreciate your unwavering effort to improve Hawaii's business climate. Thank you for the opportunity to testify in support of SB 2893.

Sincerely,  
*The Limtiaco Consulting Group, Inc.*

  
John H. Katahira  
Principal