

TESTIMONY BEFORE
HOUSE COMMITTEE ON JUDICIARY

By Joseph P. Viola
Hawaiian Electric Company, Inc.

2:05 p.m., February 24, 2009

House Bill 1316 HD1
Relating to Torts

Chair Karamatsu, Vice Chair Ito, and members of the Committee on Judiciary:

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, provided that the same protection is afforded to public utilities. Granting protection to the design professionals alone will shift liability exposure to HECO. Thus, HECO respectfully requests that HB 1316 HD1 be amended to provide similar protection to the public 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 1316 HD1, 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 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

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 Telcom Company and the State or City and County.

liability exposure in highway cases to the other so-called “deep pockets” – including the 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 1316 HD1 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.

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.



ENGINEERING SOLUTIONS, INC.

Our Name, Our Mission for a Sustainable Environment

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

February 21, 2009

Hearing Date: Tuesday, February 24th, 2:05pm, Room 325
House Judiciary Committee

Representatives Jon Riki Karamatsu, Chair, Ken Ito, Vice Chair, and Members of the House Judiciary Committee

RE: HB 1316 "Relating to Torts"

We strongly support HB 1316 "Relating to Torts". The bill introduces a small, long overdue, measure of equity to a concept that is completely unfair to the Hawaii small business community. The small businesses of Hawaii should not be subject to penalties greatly exceeding our level of responsibility.

Engineering Solutions, Inc. strongly supports HB1316, "Relating to Torts".

Thank you for the opportunity to express our views.

ENGINEERING SOLUTIONS, INC.

Vice President

February 22, 2009

EMAILED TESTIMONY TO: JUDtestimony@Capitol.hawaii.gov

Hearing Date: Tuesday, February 24, 2:05 p.m., Conference Room 325

Honorable Representatives Jon Riki Karamatsu, Chair, Ken Ito, Vice Chair, and Members of the House Committee on Judiciary

Subject: **HB 1316, Relating to Torts**

Dear Chair Karamatsu, Vice Chair Ito, and Committee Members,

Fukunaga & Associates, Inc. is a Hawaii-owned and managed Civil & Environmental Engineering firm operating in Hawaii since 1969. **We are in strong support of HB 1316, Relating to Torts.**

HB 1316 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 1316 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 1316** 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 1316 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.

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 1316**.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jon K. Nishimura", written over a faint, illegible typed name.

Jon K. Nishimura, P.E.
President
Fukunaga & Associates, Inc.

**COALITION OF HAWAII ENGINEERING AND ARCHITECTURAL
PROFESSIONALS**

Email to: JUDtestimony@Capitol.hawaii.gov

Hearing Date: Tuesday, February 24, 2009, 2:05 pm, CR 325

Honorable Representatives Jon Riki Karamatsu, Chair, Representative Ken Ito, Vice Chair and Members of the House Committee on Judiciary

Subject: HB 1316, HD1 - 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 1316, HD1 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).

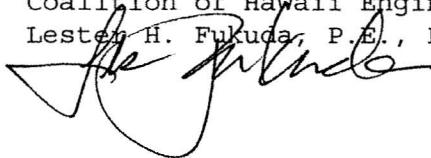
What happened to personal responsibility and accountability for the person or persons that chose to cause the accident by drunk driving, speeding, and/or being reckless or un-attentive. Design professionals very carefully design highways according to the current State and Federal codes and our design & 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 1316, HD1 - 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



ACEC

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February 22, 2009

EMAILED TESTIMONY TO: JUDtestimony@Capitol.hawaii.gov

**Hearing Date: Tuesday, February 24, 2:05 p.m., Conference Room 325
(House Committee on Judiciary)**

Honorable Representatives Jon Riki Karamatsu, Chair, Ken Ito, Vice Chair, and
Members of the House Committee on Judiciary

Subject: **HB 1316, Relating to Torts**

Dear Chair Karamatsu, Vice Chair Ito, and Committee Members,

The American Council of Engineering Companies of Hawaii (ACECH), representing
more than 70 consulting engineering firms in Hawaii, appreciates this opportunity to
express our **support for HB 1316, Relating to Torts.**

HB 1316 brings a measure of fairness to the judicial system for design professionals,
whose beneficial public works projects greatly improve the quality of life for Hawaii's
citizens. Unfortunately the professional liability risk for our small local firms far
outweighs their financial reward from these projects.

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. Often before going to trial,
insurance companies settle for the design professional's insurance policies limit, even
if there is no clear negligence on the part of the design professional, because of the
risk of large awards from juries. Design professionals have been subject to paying
large settlements and, in some cases, have no more insurance coverage for claims on
particular projects. It's important to keep in mind that our work on such projects is
performed to State and Federal design standards and codes, and is reviewed and
approved by government agencies.

We are chiefly concerned with the risks of third-party lawsuits; for example, the
passenger who is injured by a drunk or speeding driver. When the responsible party's
limited insurance is exhausted, it is simply unfair to consider design professionals as
"deep pockets" and their professional liability insurance policies as a way to
compensate the third party(ies) beyond an amount proportional to the design
professionals' degree of negligence. While firms may be able to obtain professional
liability insurance, deductibles are high (>\$25,000) and the costs of fighting lawsuits
are crippling to small businesses. And if a firm has a claim, it becomes more difficult
to obtain insurance coverage in the future.

This burden to small design firms is particularly troublesome when our role in the life
of the highway (and our profits from these projects) is so small. We are typically
involved for a small window of only one or two years, while the State has the long-
term responsibility for maintenance and repair of the highway system, and its citizens
enjoy the long-term benefit of the project. The risk to our small firms is simply out of

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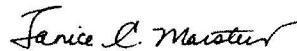
balance with their involvement and the profits they receive. However, while we favor the full abolition of joint and several liability, we believe HB 1316 is a reasonable compromise, with the design professional still subject to joint and several liability if they are greater than 25% at fault.

Because of the risks and escalating professional liability insurance premiums associated with doing highway work, many of our small firms no longer participate in highway projects. This reduces the pool of qualified consultants available to do the work, reduces innovation and quality design, and also favors large, predominately mainland firms. These large mainland firms essentially self-insure and are able to absorb more risk, but their profits go out of the state. With the upcoming anticipated increases in infrastructure funding, the damage to the State's economy from our small firms not participating is a real negative impact for the State.

HB 1316 provides for more fairness in allocation of risk. Design professionals who are found less than 25% at fault would be responsible only for the percentage of damages attributed to them, and not be subject to joint and several liability. If the design professional is twenty-five percent (25%) or more liable, joint and several liability would still apply. We have looked at tort reform legislation in other states and feel HB 1316 is a reasonable and fair compromise to the full abolition of joint and several liability enacted in a number of states.

ACECH appreciates the opportunity express our strong support of HB 1316. Please contact me if you have any questions regarding our testimony.

Kind Regards,



Janice C. Marsters, National Director

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February 23, 2009

Honorable Jon Riki Karamatsu, Chair
Honorable Ken Ito, Vice Chair
Honorable Members of the House Committee on Judiciary

I am testifying in support for House Bill 1316 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 more than 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 1316, which abolishes joint and several liability for design professionals except when their negligence is 25% or more will assist to 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 1316. Thank you for your consideration.

Sincerely yours,



Owen Miyamoto
Local Legislative Affairs Liaison

Attachment



Civil Engineers – Designers and Builders of the Quality of Life

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.



AUSTIN, TSUTSUMI & ASSOCIATES, INC.

CIVIL ENGINEERS • SURVEYORS

CONTINUING THE ENGINEERING PRACTICE FOUNDED BY H. A. R. AUSTIN IN 1934

KENNETH K. KUROKAWA, P.E.
TERRANCE S. ARASHIRO, P.E.
DONOHUE M. FUJII, P.E.
STANLEY T. WATANABE
IVAN K. NAKATSUKA, P.E.

February 23, 2009

**Hearing Date: Tuesday, February 24, 2:05 p.m., Conference Room 325
(House Committee on Judiciary)**

Honorable Representatives Jon Riki Karamatsu, Chair; Ken Ito, Vice Chair; and Members of the House Committee on Judiciary

Subject: **HB 1316, Relating to Torts**

Dear Chair Karamatsu, Vice Chair Ito, and Committee Members,

Austin, Tsutsumi & Associates, Inc. is a locally owned and managed small business civil engineering firm in business for 75 years. **We are in strong support of HB 1316, Relating to Torts.**

In 2007, we were named as one of three co-defendants 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. Our firm's role was limited to providing a traffic report on circulation improvements. Based on a reference to the State Department of Transportation's guardrail standards 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 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 a greater percentage 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.

HB 1316 offers a compromise solution. HB 1316 would limit the design professional's liability on highway projects 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, then joint and several liability would apply. This is a fair solution.

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 HB 1316.**

Sincerely,

Terrance S. Arashiro, PE
Senior Vice President

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THE LIMTIACO CONSULTING GROUP
CIVIL ENGINEERING AND ENVIRONMENTAL CONSULTANTS

February 23, 2009

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Hearing Date: Tuesday, February 24, 2:05 p.m., Conference Room 325

Honorable Representatives Jon Riki Karamatsu, Chair, Ken Ito, Vice Chair, and Members of the House Committee on Judiciary

Subject: HB 1316, Relating to Torts

Dear Chair Karamatsu, Vice Chair Ito, and Committee Members:

The Limtiaco Consulting Group, Inc., a Hawaii-owned small business engineering firm, appreciates this opportunity to **support of HB 1316, Relating to Torts.**

As a small business owner and design professional, every project has the potential to impact my professional and personal livelihood, not to mention that of my employees and subconsultants. While a risk is a reality of business, the current joint and several liability conditions are unfair when particularly when considering negligence is not required.

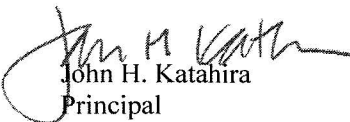
Under current law, a design professional who is pulled into a claim (even frivolously) and is found by a jury to be only one percent (1%) liable for damages could be forced to pay far more in damages. For example, a project worth \$50,000 could generate \$5,000 in profit; however, if found only 1% liable for a claim, the design professional could be forced to pay \$1,000,000 worth of damages.

HB 1316 promotes fairness in risk allocation, but HB 1316 does not eliminate liability as design professionals. As proposed in HB 1316, 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. Joint and several liability would apply if the design professional is twenty-five percent (25%) or more liable.

This bill will improve our business climate and will result in job growth, particularly with the many small business that makeup a large portion of Hawaii's engineering industry.

As a life-long resident, I sincerely appreciate your commitment to our State. Thank you for the opportunity to testify in support of HB 1316.

Best Regards,
The Limtiaco Consulting Group, Inc.


John H. Katahira
Principal



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

*Daniel S.C. Hong, PE
Sheryl E. Nojima, PhD, PE
Michael H. Nojima, PE, LEED AP
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February 23, 2009

EMAILED TESTIMONY TO: JUDtestimony@Capitol.hawaii.gov

**Hearing Date: Tuesday, February 24, 2:05 p.m., Conference Room 325
(House Committee on Judiciary)**

Honorable Representatives Jon Riki Karamatsu, Chair; Ken Ito, Vice Chair; and Members of the House Committee on Judiciary

Subject: **HB 1316, Relating to Torts**

Dear Chair Karamatsu, Vice Chair Ito, and Committee Members:

Gray, Hong, Nojima & Associates, Inc., a Hawaii-owned and –operated small business engineering firm, appreciates this opportunity to our **support of HB 1316, Relating to Torts.**

HB 1316 brings a measure of fairness to the judicial system for design professionals, whose work results in beneficial public works projects that greatly improve the quality of life for the State's citizens. Unfortunately the professional liability risk for our small local firms far outweighs their financial reward from these projects.

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. Often before going to trial, insurance companies settle for the design professional's insurance coverage for claims on particular projects. It is important to keep in mind that our work on such projects is performed to State and Federal design standards and codes, and is reviewed and approved by government agencies.

We are chiefly concerned with the risks of third-party lawsuits; for example, those filed on behalf of the passenger who is injured by a drunk or speeding driver. When the responsible party's limited insurance is exhausted, it is simply unfair to consider design professionals as "deep pockets" and their professional liability insurance policies as a means to compensate the third party(ies) behold and amount proportional to the design professionals' degree of negligence. While firms may be able to obtain professional liability insurance, deductibles are high (>\$25,000) and the cost of fighting the lawsuit can be crippling to small businesses like ours. And if a firm has a claim, it becomes more difficult to obtain insurance coverage in the future.

This burden to small design firms is particularly troublesome when our role in the life of a highway (and our profits from these projects is so small. We are typically involved for a short window of only one or two years, while the State has the long-term responsibility for maintenance and repair of the highway system, and its citizens enjoy the long-term benefit of the project. The risk to our small firms is simply out of balance with their involvement and the profits they receive. However, while we favor the full abolition of joint and several liability, we believe this bill is a reasonable compromise, with the design professional still subject to joint and several liability if they are greater than 25% at fault.

HB 1316, Relating to Torts
February 23, 2009
Page 2

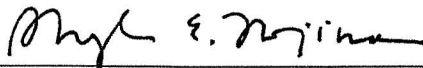
Because of the risks and escalating professional liability insurance premiums associated with doing highway work, many of our small firms no longer participate in highway projects. This reduces the pool of qualified consultants available to do the work, reduces innovation and quality design, and also favors large, predominately mainland firms. These large firms essentially self-insure and are able to absorb more risk, but their profits go out of the state. With the upcoming anticipated increases in infrastructure funding, the damage to the State's economy from our small firms not participating is a real negative impact for the State.

HB 1316 provides for more fairness in allocation of risk. Design professionals who are found less than 25% at fault would be responsible only for the percentage of damages attributed to them, and not be subject to joint and several liability. If the design professional is twenty-five (25%) or more liable, joint and several liability would still apply. We have looked at tort reform legislation in other states and feel HB 1316 is a reasonable and fair compromise to the full abolition of joint and several liability enacted in a number of states.

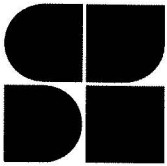
We appreciate the opportunity to testify in support of HB 1316. Please contact me if you have any questions regarding our firm's testimony.

Sincerely,

GRAY, HONG, NOJIMA & ASSOCIATES, INC.



Sheryl E. Nojima, PhD, PE
President



SHIGEMURA, LAU, SAKANASHI, HIGUCHI AND ASSOCIATES, INC.
CONSULTING STRUCTURAL ENGINEERS

February 23, 2009

EMAILED TESTIMONY TO: JUDtestimony@Capitol.hawaii.gov

Hearing Date: Tuesday, February 24, 2009, 2:05 p.m., Conference Room 325

Honorable Representatives Jon Riki Karamatsu, Chair, Ken Ito, Vice Chair, and Members of the House Committee on Judiciary

Subject: **HB 1316, Relating to Torts**

Dear Chair Karamatsu, Vice Chair Ito, and Committee Members,

Shigemura, Lau, Sakanashi, Higuchi is a locally owned and managed structural engineering firm committed to continuously improving the engineering profession and promoting high professional standards. Our firm is a member of the American Council of Engineering Companies of Hawaii (ACECH) and is an active member of various local professional organizations.

We strongly support HB 1316 – Relating to Torts. HB1316 brings a measure of fairness to the judicial system for design professionals, whose work results in beneficial public works projects that greatly improve the quality of life for the State's citizens. Unfortunately the professional liability risk for small local firms far outweighs their financial reward for these projects.

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. Often before going to trial, insurance companies settle for the design professional's insurance policies limit, even if there is no clear negligence on the part of the design professional, because of the risk of large awards from juries. Design professionals have been subject to paying large settlements and, in some cases, have no more insurance coverage for claims on particular projects. It is important to keep in mind that our work on such projects is performed to State and Federal design standards and codes, and is reviewed and approved by government agencies.

Our firm is mainly concerned with third party lawsuits and while firms may be able to obtain professional liability insurance, deductibles are high (>\$25,000). And if a firm has a claim, it becomes more difficult to obtain insurance coverage and the cost of premiums will undoubtedly increase.

This burden to small design firms such as ours is particularly troublesome when our design role is small when compared to the life of the highway. We are typically involved for 1 or 2 years, while the State has the long-term responsibility for repair and maintenance, and the citizens enjoy the long term benefits.

HB 1316 provides for more fairness in allocation of risk. Thank you for an opportunity to express our view and for your consideration of this important bill.

Sincerely,
Shigemura, Lau, Sakanashi, Higuchi

Beverly Ishii-Nakayama, P.E., Principal

1916 Young Street • Second Flr • Honolulu, Hawaii 96826 • Telephone (808) 942-9100 • FAX (808) 942-1899

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Suite 2400
Honolulu, HI 96813
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Fax: (808) 533-0226

BROWN AND
CALDWELL

February 23, 2009

EMAILED TESTIMONY TO: JUDtestimony@Capitol.hawaii.gov

**Hearing Date: Tuesday, February 24, 2:05 p.m., Conference Room 325
(House Committee on Judiciary)**

Honorable Representatives Jon Riki Karamatsu - Chair, Ken Ito - Vice Chair, and
Members of the House Committee on Judiciary

Subject: HB 1316, Relating to Torts

Dear Chair Karamatsu, Vice Chair Ito, and Committee Members

Brown and Caldwell, a national engineering firm with offices in Hawaii,
appreciates this opportunity to express our **support of HB 1316, Relating to Torts.**

As a design professional, my potential professional and personal liability is
critically important in every project I consider. While a certain amount of risk is a
reality of doing business, the current situation under joint and several liability
seems very unfair. This is particularly so for lawsuits related to the design of public
highways, where the claims and awards can be large, creating risks under joint and
several liability that far outweigh our firm's potential rewards.

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

We were recently part of an engineering team that was selected by the State
Department of Transportation (DOT) Highways Division to provide design services
for highway projects. However due to our concern with the potential liability costs
in undertaking the work in a subconsultant role in relation to the small fees and
profits, we elected to withdraw from providing engineering services. We are aware
of other engineering firms that have also decided to not pursue work with DOT
Highways Division due to the impact of current regulations that exposes a
consultant to unfair liability costs.

We feel that fear on the part of engineering design professionals limits the available pool of highly qualified consultants available to conduct State projects. With the many infrastructure projects anticipated, the impact of having engineering firms decline to work for the DOT is that the design and construction of projects will be delayed, and that the best service may not be available to public.

HB 1316 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 and the public's interests would be protected.

We appreciate the continuing efforts of your committee and the members of the House to assist businesses in Hawaii. Thank you for the opportunity to testify in support of HB 1316.

Sincerely,

Brown and Caldwell

A handwritten signature in black ink, appearing to read "Douglas Lee". The signature is stylized and cursive.

Douglas Lee, P.E.
Executive Engineer



KAI HAWAII
STRUCTURAL & FORENSIC ENGINEERS

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

February 23, 2009

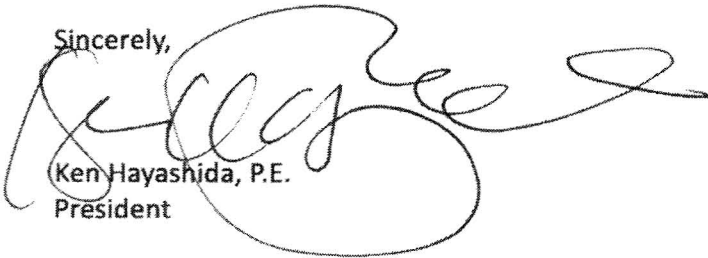
EMAIL TO: JUDtestimony@Capitol.hawaii.gov

Subject: **HB 1316, Relating to Torts**

**Hearing Date: Tuesday, February 24, 2:05 p.m., Conference Room 325
(House Committee on Judiciary)**

KAI Hawaii, Inc. expresses our SUPPORT for HB 1316, Relating to Torts. HB 1316 brings a measure of fairness to the judicial system for design professionals, whose beneficial public works projects greatly improve the quality of life for Hawaii's citizens. Unfortunately the professional liability risk for our small local firms far outweighs their financial reward from these projects. This burden to small design firms is particularly troublesome when our role in the life of the highway (and our profits from these projects) is so small. We are typically involved for a small window of only one or two years, while the State has the long-term responsibility for maintenance and repair of the highway system, and its citizens enjoy the long-term benefit of the project. It is simply unfair to shift so much of the risk resulting from highway accidents to design professionals.

Sincerely,



Ken Hayashida, P.E.
President

karamatsu3-Leanne

From: Roy K. Yamashiro [ryamashiro@consultingstructuralhawaii.com]
Sent: Monday, February 23, 2009 3:48 PM
To: JUDtestimony
Subject: HB 1316, Relating to Torts -- Hearing Date: Tuesday, February 24, 2:05 p.m., Conference Room 325

TO: JUDtestimony@Capitol.hawaii.gov

Subject: HB 1316, Relating to Torts

Hearing Date: Tuesday, February 24, 2:05 p.m., Conference Room 325
(House Committee on Judiciary)

Consulting Structural Hawaii, Inc. expresses our SUPPORT for HB 1316, Relating to Torts. HB 1316 brings a measure of fairness to the judicial system for design professionals, whose beneficial public works projects greatly improve the quality of life for Hawaii's citizens. Unfortunately the professional liability risk for our small local firms far outweighs their financial reward from these projects. This burden to small design firms is particularly troublesome when our role in the life of the highway (and our profits from these projects) is so small. We are typically involved for a small window of only one or two years, while the State has the longterm responsibility for maintenance and repair of the highway system, and its citizens enjoy the long-term benefit of the project. It is simply unfair to shift so much of the risk resulting from highway accidents to design professionals.

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

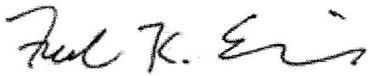
karamatsu3-Leanne

From: Fred Erskine [fred@erskinearchitects.com]
Sent: Monday, February 23, 2009 3:48 PM
To: JUDtestimony
Subject: Support for HB 1316

We at Erskine Architects, Inc. wish to express our SUPPORT for HB 1316, Relating to Torts. HB 1316 brings a measure of fairness to the judicial system for design professionals, whose beneficial public works projects greatly improve the quality of life for Hawaii's citizens. Unfortunately the professional liability risk for our small local firms far outweighs their financial reward from these projects. This burden to small design firms is particularly troublesome when our role in the life of the highway (and our profits from these projects) is so small. We are typically involved for a small window of only one or two years, while the State has the longterm responsibility for maintenance and repair of the highway system, and its citizens enjoy the long-term benefit of the project. It is simply unfair to shift so much of the risk resulting from highway accidents to design professionals.

Thanks for your consideration. If you have any questions regarding our support for HB 1316, please don't hesitate to contact me.

Mahalo.



Fred Erskine, AIA
Erskine Architects, Inc.
540 Lagoon Drive, Suite 4
Honolulu, Hi. 96819
Phone: 808.833.8891
Fax: 808.834.8477

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karamatsu3-Leanne

From: Rand Nakamura [rand@inkarch.com]
Sent: Monday, February 23, 2009 4:46 PM
To: JUDtestimony
Subject: HB 1316, Relating to Torts

WTN Architecture, Inc. expresses our SUPPORT for HB 1316, Relating to Torts. HB 1316 brings a measure of fairness to the judicial system for design professionals, whose beneficial public works projects greatly improve the quality of life for Hawaii's citizens. Unfortunately the professional liability risk for our small local firms far outweighs their financial reward from these projects. This burden to small design firms is particularly troublesome when our role in the life of the highway (and our profits from these projects) is so small. We are typically involved for a small window of only one or two years, while the State has the longterm responsibility for maintenance and repair of the highway system, and its citizens enjoy the long-term benefit of the project. It is simply unfair to shift so much of the risk resulting from highway accidents to design professionals.

Thank you,

Rand Nakamura

WTN Architecture, Inc.
650 Iwilei Road, Suite 288
Honolulu, Hawaii 96817
Phone: (808) 536-1174
Fax: (808) 536-1559
Email: rand@inkarch.com



TreeHouse HI Team, LLC

P.O. Box 5410, Kaneohe, Hawaii 96744-9165

ARCHITECTURE
PROJECT
RESOURCE
MANAGEMENT

February 23, 2009

EMAILED TESTIMONY TO: JUDtestimony@Capitol.hawaii.gov

**Hearing Date: Tuesday, February 24, 2:05 p.m., Conference Room 325
(House Committee on Judiciary)**

Honorable Representatives Jon Riki Karamatsu, Chair, Ken Ito, Vice Chair, and
Members of the House Committee on Judiciary

Subject: **HB 1316, Relating to Torts**

Dear Chair Karamatsu, Vice Chair Ito, and Committee Members,

TreeHouse HI Team, LLC, a Hawaii-owned and operated, small business architectural firm, appreciates this opportunity to express our **support for HB 1316, Relating to Torts.**

HB 1316 brings a measure of fairness to the judicial system for design professionals, whose beneficial public works projects greatly improve the quality of life for Hawaii's citizens. Unfortunately the professional liability risk for our small local firms far outweighs their financial reward from these projects. This burden to small design firms is particularly troublesome when our role in the life of the highway (and our profits from these projects) is so small. We are typically involved for a small window of only one or two years, while the State has the long-term responsibility for maintenance and repair of the highway system, and its citizens enjoy the long-term benefit of the project. It is simply unfair to shift so much of the risk resulting from highway accidents to design professionals. Although, while we favor the full abolition of joint and several liability, we believe **HB 1316** is a reasonable compromise, with the design professional still subject to joint and several liability if they are greater than 25% at fault.

We appreciate the continuing efforts of your committee and the members of the Senate to assist the small businesses in Hawaii. Thank you for the opportunity to testify in **support of HB 1316.**

Sincerely,
TreeHouse HI Team, LLC

Sundae G. Funai, AIA
President

TANIMURA & ASSOCIATES, INC.

Consulting Structural Engineers

925 Bethel Street Suite 309 Honolulu, Hawaii 96813

Telephone (808) 536-7692 Fax (808) 537-9022

February 23, 2009

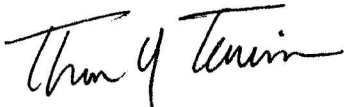
To: **Honorable Representative Jon Riki Karamatsu, Chair
Representative Ken Ito, Vice-Chair
Members of the House Committee on Judiciary**

Subject: **HB 1316, Relating to Torts**

As a consulting engineering company, we strongly support HB 1316. HB 1316 brings a measure of fairness to the judicial system for design professionals, whose beneficial public works projects greatly improve the quality of life for Hawaii's citizens. Unfortunately the professional liability risk for our small local firms far outweighs their financial reward from these projects.

We strongly urge you to support HB 1316, Relating to Tort Reform and make a decision to move this bill to the Senate.

Sincerely,
Tanimura & Associates, Inc.



Thomas Y. Tanimura
President

From: don shaw [donshawaia@mac.com]
Sent: Monday, February 23, 2009 7:10 PM
To: JUDtestimony
Subject: SUPPORT for HB 1316, Relating to Torts.

Don Shaw AIA, Inc. expresses our SUPPORT for HB 1316, Relating to Torts.

HB 1316 brings a measure of fairness to the judicial system for design professionals.

I sincerely believe that our projects improve the quality of life for Hawaii's citizens.

Unfortunately the professional liability risk for our small local firms far outweighs their financial reward from these projects.

This burden to small design firms is particularly troublesome when our role in the life of transportation projects (and our profits from these projects) is so small.

We are typically involved for a small window of only one or two years, while the State has the longterm responsibility for maintenance and repair of the transportation system, (and its citizens also enjoy the long-term benefits of the project.

It is simply unfair to shift so much of the risk resulting from accidents to design professionals.

Don Shaw
808-295-7429



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House Committee on Judiciary

Emailed testimony to: JUDtestimony@Capitol.hawaii.gov

To: Representative Jon Riki Karamatsu, Chair
Representative Ken Ito, Vice Chair
Members of the House Committee on Judiciary

From: Karen Hong, Finance Insurance Ltd.

Date: Tuesday, February 24, 2009, 2:00 pm
Conference Room 325

Subject: Support of **HB 1316 – Relating to Torts**

As the insurance agent for many of the architectural and engineering firms doing business in Hawaii, I **support the passage of HB 1316.**

Design professional's carry professional liability insurance, which like most malpractice insurance coverage is very expensive. When a design professional is put into a position of paying for more than their fair share of a claim, it increases the cost and availability of their insurance and the industry as a whole.

Unlike contractors, who can declare bankruptcy and then start a new business all over again, design professionals have a personal liability. They cannot easily escape their liabilities and can lose their personal assets. To have this risk on a frivolous claim is not fair.

Design professionals, should pay for their share of the loss due to their portion of negligence, but not more than their share, when the percentage is negligible. I feel that this bill is more than generous in that if the design professional is 25% or more negligent, then joint and several liability would still apply.

Thank you for the opportunity to testify in support of HB 1316.

Please feel free to contact me at 808-522-2095 if you have any questions.

karamatsu3-Leanne

From: Michael J. Riehm [ropa@hawaii.rr.com]
Sent: Tuesday, February 24, 2009 6:39 AM
To: JUDtestimony
Subject: HB 1316, Relating to Torts

Subject: HB 1316, Relating to Torts

Hearing Date: Tuesday, February 24, 2:05 p.m., Conference Room 325
(House Committee on Judiciary)

Riehm Owensby Planners Architects expresses our SUPPORT for HB 1316, Relating to Torts. HB 1316 brings a measure of fairness to the judicial system for design professionals, whose beneficial public works projects greatly improve the quality of life for Hawaii's citizens. Unfortunately the professional liability risk for our small local firms far outweighs their financial reward from these projects. This burden to small design firms is particularly troublesome when our role in the life of the highway (and our profits from these projects) is so small. We are typically involved for a small window of only one or two years, while the State has the longterm responsibility for maintenance and repair of the highway system, and its citizens enjoy the long-term benefit of the project. It is simply unfair to shift so much of the risk resulting from highway accidents to design professionals.

Michael J. Riehm, A.I.A.
Riehm Owensby Planners Architects
P.O. Box 390747
Kailua-Kona, Hawaii 96739
Tel: 808-322-6115
Cell: 808-936-8202
Fax: 808-322-3391
Email: ropa@hawaii.rr.com



February 24, 2009

EMAILES TESTIMONY TO: JUDtestimony@Capitol.hawaii.gov
Hearing Date: Tuesday February 24, 2:05 PM, Conference Room 325
(House Committee on Judiciary)

Subject: HB 1316, Relating to Torts

Dear Chair Karamatsu, Vice Chair Ito, and Committee Members

I am a principal at the architectural firm Ferraro Choi and Associates, a 25 person small business providing design services to the State of Hawaii, The City of Honolulu, the Federal Government, and numerous private institutions such as the YWCA and the Hawaii Theatre. This bill is extremely important to not only our firm but the tens of engineering firms we employ in our design team for our projects. As design professional, we take on the responsibility of ensuring our buildings meet codes to ensure the public safety while providing facilities that enhance our client's needs and while doing so, protect the environment.

HB 1316 brings a measure of fairness to the judicial system for design professionals whose liability risks for a small business are far outweighed by the financial reward from projects for the public. I greatly encourage you to pass it into law.

Thank you,

Joe Ferraro, FAIA, LEED AP
Principal
Ferraro Choi and Associates, Ltd.

karamatsu3-Leanne

From: Mike [mikekelso@hawaii.rr.com]
Sent: Tuesday, February 24, 2009 7:53 AM
To: JUDtestimony
Cc: Karen Hong
Subject: HB 1316, Relating to Torts

**Hearing Date: Tuesday, February 24, 2:05 p.m., Conference Room 325
(House Committee on Judiciary)**

Kelso Architects, inc. expresses our SUPPORT for HB 1316, Relating to Torts. HB 1316 brings a measure of fairness to the judicial system for design professionals, whose beneficial public works projects greatly improve the quality of life for Hawaii's citizens. Unfortunately the professional liability risk for our small local firms far outweighs their financial reward from these projects.

This burden to small design firms is particularly troublesome when our role in the life of the highway (and our profits from these projects) is so small. We are typically involved for a small window of only one or two years, while the State has the long term responsibility for maintenance and repair of the highway system, and its citizens enjoy the long-term benefit of the project. It is simply unfair to shift so much of the risk resulting from highway accidents to design professionals.

Respectfully submitted,



Kelso Architects inc.
By Michael Kelso, its President
25 S Kalaheo Ave
Kailua, HI 96734-2725
808-262-0006 (tel)
808-291-4944 (cel)
808-263-4864 (fax)
mikekelso@hawaii.rr.com

HB 1316 HD1

RELATING TO TORTS

**KEN HIRAKI
VICE PRESIDENT - GOVERNMENT & COMMUNITY AFFAIRS
HAWAIIAN TELCOM**

FEBRUARY 24, 2009

Chair Karamatsu and Members of the House Judiciary Committee:

I am Ken Hiraki, Vice President of Government and Community Relations, testifying on behalf of Hawaiian Telcom on HB 1316 HD1, "RELATING TO TORTS."

Hawaiian Telcom does not oppose providing protection to the design professional but cannot support this bill unless it is amended to clarify that public utilities are also exempt from joint and several liability. As currently drafted, this measure exempts design professionals from joint and several liability in tort cases involving a public road or rights of way, without providing a similar exemption for public utilities. Without an exemption, this bill discriminates against public utilities by unfairly exposing utilities to assume greater risk and legal liability in tort lawsuits than what was originally intended under current law.

By way of background, Hawaiian Telcom utilizes the state and county roads and rights of way to provide telecommunication services to the public. In tort cases involving an accident involving a utility pole along the public roads and highways, utilities (joint owners of the pole—telephone, electric, cable) such as Hawaiian Telcom, are often sued together with the state and county government as well as others responsible for the highway. Should the design professionals become exempt from joint and several liability, by default plaintiffs will then target the only parties remaining such as utilities. As a practical matter, this disparate shift in liability means that a utility will end up paying

more than its assigned share of liability despite the fact that it is usually the government entity that determines where and under what conditions a utility pole may be placed along a road or highway.

The passage of this bill in this form will inevitably lead to increased lawsuits and expenses for utilities such as Hawaiian Telcom. As a matter of fairness, we request that HB 1316 HD1 be amended to include a public utility exemption from joint and several liability as follows :

"§663-10.5 Government entity as a tortfeasor; public utility as tortfeasor; abolition of joint and several liability. [Notwithstanding] Any other law to the contrary notwithstanding, including but not limited to sections 663-10.9, 663-11 to 663-13, 663-16, 663-17, and [section] 663-31, in any case where a government entity is determined to be a tortfeasor along with one or more other tortfeasors, the government entity shall be liable for no more than that percentage share of the damages attributable to the government entity. In any such case, where one of the other tortfeasors is a public utility, then, likewise, the public utility shall be liable for no more than that percentage share of the damages attributable to the public utility.

For purposes of this section, "government entity" means any unit of government in this State, including the State and any county or combination of counties, department, agency, institution, board, commission, district, council, bureau, office, governing authority, or other instrumentality of state or county government, or corporation or other establishment owned, operated, or managed by or on behalf of this State or any county. For purposes of this section, "public utility" shall have the meaning set forth in section 269-1.

For purposes of this section, the liability of a government entity shall include its vicarious liability for the acts or omissions of its officers and employees."

Based on the aforementioned, unless the bill is amended to provide an exemption for utilities from joint and several liability, Hawaiian Telcom is opposed to the passage of HB 1316 HD1.

Thank you for the opportunity to testify.

karamatsu3-Leanne

From: Mike Street [mstreet@bowersandkubota.com]
Sent: Monday, February 23, 2009 3:20 PM
To: JUDtestimony
Subject: Subject: HB 1316, Relating to Torts

**Hearing Date: Tuesday, February 24, 2:05 p.m., Conference Room 325
(House Committee on Judiciary)**

I am a civil engineer with over 30 years of experience in the engineering and construction field. I would like to express my SUPPORT for HB 1316, Relating to Torts. I have been involved with many public works projects that have benefitted our community. HB 1316 brings a measure of fairness to the judicial system for the engineering profession. Currently, our local engineering firms assume a tremendous liability risk for these public work projects particularly with highway and roadway projects. This risk extends way past their time involvement in these projects and far outweighs their financial reward from these projects. The engineer is normally involved for a period of time of one to two years during design and construction, while the Government (State and County) has the long term responsibility for maintenance and repair of the roadway and highway system. The community also gets to enjoy the long-term benefit of the projects. It is simply unfair to shift so much of the risk resulting from roadway and highway accidents to engineering professionals. I urge you to pass HB 1316.

C. Michael Street, P.E.

Bowers + Kubota Consulting
Bowers + Kubota Management
Ph: (808) 836-7787 / (808) 833-1841
Mobile Ph: (808) 372-8466 / (808) 381-2530
Fax: (808) 834-4833
Email: mstreet@bowersandkubota.com

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John K. Mossman Design Inc.

P.O. Box 815 • Kaneohe, Hawaii 96744 • Telephone (808) 234-6464 • Facsimile (808) 234-6464

February 24, 2009

To: Representative Jon Riki Karamatsu, Chair, Ken Ito, Vice Chair and Members of
the House Committee on Judiciary


From: John K. Mossman

Re: **HB 1316, Relating to Torts**

Dear Chair Karamatsu, Vice Chair Ito, and Committee Members:

I am in full support of HB1316, and feel that it is a most reasonable and fair compromise
in the allocation of risks to Design Professionals.

Respectfully Yours,

A handwritten signature in black ink, appearing to read "John K. Mossman", with a long horizontal flourish extending to the right.

John K. Mossman