

**TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE CONSUMER  
LAWYERS OF HAWAII now known as the HAWAII ASSOCIATION FOR JUSTICE  
(HAJ) IN OPPOSITION TO H.B. No. 1316, HD 1**

February 24, 2009

To: Chairman Jon Riki Karamatsu and Members of the House Committee on Judiciary:

My name is Bob Toyofuku and I am presenting this testimony on behalf of the Hawaii Association for Justice (HAJ) in strong opposition to H.B. No. 1316, HD 1.

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.

However, their concern should not be about joint and several liability. It should be about indemnification. The arguments of the design professionals in support of this bill are misplaced. The design professional proponents of this bill state that this legislation is needed because they should be held liable only for their percentage of fault in highway design cases. However, they overlook a basic fact. When design professionals enter into a contract with the state to design a highway, the contract generally provides for the design professional to indemnify the state or county.

An indemnification provision in a contract, as a legal concept, means that the party indemnifying (design professional) is obligated to compensate the party being indemnified (government) for any loss that may occur during the performance of the contract.

In this context, the design professional is obligated to pay the state if the state is found to be liable. This is due to the indemnification provision in the contract and not the doctrine of joint and several liability. Under the indemnification provision, so long as the state is found liable, the design professional is obligated to pay and the defense of the litigation is often tendered to the design professional.

As to the provisions in this bill, 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, HAJ 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.

**karamatsu3-Leanne**

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**From:** Cathi Ho [cathi@collabstudio.com]  
**Sent:** Tuesday, February 24, 2009 11:08 AM  
**To:** JUDtestimony  
**Subject:** HB 1316, Relating to Torts

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

Collaborative studio LLC 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.

Cathi

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**karamatsu3-Leanne**

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**From:** Coral King [coral@AA-hi.com]  
**Sent:** Tuesday, February 24, 2009 11:00 AM  
**To:** JUDtestimony  
**Subject:** HB 1316, Relating to Torts

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

Arcadia Architecture 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 project (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 project, and its citizens enjoy the long-term benefit of the project.

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

Joseph K.M. Chan, AIA  
Vice President

*Coral C. King, AIA*  
President

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**karamatsu3-Leanne**

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**From:** Zelda Nash [zp\_nash@yahoo.com]  
**Sent:** Tuesday, February 24, 2009 12:13 PM  
**To:** JUDtestimony  
**Subject:** HB 1316, Relating to Torts

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

Atlas Engineering, LLC, 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 for 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 and unjust to shift so much of the risk resulting from highway accidents to design professionals.

**I worked as a professional civil engineer with the County of Hawaii, Department of Public Works, for 16 years. As such, I am especially qualified to design public works projects, including highway projects. However, because of the gross unfairness and immense liability, my firm, Atlas Engineering, LLC, would be extremely reluctant to take on State DOT work, even though I have been a licensed professional civil engineer for more than 20 years. As a civic minded, regular voter on Hawaii island, I am well aware of the public's need for highway projects.**

Civil engineers with my unique qualifications are in extremely high demand all over the world. I would like to take on public works jobs for our State and Hawaii County, but I am not willing to take on the unfair risk and liability.

Thank you for this opportunity to testify.

Sincerely,

Paul A. Nash, P.E.  
Atlas Engineering, LLC  
P.O. Box 11188  
Hilo, HI 96721  
(808) 965-7350  
FAX: (808) 965-9531



**karamatsu3-Leanne**

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**From:** Zelda Nash [zp\_nash@yahoo.com]  
**Sent:** Tuesday, February 24, 2009 12:20 PM  
**To:** JUDtestimony  
**Subject:** HB 1316, Relating to Torts

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

Atlas Engineering, LLC, 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 for 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 and unjust to shift so much of the risk resulting from highway accidents to design professionals.

**Our firm, Atlas Engineering, LLC, is especially qualified to design public works projects, including highway projects. However, because of the gross unfairness and immense liability, my firm would be extremely reluctant to take on State DOT work. As a civic minded, regular voter on Hawaii island, I am well aware of the public's need for highway projects.**

Civil engineering firms with our unique qualifications are in extremely high demand all over the world. I would like our firm to take on public works jobs for our State and Hawaii County, but I am not willing for our firm to take on the unfair risk and liability.

Thank you for this opportunity to testify.

Sincerely,

Colleen "Zelda" Nash, Project Manager  
Atlas Engineering, LLC  
P.O. Box 11188  
Hilo, HI 96721  
(808) 965-7350  
FAX: (808) 965-9531

**karamatsu3-Leanne**

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**From:** Chris Dacus [chris.dacus@gmail.com]  
**Sent:** Tuesday, February 24, 2009 12:22 PM  
**To:** JUDtestimony  
**Subject:** HB 1316, Relating to Torts

> EMAIL TO: [JUDtestimony@Capitol.hawaii.gov](mailto: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)

>

> Hawaii Chapter of the American Society of Landscape 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  
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> 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.

>

> Chris Dacus

> President

> Hawaii Chapter of the American Society of Landscape Architects

## karamatsu3-Leanne

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**From:** Joel Kurokawa [joelk@kilandarch.com]  
**Sent:** Tuesday, February 24, 2009 2:01 PM  
**To:** JUDtestimony  
**Cc:** Christopher A. Dacus  
**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)

Ki Concepts LLC, a Honolulu based landscape architecture and planning firm, 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.



Landscape Architect  
State of Hawaii License No. 10659

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Principal

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**karamatsu3-Leanne**

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**From:** Allan Schildknecht [irrighi@hawaii.rr.com]  
**Sent:** Tuesday, February 24, 2009 2:04 PM  
**To:** JUDtestimony  
**Subject:** HB 1316

Dear Committee Members

Subject: HB 1316, Relating to Torts

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

I, Allan Schildknecht, President of Irrigation Hawaii, Ltd. would like 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.

*Allan G. Schildknecht*  
**IRRIGATION HAWAII, LTD.**  
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## karamatsu3-Leanne

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**From:** Colleen [cchoy@wkmlarch.com]  
**Sent:** Tuesday, February 24, 2009 2:59 PM  
**To:** JUDtestimony  
**Cc:** 'Janine Mori'; Myles Nishida  
**Subject:** House Bill 1316

Walters, Kimura, Motoda, Inc. expresses its 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 such as ours is particularly troublesome when our role in the life of the highway (and our profits from these projects) is so small. Generally, our involvement is for one to 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.

Mahalo,

Michael Motoda, ASLA  
Janine E. Mori, ASLA  
Myles Nishida, ASLA

**Lester H. Inouye  
& Associates Inc.**

Landscape      90 Kawanakoa Place  
Urban Design    Honolulu, Hawaii  
Planning        96817-1708

Tel 808 595-6979  
Fax 808 595-6980

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,

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

Lester H. Inouye and Associates 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.

