

TESTIMONY BEFORE
HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE

By Joseph P. Viola
Hawaiian Electric Company, Inc.

2:00 p.m., February 4, 2009

House Bill 1316
Relating to Torts

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

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

I.

HECO does not oppose granting protection to the design professionals, 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 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, 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 liability exposure in highway cases to the other so-called “deep pockets” -- including the

¹ See Hawaii Revised Statutes (“HRS”) § 663-10.9(4) (joint and several liability preserved in tort actions relating to highway maintenance and design, which includes “utility poles” (text attached)).

² The State or County that owns the highway may also be sued, along with other joint pole owners, which may include Hawaiian Telcom Company and the State or City and County.

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 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.



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

February 3, 2009

Hearing Date: Wednesday, February 4, 2:00 p.m., Conference Room 325

Honorable Representatives Robert N. Herkes, Chair, Glenn Wakai, Vice Chair, and Members of the House Committee on Consumer Protection & Commerce

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

Dear Chair Herkes, Vice Chair Wakai, 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, joint and several liability 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 HB 1316.**

Sincerely,

Terrance S. Arashiro, PE
Senior Vice President



THE LIMTIACO CONSULTING GROUP
CIVIL ENGINEERING AND ENVIRONMENTAL CONSULTANTS

February 3, 2009

EMAILED TESTIMONY TO: CPCtestimony@Capitol.hawaii.gov

Hearing Date: Wednesday, February 4, 2:00 p.m., Conference Room 325

Honorable Representatives Robert N. Herkes, Chair, Glenn Wakai, Vice Chair, and Members of the House Committee on Consumer Protection & Commerce

Subject: HB 1316, Relating to Torts

Dear Chair Herkes, Vice Chair Wakai, 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.

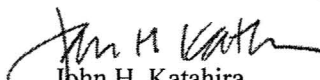
Under current law, a design professional who is pulled into a claim (even frivolously) and is found by a jury to be only one percent (1%) liable for damages could be forced to pay far more in damages. For example, a project worth \$50,000 could generate \$5,000 in profit; however, if found only 1% liable 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 protect and enhance our beautiful Hawaii. Thank you for the opportunity to testify in support of HB 1316.

Best Regards,
The Limtiaco Consulting Group, Inc.


John H. Katahira
Principal

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February 3, 2009

Honorable Robert N. Herkes, Chair

Honorable Glenn Wakai, Vice Chair

Honorable Members of the House Committee on Consumer Protection & Commerce

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.

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

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.

We recommend your passage of House Bill 1316. 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.



Consulting
Electrical
Engineers

ECS, Inc.

February 3, 2009

EMAILED TESTIMONY TO: CPCtestimony@Capitol.hawaii.gov

**Hearing Date: Wednesday, February 4, 2:00 p.m., Conference Room 325
(House Committee on Consumer Protection & Commerce)**

Honorable Representatives Robert N. Herkes, Chair, Glenn Wakai, Vice Chair, and Members of the House Committee on Consumer Protection & Commerce

Subject: HB 1316, Relating to Torts

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

ECS, Inc., a Hawaii-owned and -operated small business engineering firm, appreciates this opportunity to express our **support of HB 1316, Relating to Torts.**

As a small business owner and design professional, my potential professional and personal liability is at the forefront of my thoughts 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, especially for small firms such as ours. This is particularly true for highway cases, where the claims and awards can be large, creating risks under joint and several liability that far outweigh our firm's 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 the damages.

As a small business electrical engineering firm, serving as a subcontractor on State highway projects, our fee is typically less than \$50,000 (profit of less than \$5,000). Clearly, the State and its citizens benefit far more than the design professional by the design of these projects, and some protection for small business design professionals is warranted.

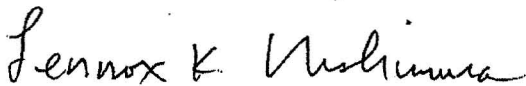
HB 1316 provides for more fairness in allocation of risk, but certainly does not allow us to escape our responsibilities. Design professionals who are found less than 25% at fault would be responsible only for the percentage of damages attributed to them, and would not be subject to

joint and several liability. If the design professional is twenty-five percent (25%) or more liable, joint and several liability would still apply.

We feel that fear on the part of small business design professionals limits the pool of highly qualified consultants available to conduct State projects. With many anticipated infrastructure projects, the impact of having small business firms decline to work for the DOI is to have this work go to large, predominately mainland firms, who choose to essentially self-insure and are able to absorb more risk, but who take their profits out of the State.

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

Sincerely,



Lennox K. Nishimura, P E., FACEC
President

**COALITION OF HAWAII ENGINEERING AND ARCHITECTURAL
PROFESSIONALS**

Email to: CPCtestimony@Capitol.hawaii.gov

Hearing Date: Wednesday, February 4, 2009, 2:00 pm, CR 325

Honorable Representatives Robert N. Herkes, Chair, Representative Glenn Wakai, Vice Chair and Members of the House Committee on Consumer Protection & Commerce

Subject: HB 1316 - 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.

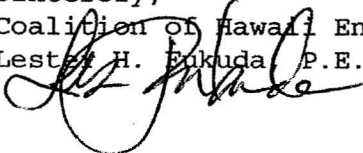
Our coalition is in STRONG Support of **HB 1316 Relating to Torts**. This bill addresses a specific problem area for design professionals: joint and several liability relating to highway accidents. Under current tort law design professionals and contractors have been the primary targets for any and all 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 - 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





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

Daniel S. C. Hong, PE
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Michael H. Nojima, PE, LEED AP
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February 3, 2009

EMAILED TESTIMONY TO: CPCtestimony@Capitol.hawaii.gov

Hearing Date: Wednesday, February 4, 2:00 p.m., Conference Room 325

Honorable Representatives Robert N. Herkes, Chair, Glenn Wakai, Vice Chair, and Members of the House Committee on Consumer Protection & Commerce

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

Dear Chair Herkes, Vice Chair Wakai, 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.**

As a small business owner and design professional, my potential professional and personal liability is at the forefront of my mind 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, 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 our firm's 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.

As a small business engineering firm, serving as a subcontractor on State projects, our fee is typically less than \$50,000 (profit of less than \$5,000). Clearly, the State and its citizens benefit far more than the design professional by the design of these projects, and some protection for small business design professionals is warranted.

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.

We feel that fear on the part of small business design professionals limits the available pool of highly qualified consultants available to conduct State projects. With the many infrastructure projects anticipated, the impact of having small business firms decline to work for the DOT is to have this work go to large, predominately mainland firms, who choose to essentially self-insure and are able to absorb more risk, but who take their profits out of the state.

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

Sincerely,

GRAY, HONG, NOJIMA & ASSOCIATES, INC.

Sheryl E. Nojima, PhD, PE
President



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 3, 2009

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Honorable Representatives Robert N. Herkes, Chair, Glenn Wakai, Vice Chair, and Members of the House Committee on Consumer Protection & Commerce

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

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

Engineering Solutions, Inc., a Hawaii-owned and operated small business engineering firm, appreciates this opportunity to our support of HB 1316, Relating to Torts.

While a certain amount of risk is a reality of doing business, the current situation under joint and several liability is very unfair. 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 our firm's potential profit. As a small business engineering firm, serving as a subcontractor on State projects, our fee is typically less than \$50,000 (profit of less than \$5,000). Clearly, the State and its citizens benefit far more than the design professional by the design of these projects, and some protection for small business design professionals is warranted. As a small business owner and design professional, my potential professional and personal liability is at the forefront of my mind in every project I consider.

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, will be forced to pay far more than his/her share of damages.

We feel that fear on the part of small business design professionals limits the available pool of highly qualified consultants available to conduct State projects. With the many infrastructure projects anticipated, the impact of having small business firms decline to work for the DOT is to have this work go to large, predominately mainland firms, who choose to essentially self-insure and are able to absorb more risk, but who take their profits out of the state.

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

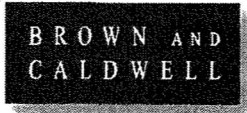
Sincerely,

ENGINEERING SOLUTIONS, INC.



Richard Frey, P.E.
Vice President

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Suite 2400
Honolulu, HI 96813
Tel: (808) 523-8499
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February 3, 2009

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Honorable Representatives Robert N. Herkes, Chair, Glenn Wakai, Vice Chair, and Members of the House Committee on Consumer Protection & Commerce

Subject: HB 1316, Relating to Torts

Dear Chair Herkes, Vice Chair Wakai, 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', written in a cursive style.

Douglas Lee, P.E.
Executive Engineer

DENNIS GLYNN ARCHITECTS, INC.

DATE:

FEBRUARY 3, 2009

EMAILED TESTIMONY TO: CPCtestimony@Capitol.hawaii.gov

Hearing Date: Wednesday, February 4, 2:00 p.m., Conference Room 325

Honorable Representatives Robert N. Herkes, Chair, Glenn Wakai, Vice Chair, and Members of the House Committee on Consumer Protection & Commerce

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

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

Dennis Glynn Architects, Inc., a Hawaii-owned and -operated small business engineering firm, appreciates this opportunity to our **support of HB 1316, 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 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, 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 our firm's 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.

As a small business engineering firm, serving as a subcontractor on State projects, our fee is typically less than \$50,000 (profit of less than \$5,000). Clearly, the State and its citizens benefit far more than the design professional by the design of these projects, and some protection for small business design professionals is warranted.

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.

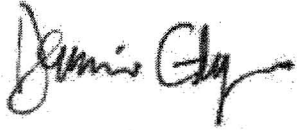
We feel that fear on the part of small business design professionals limits the available pool of highly qualified consultants available to conduct State projects. With the many infrastructure projects anticipated, the impact of having small business firms decline to work for the DOT is to have this work go to large, predominately mainland firms, who choose to essentially self-insure and are able to absorb more risk, but who take their profits out of the state.

370 PORTLOCK ROAD • HONOLULU, HI • 96825
PHONE: 808-394-6047 • FAX: 808-394-6077

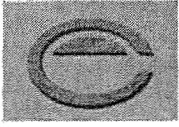
February 3, 2009

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

Sincerely,

A handwritten signature in black ink, appearing to read "Dennis Glynn". The signature is written in a cursive style with a long horizontal stroke at the end.

Dennis Glynn AIA
Principal



ENGINEERING CONCEPTS, INC.

Consulting Engineers

February 3, 2009

EMAILED TESTIMONY TO: CPCtestimony@Capitol.hawaii.gov

Hearing Date: Wednesday, February 4, 2:00 p.m., Conference Room 325

Honorable Representatives Robert N. Herkes, Chair, Glenn Wakai, Vice Chair, and Members of the House Committee on Consumer Protection & Commerce

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

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

Engineering Concepts, Inc., a Hawaii-owned and -operated small business engineering firm, appreciates this opportunity to our **support of HB 1316, 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 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, 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 our firm's 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.

As a small business engineering firm, serving as a subcontractor on State projects, our fee is typically less than \$50,000 (profit of less than \$5,000). Clearly, the State and its citizens benefit far more than the design professional by the design of these projects, and some protection for small business design professionals is warranted.

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.

We feel that fear on the part of small business design professionals limits the available pool of highly qualified consultants available to conduct State projects. With the many infrastructure projects anticipated, the impact of having small business firms decline to work for the DOT is to have this work go to large, predominately mainland firms, who choose to essentially self-insure and are able to absorb more risk, but who take their profits out of the state.

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

Riehm Owensby Planners Architects

P.O. Box 390747, Kailua-Kona, Hawaii 96739, Tel. 808.322.6115. Fax 808.322.3391

February 3, 2009

Dear Chair Herkes, Vice Chair Wakai, and Committee Members

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

Riehm Owensby Planners Architects, a Hawaii-owned and operated small business architectural firm, appreciates this opportunity to our **support of HB 1316, 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 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, 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 our firm's 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.

As a small business engineering firm, serving as a subcontractor on State projects, our fee is typically less than \$50,000 (profit of less than \$5,000). Clearly, the State and its citizens benefit far more than the design professional by the design of these projects, and some protection for small business design professionals is warranted.

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.

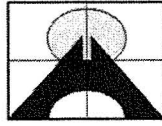
We feel that fear on the part of small business design professionals limits the available pool of highly qualified consultants available to conduct State projects. With the many infrastructure projects anticipated, the impact of having small business firms decline to work for the DOT is to have this work go to large, predominately mainland firms, who choose to essentially self-insure and are able to absorb more risk, but who take their profits out of the state.

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

Sincerely,



Michael J. Riehm, A.I.A.



ARCADIA ARCHITECTURE, INC.

DESIGN PLANNING PROJECT MANAGEMENT

February 3, 2009

EMAILED TESTIMONY TO: CPCTestimony@Capitol.hawaii.gov

Hearing Date: Wednesday, February 4, 2:00 p.m., Conference Room 325

Honorable Representatives Robert N. Herkes, Chair, Glenn Wakai, Vice Chair, and Members of the House Committee on Consumer Protection & Commerce

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

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

Arcadia Architecture, Inc., a Hawaii-owned and -operated small business architectural firm, appreciates this opportunity to our **support of HB 1316, Relating to Torts.**

As a small business owner and design professional, my potential professional and personal liability is a concern in every project we consider. 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 repairs and maintenance projects, where the claims and awards can be large, creating risks under joint and several liability that far outweigh our firm's 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. Design work on such projects is performed to design standards and codes, and is 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.

As a small business architectural firm, providing services on State projects, our fee is typically less than \$60,000 (profit of less than \$3,000). Clearly, the State and its citizens benefit far more than the design professional by our services on these projects, and some protection for small business design professionals is warranted.

Even without going to trial, insurance companies often settle for the design professional's insurance policy limits. This drives up the cost of insurance for all of us, **currently a staggering 3% of gross revenues** for a typical small design firm.

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.

We feel that fear on the part of small business design professionals limits the available pool of highly qualified consultants available to conduct State projects. With the many projects anticipated, the impact of having small business firms decline to work for the State is to have this work go to large, predominately mainland firms, who choose to essentially self-insure and are able to absorb more risk, but who take their profits out of the state.

We also feel that fear limits the design creativity that we will consider using on State projects.


We appreciate the continuing efforts of your committee and the members of the Senate to assist small businesses in Hawaii.

Thank you for your assistance on this important matter.

Sincerely,
ARCADIA ARCHITECTURE, INC.

A handwritten signature in cursive script that reads "Coral C. King".

Coral C. King AIA, President

A handwritten signature in cursive script that reads "Joseph K.M. Chan".

Joseph K.M. Chan, Vice President



FINANCE INSURANCE, LTD.

Quality Service For Your Insurance Needs

House Committee on Consumer Protection and Commerce

Emailed testimony to: CPCtestimony@Capitol.hawaii.gov

To: Representative Robert N. Herkes, Chair
Representative Glenn Wakai, Vice Chair
Members of the Committee of CPC

From: Karen Hong, Finance Insurance Ltd.

Date: Wednesday, February 4, 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 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 more than 25% 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.



650 Iwilei Road, Suite 288
Honolulu, Hawaii 96817
Telephone: (808) 536-1174
Fax: (808) 536-1559
Email: ink@inkarch.com

February 3, 2009

February 3, 2009

Honorable Representatives Robert N. Herkes, Chair, Glenn Wakai, Vice Chair, and Members of the House Committee on Consumer Protection & Commerce

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

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

INK ARCH. LLC, a Hawaii-owned and –operated small business architectural firm, appreciates this opportunity to our **support of HB 1316, 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 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, 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 our firm's 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. Architectural and 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.

As a small business architectural firm, serving as a subcontractor on State projects, our fee is typically less than \$50,000 (profit of less than \$5,000). Clearly, the State and its citizens benefit far more than the design professional by the design of these projects, and some protection for small business design professionals is warranted.

ARCHITECTURE
PLANNING
INTERIORS

February 3, 2009

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.

We feel that fear on the part of small business design professionals limits the available pool of highly qualified consultants available to conduct State projects. With the many infrastructure projects anticipated, the impact of having small business firms decline to work for the DOT is to have this work go to large, predominately mainland firms, who choose to essentially self-insure and are able to absorb more risk, but who take their profits out of the state.

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

Aloha,

A handwritten signature in black ink, appearing to read 'Maurice Kondo', with a stylized flourish at the end.

**Maurice Kondo, AIA
INK ARCH. LLC**



Franklin Wong and Associates Limited

Architecture/Interior Design/Construction Management

February 3, 2009

EMAILED TESTIMONY TO: CPCtestimony@Capitol.hawaii.gov

Hearing Date: Wednesday, February 4, 2:00 p.m., Conference Room 325

Honorable Representatives Robert N. Herkes, Chair, Glenn Wakai, Vice Chair, and Members of the House Committee on Consumer Protection & Commerce

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

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

Franklin Wong & Associates, Ltd., a Hawaii-owned and -operated small business engineering firm, appreciates this opportunity to our **support of HB 1316, 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 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, 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 our firm's 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.

As a small business engineering firm, serving as a subcontractor on State projects, our fee is typically less than \$50,000 (profit of less than \$5,000). Clearly, the State and its citizens benefit far more than the design professional by the design of these projects, and some protection for small business design professionals is warranted.

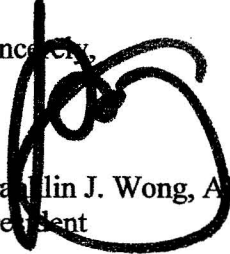
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700 Richards Street, Suite 2604
Honolulu, HI 96813-4605
Telephone 808 521-0958 Telefax 808 521-0961
Email fwa.ltd@hawaiiantel.net

We feel that fear on the part of small business design professionals limits the available pool of highly qualified consultants available to conduct State projects. With the many infrastructure projects anticipated, the impact of having small business firms decline to work for the DOT is to have this work go to large, predominately mainland firms, who choose to essentially self-insure and are able to absorb more risk, but who take their profits out of the state.

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

Sincerely,



Franklin J. Wong, AIA
President

FJW:jw



CONTROLPOINT
Surveying, Inc.

February 3, 2009

EMAILED TESTIMONY TO: CPCtestimony@Capitol.hawaii.gov

Honorable Representatives Robert N. Herkes, Chair, Glenn Wakai, Vice Chair, and Members of the House Committee on Consumer Protection & Commerce

Hearing Date: Wednesday, February 4, 2:00 p.m., Conference Room 325

Subject: HB 1316, Relating to Torts

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

ControlPoint Surveying, Inc., a Hawaii-owned and Honolulu/Maui-operated surveying firm, appreciates this opportunity to our **support of HB 1316, Relating to Torts.**

As a business owner and design professional, my potential professional and personal liability is at the forefront of my mind 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, especially for smaller 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 our firm's 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. Surveying 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.

As a business surveying firm, serving as a subcontractor on State projects, our fee is typically less than \$50,000 (profit of less than \$5,000). Clearly, the State and its citizens benefit far more than the design professional by the design of these projects, and some protection for small business design professionals is warranted.

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.

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

Very truly yours,

A handwritten signature in black ink, appearing to read 'Yue-Hong Yeh', with a stylized flourish at the end.

Yue-Hong "Ed" Yeh
PRESIDENT

Oahu: 1150 South King Street, Suite 1200
Honolulu, Hawaii 96814
Ph. (808) 591-2022 / Fax (808) 591-8333

Maui: 1129 Lower Main Street, Suite 102
Wailuku, Maui, Hawaii 96793
Ph. (808) 242-9641 / Fax (808) 244-9220

February 3, 2009

EMAILED TESTIMONY TO: CPCtestimony@Capitol.hawaii.gov

Hearing Date: Wednesday, February 4, 2:00 p.m., Conference Room 325

Honorable Representatives Robert N. Herkes, Chair, Glenn Wakai, Vice Chair, and Members of the House Committee on Consumer Protection & Commerce

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

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

Atlas Engineering, LLC, a Hawaii-owned and –operated small business engineering firm, appreciates this opportunity to our **support of HB 1316, 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 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, 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 our firm's 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.

As a small business engineering firm, serving as a subcontractor on State projects, our fee is typically less than \$50,000 (profit of less than \$5,000). Clearly, the State and its citizens benefit far more than the design professional by the design of these projects, and some protection for small business design professionals is warranted.

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.

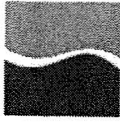
We feel that fear on the part of small business design professionals limits the available pool of highly qualified consultants available to conduct State projects. With the many infrastructure projects anticipated, the impact of having small business firms decline to work for the DOT is to have this work go to large, predominately mainland firms, who choose to essentially self-insure and are able to absorb more risk, but who take their profits out of the state.

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

Sincerely,

Paul Nash, P.E.

Atlas Engineering, P.O. Box 11188, Hilo, HI 96778



KAI HAWAII
STRUCTURAL & FORENSIC ENGINEERS

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

February 3, 2009

EMAILED TESTIMONY TO: CPCtestimony@Capitol.hawaii.gov

Hearing Date: Wednesday, February 4, 2:00 p.m., Conference Room 325

Honorable Representatives Robert N. Herkes, Chair, Glenn Wakai, Vice Chair, and Members of the House Committee on Consumer Protection & Commerce

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

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

KAI Hawaii, Inc., a Hawaii-owned and -operated small business engineering firm, appreciates this opportunity to our **support of HB 1316, 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 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, 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 our firm's 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.

As a small business engineering firm, serving as a subcontractor on State projects, our fee is typically less than \$50,000 (profit of less than \$5,000). Clearly, the State and its citizens benefit far more than the design professional by the design of these projects, and some protection for small business design professionals is warranted.

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.

We feel that fear on the part of small business design professionals limits the available pool of highly qualified consultants available to conduct State projects. With the many infrastructure projects anticipated, the impact of having small business firms decline to work for the DOT is to have this work go to large, predominately mainland firms, who choose to essentially self-insure and are able to absorb more risk, but who take their profits out of the state.

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

Sincerely,

Michael P. Hunnemann, P.E.
Vice President
KAI Hawaii, Inc.

31 North Pauahi Street, Second Floor * Honolulu * Hawaii * 96817
Telephone: (808) 533-2210 * Facsimile: (808) 533-2686 * E-mail Address: mail@kaihawaii.com

wakai1-Karen

From: Tom Tanimura
Sent: Tuesday, February 03, 2009 4:46 PM
To: CPCtestimony
Subject: HB 1316

Honorable Representatives Robert N. Herkes, Chair, Glenn Wakai, Vice Chair, and Members of the House Committee on Consumer Protection & Commerce

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

Tanimura & Associates, Inc., a Hawaii-owned and -operated small business engineering firm, appreciates this opportunity to support **HB 1316**, 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 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, 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 our firm's 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.

As a small business engineering firm, serving as a subcontractor on State projects, our fee is typically less than \$50,000 (profit of less than \$5,000). Clearly, the State and its citizens benefit far more than the design professional by the design of these projects, and some protection for small business design professionals is warranted.

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.

We feel that fear on the part of small business design professionals limits the available pool of highly qualified consultants available to conduct State projects. With the many infrastructure projects anticipated, the impact of having small business firms decline to work for the DOT is to have this work go to large, predominately mainland firms, who choose to essentially self-insure and are able to absorb more risk, but who take their profits out of the state.

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

Sincerely yours,

Tom Tanimura, P.E.



February 3, 2009

eMailed Testimony to: CPCtestimony@Capitol.hawaii.gov

Hearing Date: Wednesday, February 4, 2:00 p.m., Conference Room 325

Honorable Representatives Robert N. Herkes, Chair, Glenn Wakai, Vice Chair, and Members of the House Committee on Consumer Protection & Commerce

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

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

Richard Reese Designs, LLC, a Hawaii-owned and –operated small business engineering firm, appreciates this opportunity to our **support of HB 1316**, 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 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, 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 our firm's 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.


As a small business engineering firm, serving as a subcontractor on State projects, our fee is typically less than \$50,000 (profit of less than \$5,000). Clearly, the State and its citizens benefit far more than the design professional by the design of these projects, and some protection for small business design professionals is warranted.

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.

We feel that fear on the part of small business design professionals limits the available pool of highly qualified consultants available to conduct State projects. With the many infrastructure projects anticipated, the impact of having small business firms decline to work for the DOT is to have this work go to large, predominately mainland firms, who choose to essentially self-insure and are able to absorb more risk, but who take their profits out of the state.

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

Sincerely,



Richard Reese
For Richard Reese Designs LLC

HB1316/3 Feb 09

Richard Reese Designs LLC
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Honolulu, Hawaii 96814
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HB 1316

RELATING TO TORTS

**HAWAIIAN TELCOM
WRITTEN TESTIMONY**

FEBRUARY 4, 2009

Chair Herkes and Members of the House Consumer Protection Committee:

Hawaiian Telcom opposes HB 1316 "RELATING TO TORTS."

Hawaiian Telcom 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 unfairly exempts design professionals from joint and several liability in tort cases involving a public road or rights of way, without fairly providing a similar exemption for public utilities. Without an equal exemption, this bill unfairly subjects other defendants 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 or county government responsible for the highway. Should the design professionals become exempt from joint and several liability, by default plaintiffs will then target the parties remaining such as the State and County governments and public utilities. As a practical matter specific to the public utility, this disparate shift in liability means that a public utility will end up paying more than its assigned share of liability despite the fact that it is usually the government entity

(sometimes on the advice of design engineers) 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 public utilities such as Hawaiian Telcom. As a matter of fairness, we request that HB 1316 be amended to include a public utility exemption from joint and several liability as follows:

"§663-___ Design Professional as a tortfeasor; public highways; public utility as tortfeasor; public highways.

(a) 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 663-31, in any case involving tort claims relating to the maintenance and design of public highways, where a design professional or public utility is determined to be a tortfeasor along with one or more other tortfeasors, the design professional or public utility shall be liable for no more than that percentage share of damages attributable to the design professional or public utility, except when the design professional's or public utility's degree of negligence is twenty-five per cent or more.

(b) For purposes of this section:

(1) "Design professional" means a professional engineer, architect, surveyor, or landscape architect licensed under chapter 464, and "public utility" means a person or entity so designated under chapter 269 ; and

(2) The liability of a design professional or public utility shall include vicarious liability for the acts or omissions of the design professional's or public utility's officers and employees."

Based on the aforementioned, unless the bill is amended to provide the same exemption from joint and several liability as provided to design professionals, Hawaiian Telcom is opposed to the passage of HB 1316 .

Thank you for the opportunity to testify.

**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**

February 4, 2009

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

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.

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, 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.

wakai1-Karen

From: John Ida [jjida@UWArchitects.com]
Sent: Tuesday, February 03, 2009 4:51 PM
To: CPCtestimony
Subject: HB 1316, Relating to Torts - Hearing Date: Wednesday, February 4, 2009 @ 2:00 pm
Conference Room 325

Dear Chair Herkes, Vice Chair Wakai, and Committee Members:

Urban Works, Inc., a Hawaii-owned and –operated small business Architectural Firm, appreciates this opportunity to give our **support of HB 1315**, 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 every project I consider. While a certain amount of risk is a reality of doing business, the current situation under the 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 the firm's 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/Architectural 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 (1) percent liable for damages, could be forced to pay far more than his/her share of damages.

As a Small Business engineering/architectural firm, serving as a subcontractor on State projects, our fee is typically less than \$50,000 (profit of less than \$5,000). Clearly, the State and its citizens benefit far more than the design professional by the design of these projects, and some protection for small business design professionals is warranted.

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 (25%) or more liable, joint and several liability would still apply.

We feel that fear on the part of small business design professionals limits the available pool of highly qualified consultants available to conduct State projects. With the many infrastructure projects anticipated, the impact of having small business firms decline to work for the DOT is to have this work go to large, predominately mainland firms, who choose to essentially self-insure and are able to absorb more risk, but who take their profits out of the state.

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

Sincerely;
Urban Works, Inc.

John J. Ida, AIA, CSI
Partner

February 3, 2009

EMAILED TESTIMONY TO: CPCtestimony@Capitol.hawaii.gov

Hearing Date: Wednesday, February 4, 2:00 p.m., Conference Room 325

Honorable Representatives Robert N. Herkes, Chair, Glenn Wakai, Vice Chair, and Members of the House Committee on Consumer Protection & Commerce

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

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

KN Consulting Services, Inc., a Hawaii-owned and -operated small business engineering firm, appreciates this opportunity to our **support of HB 1316**, 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 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, 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 our firm's potential profit.

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

Kenneth O. Nagai, President
KN Consulting Services, Inc.