TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII ASSOCIATION FOR JUSTICE (HAJ) IN OPPOSITION TO H.B. No. 1316, HD 2

March 19, 2009

To: Chairperson Rosalyn Baker and Members of the Senate Committee on Commerce and Consumer Protection:

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 2.

The purpose of this bill is an attempt to materially change the statute that was passed in 1986 and absolve design professionals and public utilities 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 and public utilities 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 and utilities 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, the concern of the design professionals 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 and public utilities would shift liability currently covered by insurance for design professionals and public utilities 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.

March 18, 2009

EMAILED TESTIMONY TO: CPNtestimony@Capitol.hawaii.gov

Hearing Date: **Thursday, March 19, 9:00 a.m., Conference Room 229**
Senate Committee on Commerce & Consumer Protection

Honorable Senators Rosalyn H. Baker, Chair, David Y. Ige, Vice Chair, and Members of the Senate Committee on Commerce and Consumer Protection

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

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

My name is Jim Lyon and a licensed Hawaii professional civil engineer since 1994. I work for a locally owned, Hawaii-based consulting firm, Lyon Associates, Inc. that was founded in 1961 by my father.

I am in **strong support of HB 1316, Relating to Torts.**

As a consulting engineer I feel that we are trained and retained by our Clients to create plans using commonly accepted standards accepted by the Federal Highway Administration (FHWA), Hawaii Department of Transportation (HDOT), and guidebooks such as the Manual on Uniform Traffic Control Devices (MUTCD), and many other guidelines that dictate our design.

The plans we create allow a scope of work to be defined so that the Government/Client can obtain competitive bid prices from various General Contractors. As a percentage of construction costs, our fees range in the 4 to 6% range, according to the American Society of Civil Engineers (ASCE).

To do business with government agencies, and other developers, we carry professional liability insurance known as Errors and Omissions Policy. To use this insurance as a means of convenience for blanket lawsuits as a means to penalize our industry beyond an amount proportional to the design professionals' fee is not fair. Cost of insurance is rising annually and balance must be maintained and HB 1316 is a step in the right direction.

I am proud to be a consulting engineer and take pride in providing a service to the community and ask for your support of this important legislation.

Thank you for your consideration.

Jim Lyon, P.E., LEED AP, CFM
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