



**WRITTEN TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-NINTH LEGISLATURE, 2017**

ON THE FOLLOWING MEASURE:

H.B. NO. 1022, H.D. 1, S.D. 1, MAKING APPROPRIATIONS FOR CLAIMS AGAINST THE STATE, ITS OFFICERS, OR ITS EMPLOYEES.

BEFORE THE:

SENATE COMMITTEE ON WAYS AND MEANS

DATE: Tuesday, April 4, 2017

TIME: 9:30 a.m.

LOCATION: State Capitol, Room 211

TESTIFIER(S): **WRITTEN TESTIMONY ONLY.**

(For more information, contact Caron M. Inagaki,
Deputy Attorney General, at 586-3967)

Chair Tokuda and Members of the Committee:

The Department of the Attorney General supports this administration bill.

The purpose of this bill is to seek appropriations to satisfy claims against the State, its officers, or its employees, including claims for legislative relief, judgments against the State, settlements, and miscellaneous claims.

The bill contains twenty-seven (27) claims that total \$10,374,433.23. Twenty-two (22) claims are general fund appropriation requests that total \$4,611,412.79, and five (5) claims are appropriation requests from departmental funds that total \$5,763,020.44. Attachment A provides a brief description of each claim in the bill.

Since the bill was last amended, three (3) new claims have been resolved for an additional \$11,030,000.00. Two (2) claims are general fund appropriation requests that total \$950,000.00, and one (1) claim is to approve the payment of claims from a departmental fund in the amount of \$1,080,000.00. As to the \$10,080,000.00, no legislative appropriation of funds is needed since the moneys at issue are in the department's project budget. All that is needed is legislative approval to pay the claims for unpaid subcontractors and suppliers from the project's budget. Attachment B provides a brief description of the new claims.

Including the new claims, the appropriation request totals \$22,404,432.23 allocated among thirty (30) claims. Of this total \$6,561,411.79 are general fund appropriation requests, and \$15,843,020.44 are appropriation requests from departmental funds.

The Department also requests that the original amount of \$1,000,000.00 requested for the *Bridge Aina Le'a, LLC v. State of Hawaii Land Use Commission* case, Civil No. 11-00414 SOM KJM, USDC, be appropriated. The Committee on Judiciary and Labor expressed concerns about this appropriation amount and reduced the amount to \$1.00 to encourage further discussion. Bridge Aina Le'a brought this lawsuit against the Land Use Commission (LUC) and individual commission members alleging that when the LUC changed the classification of the subject property on Hawai'i Island from agriculture to urban, it constituted a regulatory taking that required just compensation. Bridge Aina Le'a was seeking approximately \$29,000,000.00 in damages. The Department believes that a settlement of \$1,000,000 is in the best interests of the State because, if Plaintiff prevailed at trial, the award would almost certainly be a much larger amount.

If the \$1,000,000 is appropriated, the total appropriation request would then be \$23,404,431.23 allocated among the thirty (30) claims.

The Department has had a longstanding policy of advising agencies as to how to avoid claims such as those in this bill. The Department has also complied with section 37-77.5, Hawaii Revised Statutes, which requires the Attorney General to develop and implement a procedure for advising our client agencies on how to avoid future claims.

We respectfully request passage of this bill with the additional appropriations and amendments.

parts but one and were also successful in reducing the amount sought by about \$40,000. This is the total amount reflected in the final Ninth Circuit order after all the reductions.

DEPARTMENT OF HUMAN SERVICES:

**Ah Chong, et al. v. McManaman
Civil No. 13-00663 LEK-KSC, USDC**

**\$1,100,000.00 (General Fund)
Settlement**

Plaintiffs filed a class lawsuit in federal court alleging that the State's foster care maintenance payments are inadequate under the Social Security Act, that the Department of Human Services failed to properly set its payment rates, and that DHS failed to periodically review and update its payment rates. After extensive discovery and motions work, the parties settled both this case and a related state class action lawsuit with the assistance of the federal magistrate.

As part of the settlement, the parties agreed to negotiate the amount of Plaintiffs' counsel's attorneys' fees and costs. Plaintiffs claimed they were entitled to over \$2.93 million in fees and costs for the federal lawsuit. The parties eventually agreed to an amount of \$1.1 million for all fees, costs, non-taxable expenses, and taxes, with no interest. The amount is subject to approval by the federal judge, who has given permission to notify class members that Plaintiffs are seeking \$1.1 million in fees and costs. Final approval of the attorneys' fees and the settlement of the lawsuit are subject to legislative appropriation of the \$1.1 million, among other conditions.

**Carroll, et al. v. Camit, et al.
Civil No. 12-1-0622(2), Second Circuit**

**\$ 18,500.00 (General Fund)
Settlement**

In June 2010, Defendant Camit, a social worker employed by the Adult and Community Protective Services Office (APS) of the Department of Human Services, removed Christopher Carroll's terminally ill, disabled wife from the family home in Mr. Carroll's absence based on alleged psychological abuse and based on Mrs. Carroll's request. After her removal, Mr. Camit did not inform Mr. Carroll regarding his wife's whereabouts. A witness for the Plaintiff testified at trial that Mr. Camit suggested to a Child Protective Services (CPS) worker to further restrict Mr. Carroll's visitation with his minor children who had been removed from the home by CPS per Family court order. Although Mr. Camit acted within his authority to remove Mrs. Carroll from the family residence, the jury found Mr. Camit liable for Intentional Infliction of Emotional Distress based on these circumstances.

Two days later, after Mr. Carroll determined that his wife had been removed from the home in his absence, Mr. Carroll came to the APS office and declared that he was making a citizen's arrest of Mr. Camit and his supervisor for kidnapping his wife. A physical altercation occurred between Mr. Camit and Plaintiff when Mr. Camit forced his

way out of the APS office. Although Mr. Carroll was convicted of the criminal offense of Harassment for his conduct in that incident, the jury determined that Mr. Camit committed Battery due to the excessive force he used to get past Mr. Carroll while leaving the office.

A jury trial in March 2016 resulted in a verdict finding that Mr. Camit was liable for Intentional Infliction of Emotion Distress and Battery upon Mr. Carroll. The jury found no liability against the State or Mr. Camit's supervisor. The jury awarded \$7,500 in general damages and \$10,000 in punitive damages. While Mr. Camit's appeal was pending, appellate mediation was ordered. Based on the Mediator's recommendations, a settlement was reached by which the Plaintiff would accept \$18,500 and waive any claim for the award of costs and prejudgment and post-judgment interest.

J.E., et al. v. Wong, et al.
Civil No. 14-00399 HG-KJM, USDC

\$ 396,858.00 *(General Fund)*
Settlement

In this 42 U.S.C. § 1983 action, the Plaintiffs claimed that the Department of Human Services violated the federal Medicaid Act by not covering Applied Behavioral Analysis as a treatment for autism. The court granted summary judgment in favor of the Plaintiffs. The parties settled Plaintiffs' attorneys' fees.

Sheehey, et al. v. State of Hawaii
Civil No. 14-1-1709-08 VLC, First Circuit

\$2,341,103.10 *(General Fund)*
Settlement

Plaintiffs filed a class lawsuit in state court alleging that the State's foster care maintenance payments are inadequate under federal and state law, and that DHS failed to periodically review and update its payment rates. Because the payments for adoption assistance, permanency assistance and higher education are capped at the amount of the foster care payments, plaintiffs alleged that those payments were also inadequate. Claims were also asserted on behalf of children in the care of resource caregivers, permanent custodians/legal guardians, and adoptive parents of former foster children, asserting that those children were deprived of adequate care because the payments to their caregivers were too low. Plaintiffs sought damages in the amount of the difference between what they claim they should have been paid by DHS and what they were paid. A related federal class action lawsuit, which was settled together with this state lawsuit, sought to require increased foster care payments and periodic review in the future (prospective relief). After extensive discovery and motions work in the federal lawsuit, the parties settled both this case and the federal lawsuit with the assistance of the federal magistrate.

Settlement of this lawsuit provides for the establishment of a common fund in the amount of \$2,341,103.10, to be used to pay attorneys' fees, costs, and expenses to administer the settlement, with the balance to be distributed among those who under the settlement are entitled to a payment: resource caregivers (foster parents), legal

guardians/permanent custodians, adoptive parents of former foster children, and youth in the higher education program who received monthly payments from DHS from July 1, 2013 to June 30, 2014. The amount of each person's payment is based on the number of days each eligible child was in their care during that fiscal year. The gross amount in the common fund was calculated by using \$35 per month per eligible child in care, prorated for actual days in care. Plaintiffs believed they were entitled to a much higher amount, for a longer period of time including up through trial if there had been one.

DEPARTMENT OF LAND AND NATURAL RESOURCES:

**Claim of First Insurance Company of Hawaii, Inc. \$ 18,000.00 (General Fund)
Settlement**

First Insurance Company of Hawaii, Inc. made an insurance subrogation claim on behalf of its insured whose vehicle was totaled in a collision with a State employee who was acting within the scope of his employment. The vehicle was a brand new Nissan Leaf valued at \$33,000 when new, and with a market value exceeding of \$25,000 at the time of the accident. Following an investigation of this claim, a settlement at a compromised value was achieved without court intervention or related costs.

LAND USE COMMISSION:

**Bridge Aina Le'a, LLC v. State of Hawaii Land Use \$ 1.00 (General Fund)
Commission, Civil No. 11-00414 SOM KJM, USDC Settlement**

The Land Use Commission (LUC) changed the land classification of property on Hawaii Island from agriculture to urban. The change was subject to some conditions. Specifically, the owner was required to complete (including certificates of occupancy) 385 affordable housing units. Twenty years later the only "affordable housing" at the site was several incomplete multi-unit dwellings that did not have utilities and could not actually be used.

The LUC found as a matter of fact that this work did not constitute "substantial commencement" with the affordable housing requirement. The Supreme Court reversed, reasoning that \$20 million of planning and other preparation constituted "substantial commencement." *DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC.*, 134 Haw. 187, 191, 339 P.3d 685, 689 (2014). Bridge's lawsuit sought \$40,000,000.00 arguing that the improper reversion was a temporary regulatory taking requiring payment of just compensation. The State was able to obtain some favorable rulings but was not able to get the entire case dismissed. The matter was scheduled for decision by a federal jury trial. Plaintiff intended to argue that its damages totaled some \$29 million. The State agreed to the settlement shortly before trial.

DEPARTMENT OF PUBLIC SAFETY:

Antoque v. State of Hawaii, et al.
Civil No. 15-1-0262, Third Circuit

\$ 35,000.00 *(General Fund)*
Settlement

An inmate was injured while taking a shower at the Hawaii Community Correctional Center. The ceiling of the shower stall broke away from the rest of the ceiling and fell, striking the inmate on the head. Prior to this incident, when moisture appeared to damage the ceilings of the showers and peeling of the paint resulted, the shower ceilings were painted but no further repairs were performed. Eventually the drywall ceiling material softened to the point where it simply fell, causing this incident. The inmate developed cervical symptoms. It was determined that he had a pre-existing spinal stenosis in his neck that became symptomatic as a result of this incident. This cervical injury has caused radiculopathy in the plaintiff's arms, back, and legs. The case proceeded to the Court Annexed Arbitration Program, which resulted in an award to the inmate in the amount of \$44,011.88. The case later settled for \$35,000.00.

Freitas, et al. v. Gillespie, et al.
Civil No. 13-1-0365, Fifth Circuit

\$ 400,000.00 *(General Fund)*
Settlement

This case arises out of a business dispute between a Kauai-based polygraph examiner, Plaintiff, and a Department of Public Safety ("PSD") employee, Defendant Gillespie, who is married to a polygraph examiner. Defendant Gillespie is the coordinator of the Sex Offender Management Team ("SOMT"). SOMT and the Statewide Integrated Sex Offender Treatment Program ("SOTP") are established under section 353E-1, Hawaii Revised Statutes. Under section 353E-1, PSD, the Judiciary, Hawaii Paroling Authority, and other agencies with oversight of sex offenders must develop and update a comprehensive statewide master plan for the treatment of sex offenders. Under SOTP, both private and government agencies regularly hire independent polygraph examiners to conduct polygraph exams of sex offenders.

Plaintiff alleged that Defendant Gillespie funneled polygraph business to her husband while working as the SOMT coordinator, as evidenced by several email messages sent in early 2012 allegedly claiming that her husband was the only polygrapher qualified to do business in the State of Hawaii. Plaintiff alleged Defendants were liable for intentional wrongful conduct, and the State was negligent in supervising Defendant Gillespie. Plaintiff alleged that her business as a polygrapher suffered drastically as a result of Defendants' conduct. Defendants denied the allegations. The case proceeded to mediation, which resulted in the settlement.

Leolao, et al. v. State of Hawaii, et al.
Civil No. 13-1-3038-11, First Circuit

\$ 60,000.00 *(General Fund)*
Settlement

Two inmates who were incarcerated at the Halawa Correctional Facility were attacked in the quad of the housing module by several members of the USO gang that lived in the quad above the plaintiffs. The adult correctional officer that controlled the locked door of each quad unlocked the doors to both quads at the request of one of the assailants, allowing the assailants access to the inmates. That adult correctional officer had allowed other inmates access to other inmates' quad three days before this incident. That prior incident resulted in an inmate being attacked, which resulted in a lawsuit against the State of Hawaii. The adult correctional officer in question was counseled, and then allowed to remain on duty after the first incident.

One inmate sustained severe head injuries that required five days of inpatient hospitalization at Queen's Medical Center. He suffered residual symptoms of traumatic brain injury, including headaches, vision disturbance and depression, as well as back/neck and knee injuries. The other inmate claimed back and head injuries. The case proceeded to the Court Annexed Arbitration Program, and the arbitrator awarded the inmates \$78,815.60. The case later settled for \$60,000.00.

Muller v. State of Hawaii, et al.
Civil No. 14-1-2133-10, First Circuit

\$ 80,000.00 *(General Fund)*
Settlement

Plaintiff was incarcerated at the Hawaii Community Correctional Center ("HCCC") on February 21, 2012 and later at Halawa Correctional Facility ("HCF") for crystal methamphetamine trafficking and drug paraphernalia offenses. Prior to incarceration, Plaintiff self medicated for chronic hip and back pain; which pain relief options (including marijuana) were unavailable to Plaintiff once in prison. Plaintiff sought medical assessment of his pain at HCCC and received Ibuprofen (an NSAID) in a therapeutic dosage (800 mg twice daily). Plaintiff began to experience gastric upset after an initial trial of Ibuprofen and he reported the NSAID did little to ease his pain complaints. Plaintiff was switched to Naproxen to see if Plaintiff better tolerated that medicine. Prilosec was deferred at this stage of the assessment, although Plaintiff was directed to see the doctor if he experienced dyspepsia again. A follow-up appointment at HCCC was cancelled when the doctor ran out of time and then the Plaintiff was transferred to HCF on September 27, 2012. At the time of this transfer, Plaintiff was receiving Naproxen and Gabapentin and was scheduled for re-evaluation because his pain complaints persisted. No stomach upset or gastric problems were reported to HCF as of October 5, 2012. However, on October 12, 2012 Plaintiff was evaluated for complaints of acute abdominal pain and transported to Queen's hospital. Plaintiff was treated surgically for a perforated ulcer with a Graham patch repair and recuperated an inpatient at Queen's for one week. Plaintiff's ulcer was attributed to his NSAID use. Plaintiff's medical expert contended that Plaintiff should have received Prilosec from the onset of his gastric complaints and would not have developed an ulcer had Prilosec been provided from the first complaint.

Obata v. State of Hawaii, et al.

\$ 20,000.00 *(General Fund)*

Civil No. 14-1-1660-07 KTN, First Circuit

Settlement

An inmate at Waiawa Correctional Facility complained several times to the medical clinic of headaches, ear aches, and facial swelling and pain from July 31, 2012, to August 5, 2012. His condition was initially assessed by the facility nurses. The nurses related the inmate's symptoms and complaints by telephone to a Department of Public Safety Department physician who diagnosed the condition as a bacterial ear infection and prescribed an antibiotic. The inmate requested that he be transported to an emergency room as his symptoms grew more severe. The inmate was not seen by a Department of Public Safety physician during this period of several days. After several days, the inmate developed symptoms of nerve damage to his facial nerves from the infection. He was hospitalized for several days. It was determined that the inmate had contracted Ramsay-Hunt syndrome, a viral infection of the facial nerves. The inmate developed diplopia in his left eye that will require surgical correction.

Sullivan, et al. v. State of Hawaii, et al.
Civil No. 15-1-2429-12, First Circuit

\$ 48,000.00 (General Fund)
Settlement

An inmate at the Women's Community Correctional Center ("WCCC"), was being transported to a work detail while riding in the bed of a WCCC truck. She was one of several inmates sitting on a plank of wood that rested on both sides of the truck's guard rails. This plank of wood sticks out about five inches beyond the guard rail to maintain stability. As the truck slowly drove through the perimeter gate, the right side of the plank made a slight contact with a fence post. The inmate alleges that when this slight contact occurred, the lower part of her left leg hit the bench in front of her and caused nerve damage to her left lower leg. The case proceeded to the Court Annexed Arbitration Program, and the arbitrator awarded the inmate \$48,944.80. The case later settled for \$48,000.00.

MISCELLANEOUS CLAIMS:

Eaton Arakaki

\$ 557.99 (General Fund)

Claimant requests reissuance of an outdated check that was misplaced. The check when found was outdated and could no longer be cashed. The legislative claim was filed with the Attorney General's office and, for good cause shown, the Department of the Attorney General recommends payment of this claim pursuant to section 37-77, Hawaii Revised Statutes.

Paquito and Natividad Dimaya

\$ 1,001.00 (General Fund)

Claimants request reissuance of an outdated check that was misplaced. The check when found was outdated and could no longer be cashed. The legislative claim was

filed with the Attorney General's office and, for good cause shown, the Department of the Attorney General recommends payment of this claim pursuant to section 37-77, Hawaii Revised Statutes.

Shigeko Kiyojima **\$ 697.00** *(General Fund)*

Claimant requests reissuance of an outdated check that was misplaced. The check when found was outdated and could no longer be cashed. The legislative claim was filed with the Attorney General's office and, for good cause shown, the Department of the Attorney General recommends payment of this claim pursuant to section 37-77, Hawaii Revised Statutes.

Ronald Martinez, Jr. **\$ 92.00** *(General Fund)*

Claimant requests reissuance of an outdated check that was misplaced. The check when found was outdated and could no longer be cashed. The legislative claim was filed with the Attorney General's office and, for good cause shown, the Department of the Attorney General recommends payment of this claim pursuant to section 37-77, Hawaii Revised Statutes.

Kan Shimada **\$ 250.00** *(General Fund)*

Claimant requests reissuance of an outdated check that was misplaced. The check when found was outdated and could no longer be cashed. The legislative claim was filed with the Attorney General's office and, for good cause shown, the Department of the Attorney General recommends payment of this claim pursuant to section 37-77, Hawaii Revised Statutes.

Kiyomi Young **\$ 399.60** *(General Fund)*

Claimant requests reissuance of an outdated check that was misplaced. The check when found was outdated and could no longer be cashed. The legislative claim was filed with the Attorney General's office and, for good cause shown, the Department of the Attorney General recommends payment of this claim pursuant to section 37-77, Hawaii Revised Statutes.

Jocelyn Valdez **\$ 837.00** *(General Fund)*

Claimant requests reissuance of an outdated check that was misplaced. The check when found was outdated and could no longer be cashed. The legislative claim was filed with the Attorney General's office and, for good cause shown, the Department of

the Attorney General recommends payment of this claim pursuant to section 37-77, Hawaii Revised Statutes

DEPARTMENT OF TRANSPORTATION, HIGHWAYS DIVISION:

Burley v. State of Hawaii
Civil No. 14-1-2102-10, First Circuit

\$ 85,000.00 (*Department
Settlement Appropriation*)

Plaintiff was riding a bicycle toward Dole Plantation on Kamehameha Highway in proximity to Poamoho Bridge. There is no bicycle lane on this portion of roadway. This was the first time Plaintiff used this route, although bicycling was his primary mode of transportation on Oahu. Plaintiff became concerned for his safety because he could not match the speed of traffic approaching from behind and because the traffic lanes narrow on the bridge. Shortly before the bridge, Plaintiff elected to leave the highway and ride on the adjacent dirt shoulder so that he could cross the bridge on a narrow concrete sidewalk. According to Plaintiff, the transition area was in disrepair and, when his front tire struck the lip of the concrete sidewalk, it snapped left and he was ejected from the bike. The bridge and roadway were scheduled for upgrade and repair but the work had not started at the time of the incident. Plaintiff landed primarily on his head and, despite wearing a helmet, sustained injuries that resulted in five days of hospitalization at Queen's. Inpatient medical charges, including surgical repair of facial fractures and lacerations, exceeded \$50,000 and Plaintiff was "off profile" with the Army for six weeks on account of his injuries and missed a unit deployment. The case proceeded to the Court Annexed Arbitration Program, and the arbitrator awarded the Plaintiff \$135,651.44. Plaintiff's speed was a factor in the accident and accounted for a 25 percent contributory negligence finding in arbitration award. The case later settled for \$85,000.00.

Kawamura, et al. v. State of Hawaii, et al.
Civil No. 11-1-0311, Fifth Circuit

\$ 95,000.00 (*Department
Settlement Appropriation*)

Plaintiffs sued the State and the County of Kauai for property damage to their residence from heavy rain and related flooding on November 14, 2009. The Plaintiffs alleged this flooding would not have happened but for a clogged drain inlet near their property. The clogged drain inlet is within the right-of-way of Kuamoo Road, a State highway, and thus it is on land that the State owns. Surrounding the drain inlet on either side of Kuamoo Road, the County controls a subsurface drainage system. However, there are no other inlets near Kuamoo Road besides the one owned by the State, and so when the subject drain inlet clogged with mud due to heavy rains, the rain water could not flow into the County's drainage system and instead flooded onto the neighboring property owned by the Plaintiffs.

The case proceeded to the Court Annexed Arbitration Program, and the arbitrator found the State liable to Plaintiffs in the amount of \$200,000.00 and found no liability against the County of Kauai. The parties agreed to have a neutral adjuster opine on the property damages suffered by Plaintiffs who concluded that the depreciated value of Plaintiffs' property damage amounted to \$85,255.94, but that amount did not consider any personal property that was damaged inside the house.

Lee, et al. v. Tavai, et al.
Civil No. 14-1-1659-07, First Circuit

\$1,565,154.00 (*Department
Settlement Appropriation*)

This case arises out of a two-car collision at the intersection of Kamaaha Avenue and Fort Barrette Road in Kapolei. Traffic control devices were not working. The State DOT owns Ft. Barrette Road in Kapolei. The City owns Kamaaha Avenue, which intersects Ft. Barrette Road. The State owns the traffic control signal system at the intersection. By Agreement dated April 4, 1990, between the City and State, the City maintains and repairs the traffic control systems on Oahu for the State. In exchange, the State agrees to defend and indemnify the City for claims arising out of the maintenance and repair of the systems. After this lawsuit was filed, the City took the position that the Agreement also included traffic control (e.g., police assistance) during the repairs.

On October 21, 2013, at 9:30 a.m., HPD notified the City's Department of Transportation Services (DTS) that the traffic control signal lights at the intersection were out. The DTS crew arrived at the scene at 10:00 a.m. The crew had just put out its orange cones around its truck at 10:39 a.m. when the accident occurred. The first HPD officer arrived a few minutes before the accident and was just getting his safety vest and gloves and flares from his car trunk when the accident occurred.

According to HPD, at least two officers would be required to provide traffic control at the intersection. HPD had knowledge of the outage as early as 9:30 a.m. when it contacted the City DTS. The first officer to arrive at the scene to provide traffic control during the repair arrived just a few minutes before the accident, but he had not set up at the intersection. Although the subject intersection is a three to five minute drive from the HPD Kapolei station, no other officer arrived until after the accident occurred and was reported by the first officer. Therefore, there was no police control at the time of the accident (approximately 70 minutes).

Plaintiffs alleged that the City and State negligently maintained, responded to, and repaired the traffic control signal, and negligently failed to provide manual traffic control direction at the scene during the repairs. The court granted partial summary judgment in favor of the City and State on the issue of the maintenance, response time, and repair. However, the judge denied the City's motion on the issue of the police failure to provide manual traffic control during the repairs in a timely manner.

Driver Salena Tavai was traveling south on Ft. Barrette Road at a speed between 35 and 40 mph. Plaintiff-driver Vernetta Lee was traveling west on Kamaaha. She alleges that she knew that the traffic control signal was out and that she had treated the intersection as a four-way stop. Her husband, Plaintiff Walter Lee, was a passenger in Lee vehicle. The Tavai and Lee vehicles collided and Walter Lee was seriously injured.

Walter Lee sustained, among other injuries, a severe head injury that resulted in a left intracranial hemorrhage and eventual paralysis and an inability to speak. He was admitted to the Queen's Medical Center for one week, then transferred to Kaiser Hospital for two weeks, and eventually transferred to skilled care and nursing facilities for nearly 18 months. He was discharged to home where he required 24 hour-7 days per week care. At the time of the accident, Walter Lee was 78 years old, but still working full time as a tour bus driver. At present, Walter Lee is nearly 82 years. We used a life expectancy for him of an additional 7.2 years from the present.

With the assistance of the mediator, the parties were able to reduce the estimated future medical care expenses and future wage loss claim, as well as to reduce the general damages for Walter Lee, his wife, and four children. However, the past medical expenses of nearly \$500,000 and past wage loss of nearly \$90,000 were not negotiable. With the assistance of the mediator, we were able to get Plaintiffs to agree to settle for one-third of the total estimated damage in the amount of **\$1,565,154.00**, which reflected an apportionment of amount of 33.3 percent for each tortfeasor, and therefore, 33.3 percent for the City and State.

Lopez, et al. v. State of Hawaii
Civil No. 13-1-0885(2), Second Circuit

\$3,901,866.44 (*Department
Settlement Appropriation*)

A 12-year-old boy fell off a cliff at the scenic lookout area on Hana Highway and died. The State DOT owns Hana Highway. The road was originally a series of connecting sections of horse trails and bridges. Then in 1926, Maui County completed construction of the road. Along the highway, there are several spots where the terrain permits widened shoulders. The subject accident site at approximately Mile Post 14.6 is one of those spots. Since the proliferation of guidebooks that have encouraged tourists to stop at this and other spots along the highway, the subject spot had come to resemble a quasi-lookout. There was ample evidence that DOT crew workers were aware that for many years tourists had been stopping at the site and standing on the top of the berm to take photographs.

Beyond the mauka shoulder of the highway there is a berm that tourists climb/walk up and stand on to take photographs of the bay below. Through continual use, tourists had created four footpaths leading from the extended shoulder up to the top of the berm. Beyond the berm is a steep cliff that drops off to the bay some 320+ feet below. The Department of Land and Natural Resources owns the berm and drop-off. The parcel is

designated as unencumbered land. There was no evidence that DLNR personnel were aware that tourists were stopping at the site and standing on top of the berm.

The boy's family stopped to at the subject accident site. The spot was described in as having a beautiful and scenic view of the bay below in the "Maui Revealed" guidebook that they used that day. Mr. Lopez pulled along side another vehicle that was parked at the site. While he was changing his shoes, and Mrs. Lopez was setting up her camera and tripod, their son ran up the berm and disappeared over the drop-off in front of his parents and five-year-old sister. The parents looked for their son over the cliff edge, but realized he had fallen down the steep drop off. Later that day, a fire department boat was dispatched to the bay below the site, and eventually found the body.

Plaintiffs alleged that the extended shoulder and that the footpaths on the berm leading from the shoulder to the top of the berm invited tourists to stop, park, and take photographs at the site. They also alleged that tall grass and other vegetation hid the dangerous steep drop-off and cliff from the view of those who were unfamiliar with the site. Therefore, any substantial comparative fault on the parents would have been unlikely, and any comparative fault on the 12-year-old decedent improbable.

Conservatively, total damages could be in excess of \$4.75 million. However, the State's self-insured retention (SIR) limit is \$4 million. Therefore, a likely judgment would have been in excess of the State's SIR. The State tendered the SIR of \$4 million less defense expenses incurred to the excess insurance carrier. The carrier then retained their own attorneys who continued mediation efforts and proceeded to trial, which ended before the conclusion of trial when Plaintiffs accepted the offer to settle in the amount of \$4 million.

The State incurred defense costs in the amount of \$98,133.56. The excess insurance carrier will contribute that amount toward settlement, and the State will contribute \$3,901,866.44.

DEPARTMENT OF TRANSPORTATION, HARBORS DIVISION:

Smith v. State of Hawaii, et al.
Civil No. 15-1-0549-03, First Circuit

\$ 116,000.00 (*Department
Settlement Appropriation*)

Plaintiffs' vehicle was hit by a State of Hawaii harbor patrol beat officer on Nimitz Highway near Alakawa Street. Plaintiffs were traveling eastbound in the contra-flow lane. The harbor patrol officer was traveling westbound on Nimitz Highway to Sand Island. A little past Alakawa Street, the officer was dispatched to an argument/fight call at Aloha Tower. At this time in the morning, the makai-most westbound lane of Nimitz was coned off as a contra-flow lane headed eastbound to downtown. A little less than a hundred yards before the Waiakamilo intersection there is a paved break in the median. The officer decided to utilize this paved median break to turn around and head back

eastbound to the Aloha Tower call. The officer claims his lights and sirens were on and that he visually cleared the oncoming lane of traffic. The Plaintiffs were headed eastbound in the contra-flow lane when the patrol officer's patrol car was attempting to proceed through the contra-flow lane and make a u-turn at the paved part of the median. Plaintiff-passenger does not recall seeing the officer's car until after impact. Plaintiff-driver claims that although she saw the lights before entering the intersection, the officer's movement into her lane happened so quickly she could not avoid the collision. At the CAAP arbitration, the arbitrator found the State to be 100 percent at fault and awarded a total of \$200,758.35 to the two plaintiffs. The case later settled for \$116,000.

ATTACHMENT "B"

DEPARTMENT OF HUMAN SERVICES:

Rooney, et al. v. State of Hawaii, et al.
Civil No. 14-0323(2), Second Circuit

\$ 875,000.00 *(General Fund)*
Settlement

This case involves the death of a four-year-old boy while he was in the custody of his father on Maui in 2012. The father was charged with the murder of his son. The boy was first seriously injured while in the custody of his mother, and father at the age of four months in 2008. Child Welfare Services (CWS) gained custody of the boy. The boy's parents had a history of mental illness, violence against family members, and criminal convictions for violence. The mother was largely noncompliant with Family Court orders in the CWS case involving her older child and lost custody and parental rights in that proceeding. In the CWS/Family Court proceeding involving the boy, the parents denied responsibility and were largely noncompliant with court orders and services offered through CWS. Despite the poor history of the parents, the mother was granted custody and the CWS and Family Court cases were terminated without further review or opportunity for recommendations from the multi-disciplinary team of professionals available to the CWS staff. In February 2010, CWS received an anonymous report that the boy was being abused by his mother. CWS called the mother to offer services. No further follow-up was taken. The mother gave custody to the boy's father without further monitoring of mother or father. Plaintiffs are the boy's grandmother on behalf of the boy's estate and the boy's sister. Plaintiffs' demand was nearly \$4,000,000.00. This case proceeded to mediation, and the case settled with assistance from the mediator.

DEPARTMENT OF LAND AND NATURAL RESOURCES:

Silva v. State of Hawaii, et al.
Civil No. 15-1-269K, Third Circuit

\$ 75,000.00 *(General Fund)*
Settlement

A man was lying down on the pavement under a canopy at the Kailua Pier, and fell asleep. A state employee, who was emptying trash on the pier, drove a State-owned pickup truck under the canopy to get closer to a trash can that he intended to empty. In doing so, the state employee drove the pickup truck over the man who was still asleep on the pavement. The man sustained a fractured right clavicle, fractured left second and third metacarpal proximal shafts, multiple pelvic fractures, and sacral fractures. The case proceeded to the Court Annexed Arbitration Program, and the arbitrator found the State liable in the amount of \$90,051.00. The case later settled for \$75,000.00.

DEPARTMENT OF TRANSPORTATION, AIRPORTS DIVISION:

Helix Electric, Inc. v. DCK Pacific Construction, LLC, et al., Civil No. 16-1-1090-06, First Circuit **\$ 10,080,000.00** *(Department Settlement Appropriation)*

The Department of Transportation (DOT) contracted with DCK Pacific Construction, LLC, to build the Inter-Island Terminal Maintenance/Cargo Facility at Honolulu International Airport. The project fell behind schedule and was lightly staffed. DOT learned that subcontractors were not sending people to the job because DCK was not paying the subcontractors. This violates section 103-10.5, Hawaii Revised Statutes (HRS) and an identical provision in the general contract. There were also other deficiencies on the project. DOT gave DCK time to remedy the situation, and when DCK failed to do so, DOT terminated the general contractor for cause. The last day of work was December 28, 2015.

DOT had paid DCK through September 30, 2015. DOT learned that DCK had kept over \$3,000,000.00 that it should have paid to suppliers and subcontractors up to that point. DOT referred the matter to the DCCA Regulated Industries Complaints Office for appropriate action. Over a year later, DCK has not completed disgorging the funds it withheld, but is making payments slowly through RICO. Meanwhile, subcontractors and suppliers who provided materials and labor to the project after September 30, 2015 have not been paid by DOT based on section 103-10, HRS.

Two lawsuits have been instituted against the State by subcontractors seeking payment for their post-September 30, 2015, work. Other suits are threatened. DOT acknowledges that these claims have merit. DOT desires to avoid protracted and expensive litigation by settling the subcontractors' and suppliers' claims. No legislative appropriation of funds is needed since the money for the work and materials in question is in the project's budget. All that is needed is legislative approval to pay the claims of unpaid subcontractors and suppliers. All these claims are being closely scrutinized by DOT engineers and the construction manager for the project.

DAVID Y. IGE
GOVERNOR



Testimony by:
FORD N. FUCHIGAMI
DIRECTOR

Deputy Directors
JADE T. BUTAY
ROSS M. HIGASHI
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IN REPLY REFER TO:

STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION
869 PUNCHBOWL STREET
HONOLULU, HAWAII 96813-5097

April 4, 2017
9:30 a.m.
State Capitol, Room 211

H.B. 1022, H.D.1, S.D.1
**MAKING APPROPRIATIONS FOR CLAIMS AGAINST THE STATE, ITS OFFICERS,
OR ITS EMPLOYEES**

Senate Committee on Ways and Means

The Department of Transportation (DOT) **supports** its request to settle and pay claims of subcontractors and suppliers who supplied labor and materials on the project to construct an Inter-Island Terminal Maintenance / Cargo Facility at Honolulu International Airport and were not paid by the general contractor.

The DOT does not seek funds to be appropriated for these settlements.

Thank you for the opportunity to provide testimony.