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DISSENTING OPINION OF ACOBA, J.

I respectfully dissent because (1) the Hawai'i State Legislature clearly intended that Hawai'i follow California law and thus adopt the governing factors listed in Tech-bilt, Inc. v. Woodward-Clyde & Assoc., 698 P.2d 159 (Cal. 1985), in applying Act 300 (codified as Hawai'i Revised Statutes (HRS) § 663-15.5) rather than the totality of the circumstances test fashioned by the majority, and (2) the amorphous nature of the majority's totality of circumstances test invites due process violations and fails to adequately protect the rights of all parties involved.

I.

In enacting Act 300, the Hawai'i Legislature sought to "establish[] a good faith settlement procedure for joint tortfeasors and co-obligors." Sen. Stand. Comm. Rep. No. 828, in 2001 Senate Journal, at 1253. In doing so the legislature plainly intended that Hawai'i apply California case law in implementing the Act. Act 300 is expressly modeled after California Code of Civil Procedure §§ 887 & 887.6. The legislature declared that the "procedures proposed by the measure are based on a system that has been in existence in California for over ten years." Hse. Stand. Comm. Rep. No. 1230, in 2001 House Journal, at 1599 (emphasis added). Whereas Act 300 was expressly "based" on the California "system" it would appear indisputable that the legislature meant that our courts should

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essentially adhere to the body of law and judicial standards aggregated over the sixteen years the California statute has been in existence. In this context, it can be reasonably assumed the legislature was familiar with litigation surrounding the California statute, and the case law that subsequently evolved. See Cowen v. First Ins. Co. of Haw., 61 Haw. 644, 649 n.4, 608 P.2d 394, 399 n.4 (1980) (holding that it is a well-settled rule that the adoption of another state's statute encompasses that state's judicial construction of the statute unless a contrary intent appears).

Despite any concerns that followed in the wake of the Tech-Bilt standards, the legislature did not voice similar objections in passing Act 300. The legislature had the opportunity to draft Act 300 in response to such matters, but obviously chose not to do so. In light of this history, it is incumbent on this court to apply Act 300 as intended by the legislature. See Crichfield v. Grand Wailea Resort, 93 Hawai'i 477, 483, 6 P.3d 349, 355 (2000) (holding that when the Supreme Court construes a statute, its foremost obligation is to ascertain and give effect to the intention of the legislature), Gorospe v. Matsui, 72 Haw. 377, 379-380, 819 P.2d 80, 81 (1991) (holding that the court's primary duty is to ascertain and give effect to the intention of the legislature).

The majority asserts that Hawai'i should not follow California case law because the interpretation of the model rule from which the California statute is derived was misread. See

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majority opinion at 54-56. The criticism of that interpretation was presented in Chief Justice Bird's dissent to Tech-bilt and in subsequent cases in other jurisdictions. Again, it may reasonably be presumed that the Hawai'i Legislature was aware of these criticisms when it chose to adopt the "system that has been in existence in California." Hse. Stand. Comm. Rep. No. 1230, in 2001 House Journal, at 1599. See Cowen, 61 Haw. at 649 n.4, 608 P.2d at 399 n.4. Therefore, inasmuch as the arguments cited by the majority have been presented and rejected in the California case law, there is no rational basis for inferring that the legislature's position would have been otherwise.

Moreover, when a law has been adopted from another jurisdiction we have generally found the decisions of the courts in that jurisdiction persuasive in construing and applying our analogous law. See, e.g., Territory v. Ota, 36 Haw. 80, 97-98 (1942) (holding that the adoption of a statute from another jurisdiction after said statute has been construed carries with it the construction placed upon it by the courts of the jurisdiction from which it is borrowed unless the imported construction is out of harmony with the spirit and policy of general legislation of the home State); S. Utsonomiya Enter. v. Moomuku, 75 Haw. 480, 505, 866 P.2d 951, 964, (1994) (holding that California courts' interpretation of California's lis pendens statutes are particularly relevant in interpreting Hawaii's statute, in light of similarity between statutes); Gold v. Harrison, 88 Hawai'i 94, 105, 962 P.2d 353, 364 (1998)

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(holding that “[w]here we have patterned a rule of procedure after an equivalent rule within the [Federal Rules of Civil Procedure], interpretations of the rule by the federal courts are deemed to be highly persuasive in the reasoning of this court”); Schefke v. Reliable Collection Agency, 96 Hawai‘i 408, 425, 32 P.3d 52, 69 (2001) (construing Hawai‘i discrimination statute in light of interpretations by the federal courts of analogous federal laws for guidance). Under the circumstances of this case, there is no principled reason for departing from that approach.

II.

The standards developed under California law provide a definitive basis for effectuating the requirement of “good faith” in Act 300. In Tech-bilt, the California Supreme Court established the procedure for satisfying the rather abstract notion of a “good faith” settlement as required under the statute. It was said that the “intent and policies” that underlie the good faith settlement provision are “first, equitable sharing of costs among the parties at fault, and second, encouragement of settlements.” Tech-bilt, 698 P.2d at 166. The Tech-bilt court stated that “the intent and policies underlying section 877.6 [good faith settlement provision] require that a number of factors be taken into account” and

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enumerated those factors.<sup>1</sup> Id. It was observed that a "primary concern" was that "[i]n the great majority of cases . . . equity and fairness call for an apportionment of loss between the wrongdoers in proportion to their relative culpability." Id. at 163 (citations omitted). On the other hand, requiring a proportionate liability assessment would also encourage settlement because "the settling defendant is induced to offer more in order to bring the settlement within the bounds of fairness, [thus] the plaintiff's incentive to settle may be greater." Id. at 167. By setting forth the discrete factors germane to a good faith evaluation, Tech-bilt informs parties, counsel and trial courts of those facts pertinent in an Act 300 hearing on good faith.

On the other hand, jurisdictions adopting the totality of the circumstances test expressly announce that they will not follow the Tech-bilt proportionate liability test. Whereas Tech-bilt emphasized that there could not be a good faith settlement in the absence of a judicial determination of the proportionate

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<sup>1</sup> In this inquiry, Tech-bilt requires that the trial court must determine the following:

1. A rough approximation of plaintiff's total recovery and the settlor's proportionate liability.
2. The amount paid in settlement.
3. The allocation of settlement proceeds among plaintiffs, with the recognition that a settlor should pay less in settlement than he would if he were found liable after trial.
4. The financial condition and insurance policy limits of settling defendants.
5. The existence of collusion, fraud, or tortious conduct aimed to injure the interest of the settling defendant.
6. Whether, on the basis of information available at the time of settlement, the settlement is not grossly disproportionate to what a reasonable person, at the time of the settlement would estimate the settling defendant's liability to be. Tech-bilt, 698 P.2d at 166-167.

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liability of the settling joint tortfeasor, the totality of the circumstances test rejects this view. See Mahathiraj v. Columbia Gas of Ohio, Inc., 617 N.E.2d 737, 741 (Ohio Ct. App. 1992) (refusing to adopt Tech-Bilt requirement and instead holding that "[w]hile courts are free to consider the amount of a proposed settlement in comparison to the amount the party would likely be responsible for at trial, the comparison is only one of many factors that a court weighs in its totality of the circumstances analysis"); Smith v. Texaco, 597 N.E.2d 750, 756 (Ill. 1992) (rejecting the argument that there cannot be a determination of good faith unless there is a showing of the relative liabilities of the parties and refusing to place emphasis on any one factor as being determinative of good faith); Smith v. Monongahela Power Co., 429 S.E.2d 643, 652 (W. Va. 1993) (holding that good faith is determined by several factors--the focus is not whether the settlement fell within a "reasonable range" of the settling tortfeasors's proportional share of liability, but whether the circumstances indicate corrupt behavior on the part of the settling tortfeasor).

In a similar vein, the totality of the circumstances test that the majority adopts is an amorphous one in which the list of factors to consider "is not exclusive." Majority opinion at 59. Allowing the trial courts to consider "any other factor that is relevant to whether a settlement has been given in good faith[,]" leaves the term "good faith" without any discernable boundaries. Majority opinion at 59 (emphasis added). For

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example, in the majority view, proportionate liability is only one of many factors that may be considered. Since a judicial determination of this factor is not required there is no assurance that an appropriate apportionment of fault will be achieved in the settlement.

Without the guidance the Tech-bilt factors provide, parties and counsel will be unsure of the type of information necessary to establish a good faith claim. Trial courts will be uncertain of what evaluative factors should be dispositive. The undifferentiated approach inherent in the majority test would fail to ensure a focused record for appellate review. The ultimate result of such an approach will engender disparate results among the cases.

III.

In failing to require that the parties and the courts arrive at a reasonable apportionment of liability before settlement is approved, the majority's good faith test, in effect, invites unjust results. Under HRS 663-15.5(a)(3) a settling party is discharged from all liability for any contribution to any other party. HRS 663-15.5(d) bars a non-settling party from asserting claims against a settling party at the subsequent trial. HRS 663-15.5(a)(2) (Supp. 2002) provides that the recovery against a nonsettling defendant is only diminished by "the amount stipulated by the release, dismissal, or covenant, or in the amount of the consideration paid for it,

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whichever is greater[.]” The fact finder at trial will not be apprised of any contribution by the settling joint tortfeasor. Thus, the risk is great that unless a meaningful attempt is made to arrive at a reasonable apportionment of the settling joint tortfeasors’s liability prior to trial, the nonsettling defendant will be required after trial to pay more than an appropriate proportionate share of the damages owing to the plaintiff.

By contrast, the California courts have recognized that “the goals of equitable sharing and encouragement of settlements are not always necessarily harmonious. If the policy of encouraging settlements is permitted to overwhelm equitable financial sharing, the possibilities of unfair tactics are multiplied. Neither statutory goal should be applied to defeat the other.” Tech-bilt, 698 P.2d at 163 (emphasis added). The Tech-bilt factors accomplish both goals of equitable sharing and encouragement of settlement.

The net result of the majority test is to encourage settlements to the detriment of equitable financial sharing. As stated by the Tech-bilt court, “encouragement of settlements and the equitable allocation of costs among multiple tortfeasors . . . would be disserved by an approach which emphasizes one to the virtual exclusion of the other.” Id. at 166. The majority’s test is such an approach, contrary to the legislature’s intent of protecting the rights of all parties to the settlement. The legislature has declared that Act 300 “will achieve its stated purpose while still adequately protecting the rights of all



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parties involved.” Sen. Stand. Comm. Rep. No. 828, in 2001 Senate Journal, at 1253 (emphasis added). Hence, a determination of proportionate liability among the joint tortfeasors is crucial to ensuring that the rights of all parties are protected. The only remedy for such a digression would be to amend the statute.

IV.

Procedural due process rights are violated when (1) a particular interest which a claimant seeks to protect is “property” within the meaning of the due process clauses of the federal or state constitutions, and (2) those property interest are not adequately protected by specific procedures. See Sandy Beach Defense Fund v. City Counsel of Hono., 70 Haw. 361, 376, 773 P.2d 250, 260 (1989). Once it is determined that a valid property interest is at stake, it must be determined whether proper procedural due process was afforded the claimant. See id. The basic elements of procedural due process require notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of the property interest. Id. at 378, 773 P.2d at 261.

In construing the analogue of Act 300, California courts have held that a cross-claim for contribution asserted by one joint tortfeasor against another constitutes a property interest protected by due process although the right of contribution has not yet accrued. In Singer Co. v. Superior Court, a non-settling co-defendant (not a party at the time of

settlement) was denied contribution from a settling co-defendant after a good faith determination was rendered. 225 Cal. Rptr. 159, 161 (Cal. Ct. App. 1986). The California Court of Appeals, Fifth District interpreted Section 877 of the California Code of Civil Procedure, the same section upon which Act 300 is based. See id. at 161. Singer held that under the California statute, "[s]ince a nonsettling tortfeasor loses his right to seek contribution or partial indemnity from a joint tortfeasor who settled if that settlement is adjudged to be in good faith, the nonsettling tortfeasor stands to be deprived of his property right to contribution or partial indemnity." Id. at 168 (emphasis added). As Act 300 is based on the California statute, the Singer holding is instructive.<sup>2</sup>

The majority holds that assuming an unaccrued right of contribution constitutes a property interest protected by due process, the procedures requiring a good faith hearing provided for in HRS §663-15.5(b) and (c) afford a nonsettling joint tortfeasor adequate notice and opportunity to be heard. Majority

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<sup>2</sup> Because the Hawai'i Legislature explicitly stated that Act 300 was modeled after the California statute, case law interpreting other state statutes is not instructive. Although other cases hold that the joint tortfeasors' right to contribution is not a property right protected under the Due Process Clause, these cases interpret other joint tortfeasor statutes. See Snood v. Teepak, Inc., 556 N.E.2d 682 (Ill. App. Ct. 1990) (interpreting the Uniform Among Joint Tortfeasor Act (Ill. Rev. Stat. 1987, ch. 70, par 301 et seq.)); West v. Rollhaven Skating Arena, 306 N.W.2d 408 (Mich. Ct. App. 1981) (interpreting Michigan Statute (M.C.L. § 600.2925(d)(c); MSA § 27A.2925(4)(e)); National Mut. Ins. Co. v. Whitmer, 435 N.E.2d 1121 (Ohio 1982) (interpreting Ohio Contribution Among Tortfeasors Act); Scovell v. TRK Trans, Inc., 705 P.2d 1144, 1145 (Or. 1985) (interpreting Oregon statute which states that settling party is not entitled to contribution); Nelson v. Ptaszek, 505 A.2d 1141, 1143 (R.I. 1986) (interpreting release agreement, not a joint tortfeasor statute); Monongahela, 429 S.E.2d at 648 (extending a West Virginia statute barring contribution by settling defendants to include non-party joint tortfeasors).

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opinion at 73. On the contrary, the majority's totality of circumstances test as it implements the good faith standard does not compel the courts to engage in the inquiry necessary to determine whether the amount contributed by the settling defendant is fairly related to its proportional liability. But in the framework of Act 300, the right to contribution is a property interest protected by the due process clause. Thus, the majority's totality test fails to ensure that the nonsettling joint tortfeasor's right to due process is protected. Consequently, a nonsettling defendant is deprived of the opportunity to be heard at a meaningful time and in a meaningful manner.

V.

Based on the foregoing, I would vacate the June 5, 2002 order, granting petition of Plaintiff-Appellee Jennifer L. Troyer, formerly known as Jennifer L. Decker (Plaintiff), and determining that her settlement was made in good faith and remand to the court for application of the Tech-bilt factors. I would order that Defendant-Appellant Carl W. Adams, M.D. (Defendant) be permitted to depose Plaintiff's expert witnesses with respect to their opinions concerning the liability of the settling defendants (John Bellatti, M.D. and Patricia Bailey, M.D.). See Singer, 225 Cal. Rptr at 172 (holding that depositions of experts after the settlement were required to be made available to a defendant contesting the settlement because evidence available at

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the time of settlement is not only what the settling parties actually contemplated or actually presented to the court in seeking good faith determination; available evidence also encompasses what the parties should have known).

Because the purpose of the depositions would be to ascertain the "good faith" of the settlement proposal, and inasmuch as HRS 663-15.5(b) places the burden on the nonsettling party to demonstrate a lack of good faith, Defendant is entitled to discover the basis on which the settlement was reached. See Erreca's v. Superior Ct., 24 Cal. Rptr. 2d 167, 167 (1993) ("settling parties have the most knowledge of the value of the various claims they are attempting to settle and can best allocate settlement proceeds among those various claims, subject to court approval"); Abbott Ford, Inc. v. Superior Ct., 741 P.2d 124, 138 n.22 (Cal. 1987) (holding that because a nonsettling defendant may challenge the settlement amount, it is appropriate to place the burden of assigning value of consideration on the parties to the agreement who have particular knowledge of the facts).

Such discovery would be limited to information relevant to the good faith evaluation and available at the time of settlement. Tech-bilt, 698 P.2d at 167 (holding that good faith "evaluation be made on the basis of information available at the time of settlement"). Because the purpose of the depositions would be to ascertain the good faith of the settlement proposal, I would limit the use of the depositions to the good faith

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hearing. See Singer, 225 Cal. Rptr. at 172 (holding that party is obligated to turn over evidence which is relevant to the good faith hearing, but subsequent discovery or trial after settlement is not relevant to the "good faith" of the settlement). Moreover, parties have an obligation to obtain their own experts for trial.

In consonance with precedent under the California analogue, Plaintiff must at the hearing on the issue of good faith "explain to the court and to all other parties, by declaration or other written form, the evidentiary basis for any allocations and valuations made, and . . . demonstrate that the allocation was reached in a sufficiently adversarial manner to justify the presumption that a reasonable valuation was reached." Erreca's, 24 Cal. Rptr. 2d at 170. As the nonsettling defendant also has a burden of proof, Defendant should be permitted to demonstrate that the settlement is disproportionate to what the settling defendants' liability should be. Tech-bilt, 698 P.2d at 167 (holding the party asserting the lack of good faith has to burden of proof on that issue and should be permitted to demonstrate that the settlement is so far "out of the ballpark" in relation to these factors as to be inconsistent with the equitable objectives of the statute).

VI.

Definitive standards are imperative in the administration of the judicial system. The legislature

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manifestly intended that the factors set out in Tech-bilt be applied in implementing the good faith provision in Act 300. Such factors would afford the parties, attorneys, and trial courts the guidance required to ensure a fair apportionment of liability in settlement and an efficient adjudication of settlement matters. Therefore, I believe the Tech-bilt factors should control in HRS § 663-15.5 hearings on good faith settlement.