SHAMBERG, JOHNSON & BERGMAN

TRIAL ATTORNEYS

SUMMER 2000

"False Claims Act" Used To Recover Fraudulent Medicare Payments

In cooperation with the Colorado U.S. Attorney's Office, our firm brought a False Claims Act action against PorterCare Adventist Health Systems (now a part of Centura Health Corporation) alleging that the company submitted fraudulent Medicare billings for respiratory services between 1994 and 1996. The suit alleged that Porter billed approximately $750,000 in false claims for services provided by Hospital Therapy Services, Inc. (HTS) at nursing homes in Denver and in the San Luis Valley in Colorado. HTS is a California company that managed an extended-care respiratory program for Porter.

John Parisi filed the False Claims Act case on behalf of Gary Norris, Julie Christensen, Lea Desmond, Shawn McGurran, Kelly Gruber, and Christie LeBrone, respiratory therapists who brought the billing violations to light. The suit alleged that Porter billed Medicare for respiratory therapy treat-

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Whistle-blower Claims For Environmental Violations Under The Federal False Claims Act

Government contractors have submitted false claims for payment under government contracts since the founding of our country. To combat the problem, the Federal False Claims Act was passed in 1863, at the urging of President Abraham Lincoln, to stop the fraud being perpetrated on the Union Army effort by profiteers. A key component of the Act was private citizen enforcement – "whistle-blower" legislation. Private citizens were given an incentive to report fraud by allowing them to keep a portion of the monies recovered by the government under the "Qui Tam" provision of the Act. The future of private whistle-blower actions is currently before the United States Supreme Court on the issue of whether people ever have legal standing to file fraud claims on the government's behalf.

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Welcome

Our firm has always taken pride in representing individuals who have suffered serious loss, either physical or financial, or the wrongful death of a loved one. In the past several years we have also added environmental torts, consumer class actions and "Qui Tam" actions to our areas of expertise. "Qui Tam" or Federal False Claims Act litigation is an expanding area of interest, so we have featured a recent settlement and article on the subject.

Automobile design liability has been a longstanding part of our practice and we report the successful settlement on a defective seatbelt design case out of Montana.

Finally, we proudly report yet another major award to our founder and mentor, John Shamberg.

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—Defective Seatbelt Design—

Death in Montana, Settlement for the Family

Steve Barnard did not know when he buckled the lap belt on his 1991 Subaru Legacy that it had a design defect allowing it to expand when subjected to foreseeable forces. Subaru, however, did have knowledge of the problem, and the cure, but took no corrective action.

Lynn Johnson and Steve Bough represented Mr. Barnard's family in their lawsuit, filed in Lewis and Clark County, Montana, against Subaru claiming that the vehicle's restraint system was defectively designed. Mr. Barnard and his two children were traveling on Highway 12 near Helena, Montana when their car left the highway and rolled over. Mr. Barnard was killed in the crash. The Montana Highway Patrolman testified that Mr. Barnard swerved to avoid an animal.

Post-rollover Subaru Legacy.

The Subaru lap belt had a feature known variously in the automotive industry as "rip stitching," "load limiting system" or an "energy management loop," in which several inches of the seatbelt webbing are folded over and stitched to the belt. In an accident, the stitching rips, allowing the seatbelt webbing to expand up to an additional six inches. In Mr. Barnard's rollover, the extra webbing allowed him to be partially ejected from the vehicle and then killed as the car rolled over him.

Failed seat belt.

Federal Motor Vehicle Safety Standard ("FMVSS") 209 requires the belts to be designed to remain on the pelvis under all conditions, including rollovers. Defendant's own expert testified that "you would like the lap belt to be as snug as possible." FMVSS 209 also sets elongation requirements for seatbelts. If rip stitching is used, manufacturers are exempt from the elongation requirements. The industry and the federal government have known for years of the potential for severe injury and death when rip stitching is used on lap belts.

Volvo of America, in a 1980 official comment to proposed changes in FMVSS 209, warned that without limits on the amount of rip stitching, excessive elongation would occur and the belt would not provide protection in a rollover accident. The National Highway Transportation Safety Administration responded by saying Volvo's concerns were unfounded and

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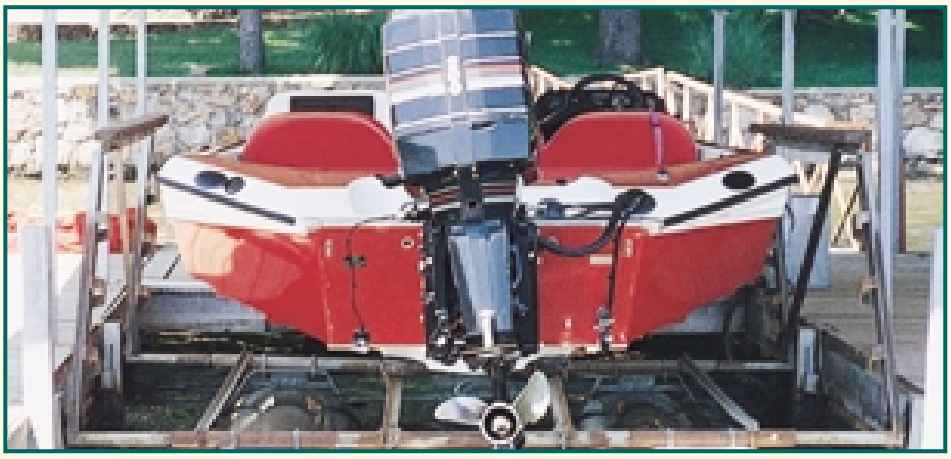

Lake of the Ozarks Boating Accident Results In Injury

A fast boat, an inexperienced young driver and rough water conditions were a recipe for a serious watercraft accident at the Lake of the Ozarks. Steve Six represented Travis (last name withheld) in his negligence claim against the driver, obtaining a $590,000 settlement. The accident happened as the boat neared the twelve-mile marker at the Lake of the Ozarks in central Missouri. Kurt, the 20-year-old driver, was accelerating his parents' 21-foot Champion Bass Boat (see photo) with a 200 horse power Mercury engine and a high performance jack plate when the accident happened. Crossing the twelve-mile marker at a high rate of speed, the driver suddenly lost control, the boat turned violently, and the engine cavitated causing the boat to hook. Three passengers were thrown from the boat. Unfortunately for Travis, as he was ejected from the boat, he struck his head on the side causing a closed head injury, hearing loss in his left ear, partial loss of hearing in his right and a persistent bilateral tinnitus. Tinnitus is an incurable constant ringing in the ears. The condition causes difficulty with hearing and concentration, and frequently leads to depression and other anxiety disorders. The Missouri Water Patrol investigated the accident and determined it was caused by an inexperienced operator driving too fast for the conditions. The case was settled at mediation shortly before trial.

John Shamberg Receives Justinian Award

John Shamberg, senior partner and co-founder of our firm, was recently awarded the Justinian Award by the Johnson County, Kansas Bar Association at the annual Herbert W. Walton Bench/Bar Conference. The Justinian Award for professional excellence is the highest honor granted by the Bar Association. The award goes to an attorney who has exemplified integrity, service to the community, service to the legal profession, and the professional qualities of warmth, friendliness and camaraderie. This much-deserved recognition is added to a long resume of major honors John has received for his many accomplishments and contributions during his storied career. In recent years John has received the Washburn University Honorary Doctorate of Law Degree; the highest honors of the Kansas Bar Association, the Distinguished Service Award; the Kansas Trial Lawyers' Association's first Arthur G. Hodgson Distinguished Service Award; and in 1997 John became the first Kansas-based recipient of the Dean of the Trial Bar Award presented by the Kansas City, Missouri Metropolitan Bar Association. John is a veteran of World War II and was awarded the Bronze Star for service in the Pacific Theater. We are proud of the honor John has brought to our firm and to our profession.

John E. Shamberg

Forklift Accident Results In Injury

A forklift operator's error in pulling the wrong lever caused a serious work place accident for our client, Ron Dreher. Lynn Johnson and Steve Bough represented Mr. Dreher in a negligence action against Heartland Building Center in Ellis County, Kansas. Heartland had been hired by Mr. Dreher's employer to unload PVC pipe. Mr. Dreher was injured when a Heartland Building Center forklift operator dumped a load of PVC pipe on him.

The central issue in the case was how the PVC pipe came off of the forklift. Plaintiff's explanation, which was supported by the eyewitness testimony, was that the forklift driver pulled the wrong lever dumping the PVC pipe on Mr. Dreher. The forklift operator

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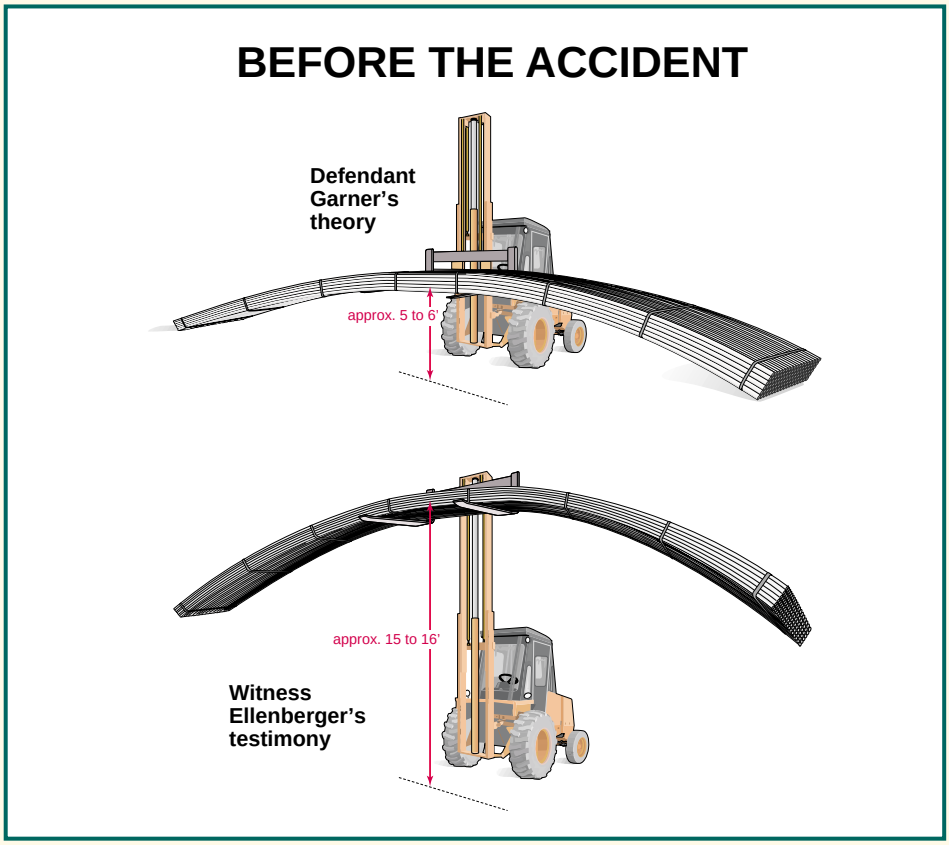

Claims For Expenses On Behalf Of Minors In Kansas

Part II

In our Summer 1999 Newsletter, we brought to your attention the Kansas Court of Appeals decision in Wilson v. Knight, 26 Kan. App. 2d 226 (Kan. Ct. App. 1999). See "Statute of Limitation Alert! Claims for Medical Expenses on Behalf of Minors in Kansas," Shamberg, Johnson & Bergman Newsletter, Summer, 1999, available at www.sjblaw.com. If you recall, the Kansas Court of Appeals held in Wilson that, absent exceptional circumstances, claims for medical expenses incurred on behalf of minors are vested solely in the parents. Because the claim for medical expenses belongs to the parents, it must be brought within the two year statute of limitations period even though the statute of limitations on the child's claim is eight years (or at least one year after reaching the age of majority). The Wilson court listed the following exceptional circumstances:

1) When the minor child has paid or agreed to pay the expenses;
2) When the minor child is legally responsible for the payments, such as by reason of emancipation or the death or incompetency of his or her parents;
3) When the parents have waived or assigned their right of recovery in favor of the minor child; or
4) When recovery is permitted by statute.

The United States District Court for the District of Kansas recently applied the waiver/assignment exception as articulated by the Wilson court and allowed a claim for medical expenses to be brought outside the two year statute of limitations period. See Villa by and through Villa v. Roberts, 80 F. Supp. 2d 1229 (D. Kan. 2000). The Villa court held that even though the statute of limitations had run on a direct claim by the parents, the waiver/assignment exception allowed the minor to recover medical expenses under the eight year statute of limitations period. The Villa court further held that the waiver/assignment exception is met when a

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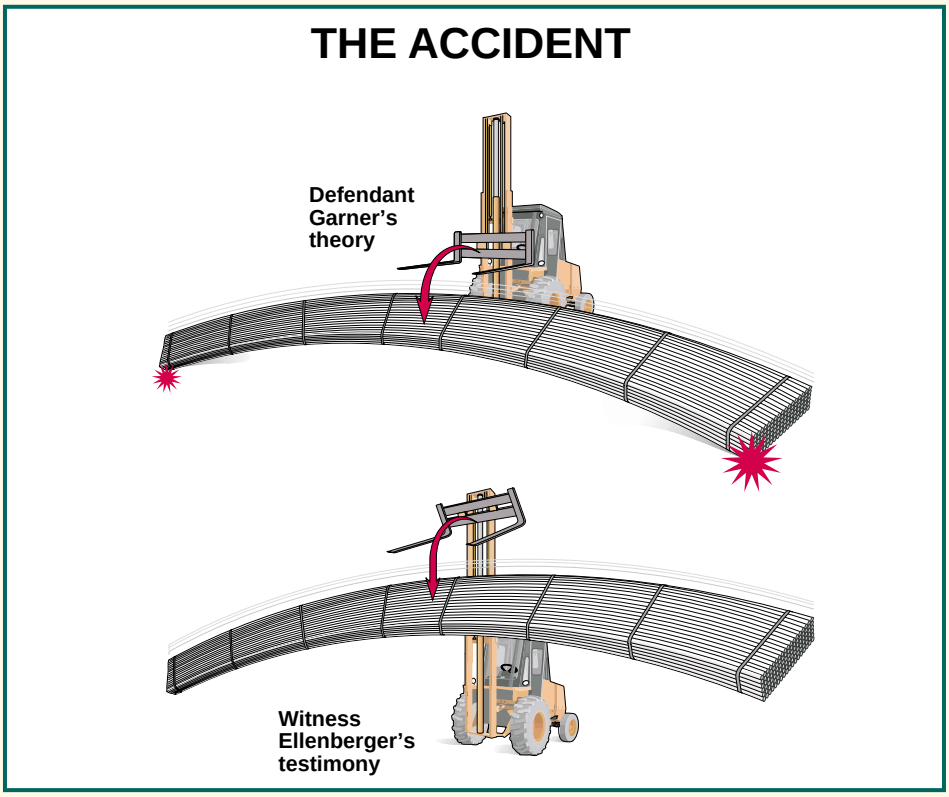
"FORKLIFT ACCIDENT" CONTINUED FROM PAGE 4

denied that he hit the wrong lever. Defendant Heartland took the position that the ends of the PVC pipe hit the ground and rolled forward off of the forklift. We created diagrams (see diagrams) to illustrate the vast difference between the eyewitness testimony and the defendant's testimony. Confident that the defendant's theory of the accident was inaccurate, we decided to expose the flaws in the theory through testing. Over the defendant's objection, the Court ordered that the forklift be made available at the job site for testing. Kansas Rules of Civil Procedure provide that a party can "inspect and copy, test or sample any tangible things which constitute or contain matters within the scope of" discovery. K.S.A. § 60-234. We then arranged for the identical truck and PVC pipe to be at the accident site. The case settled shortly after the court ordered the production of the forklift. The old saying "a picture is worth a thousand words" illustrates the usefulness of these type of "low tech" diagrams in demonstrating how an accident took place.



"PART II" CONTINUED FROM PAGE 4

parent brings a lawsuit as next friend of the minor and testifies in support of the minor's claim for medical expenses.

The plaintiffs Adrianna and Juan Villa were four and five years old when they were struck by an automobile driven by defendant Tommy Roberts. The children's mother, Armida Villa, filed suit as the conservator and natural mother of Adrianna and Juan Villa within the eight year period of limitations, seeking, among other things, damages for past and future medical expenses. Although the parents' cause of action was barred by the two year statute of limitations, Armida argued that she was seeking medical expenses on behalf of her children and not herself.

The Villa court held that plaintiffs' claim for medical expenses fell within the waiver/assignment exception articulated in Wilson. The court stated that "waiver should be considered sufficient so long as it is sufficient to meet the purpose of the rule by protecting the defendant against the danger of a double recovery." The exception is established by:

1) bringing suit as next of friend;

2) testifying in support of the child's suit; or

3) executing a formal waiver of rights. Id.

Armida Villa explicitly confirmed that she brought no action for medical expenses in her own name, she supported the claim for medical expenses brought by Juan and Adrianna Villa, and she did not bring any action on her own behalf during the applicable limitations period. The Villa court therefore held that the claim for medical expenses was properly and timely brought by Adrianna and Juan Villa.

Practitioners should be aware, however, that the Villa case is a federal district court decision and not binding in Kansas state court. The Wilson decision should be read carefully, with real consideration given to filing a parent's claim before the two year statute of limitations and executing an assignment of the parents' rights of recovery for medical expenses in favor of the minor child. Nonetheless, armed with the Villa decision, counsel has ammunition to argue that the waiver/assignment exception allows a minor child to recover medical expenses even when the parents' direct claim has been barred by the statute of limitations.

U.S. Supreme Court Rejects Expressed Preemption And Limits Implied Preemption In Automobile Product Liability Case

The United States Supreme Court recently decided the case of Geier v. Honda, 120 S.Ct. 1913 (2000), and, in a victory for consumers, struck down arguments regarding expressed preemption and severely limited arguments of implied preemption. At issue in Geier, and virtually every automobile product liability case, was the Federal Motor Vehicle Safety Standards ("FMVSS"). 15 U.S.C. § 1397(c) (1966) includes a savings clause: "compliance with the federal regulations does not exempt any person from liability under common law." Despite this clear language, many district court judges and some circuit courts have found that FMVSS expressly preempted all automotive product liability lawsuits. The Supreme Court held that "the savings clause reflects a congressional determination that occasional non-uniformity is a small price to pay for a system in which juries not only create, but also enforce, safety standards, while simultaneously providing necessary compensation to victims." Once and for all, automobile manufacturers' arguments of expressed preemption have been put to rest.

The Supreme Court also limited arguments regarding implied preemption. Although the Court held that the particular airbag design claim at issue in Geier was impliedly preempted by the FMVSS, the Court set specific limits on the implied preemption defenses. The plaintiff in Geier had alleged that the lack of an airbag was a design defect. However, the FMVSS 208 set a range of choices for different passive restraint devices and required manufacturers to gradually implement airbags thereby impliedly preempting plaintiff's claim.

A thorough reading of the Geier opinion reveals that the implied preemption defense applies only when a Federal Motor Vehicle Safety Standard sets forth a phase-in requirement. When manufacturers are permitted to gradually implement a new safety feature, they will not be liable based on the absence of the feature during the phase-in period. Beyond a phase-in requirement, it is going to be difficult for automobile product manufacturers to argue implied preemption.

The Supreme Court provided trial courts with considerable guidance in dealing with express and implied preemption arguments. Consumers seeking to exercise their 7th Amendment constitutional rights to trial by jury will no longer be denied their day-in-court by manufacturers' arguments of preemption. The plaintiff in Geier was represented by Robert Palmer of Springfield, Missouri and the Trial Lawyers for Public Justice, who won an important victory for consumers.

Continued From Page 2

"it is not likely the manufacturers will design load limiting systems that will elongate beyond the limits specified in Standard Number 209.… If a load limiting belt design elongates to the extent that it would provide no protection in rollover accidents, it will also not provide any protection in frontal crashes.… Manufacturers should be cognitive of the point made by Volvo, however, during the development of their systems." Despite notice of the potential defect, Subaru's engineers designed a seatbelt with rip stitching that allowed for partial ejection when deployed.

The settlement terms are confidential, however, the family believes that their efforts were successful. Our firm also protected other litigants by requiring that Subaru agree to a sharing-protective-order which allows our firm to retain the manufacturer's protected documents and share them with lawyers handling similar cases.

Answers to "My Cousin Vinny" Puzzler: Across: 3) biological 4) Tempest 7) Pesci 8) Six 13) bullshit 14) pool 17) sacsouds 19) Herman 22) deer 24) thickness Down: 1) tires 2) balls 5) Macchio 6) finished 9) youths 10) UCLA 11) grits 12) Rothenstein 13) blend 15) Tomei 16) tuna 18) Alabama 20) mud 21) NewYork 23) bushes

"WHISTLE-BLOWER" CONTINUED FROM PAGE 1

Under the Qui Tam provision, a citizen– "relator" – who provides information that leads to the recovery of monies by the federal government is entitled to share in the award. The relator can receive anywhere from 15% to 30% of the overall award.

The Act also prohibits an employer from taking retaliatory action against a whistle-blowing employee for reporting false claims. The employee is protected against discharge, demotion, suspension, harassment, threats, or discrimination. Remedies available to the whistle-blower include reinstatement with seniority, double back pay, interest on back pay, compensation for discriminatory treatment, reasonable attorney's fees, and litigation costs.

Litigation under the False Claims Act has expanded into the realm of environmental law. In the last two years, at least three courts have determined that failure to report violations of federal environmental law can serve as the basis for claims under the False Claims Act. In United States v. Accudyne, 93-C-801-S (Western District of Wisconsin 1995), the court upheld False Claims Act claims brought by five former employees of Accudyne, who alleged that the company violated its contract with the government by failing to comply with hazardous materials disposal and handling regulations of the Clean Air Act, Clean Water Act, and Resource Conservation and Recovery Act. In U.S. ex rel. Pickens v. Kanawha River Towing, et al., 1996 Westlaw 56092 (7th Dist. Oh. 1/23/66), the court refused to dismiss a claim by an employee of the subcontractor who alleged that the general contractor involved in a construction repair of a dam project dumped bilge water which contained hazardous substances into the river in violation of environmental law. A similar result was reached in U.S. ex rel. Stevens v. McGinnis, Inc., et al., Order No. C-1-93-442 (7th Dist. Oh. 8/27/96), where the court also ruled that a contractor's violation of the Clean Water Act could serve as the basis of a False Claims Act lawsuit. The court held that a contractor, who knowingly fails to perform a material requirement of a contract with the government, and seeks to recover payment under the contract as if it had been fully performed without declaring the nonperformance, has presented a false claim subject to liability under the False Claims Act.

The above cases have established that violations of environmental regulations by government contractors can serve as the basis for False Claims Act suits against companies.

"Senator, our research shows most people would prefer the plan where they or their loved ones could be injured or killed without recourse, in order to save premium dollars."

"FALSE CLAIMS" CONTINUED FROM PAGE 1

ments which were not provided. Porter has agreed to pay $1.5 million to settle the allegations of Medicare Fraud. Additionally, the owners of HTS, Glen and Judy Conley, agreed to pay $40,000. HTS is no longer in business.

As the original plaintiffs in the False Claims suit, the six plaintiffs are entitled to a share of the settlement for reporting the alleged fraud. The plaintiffs will share $277,200 or 18% of the $1.5 million settlement.

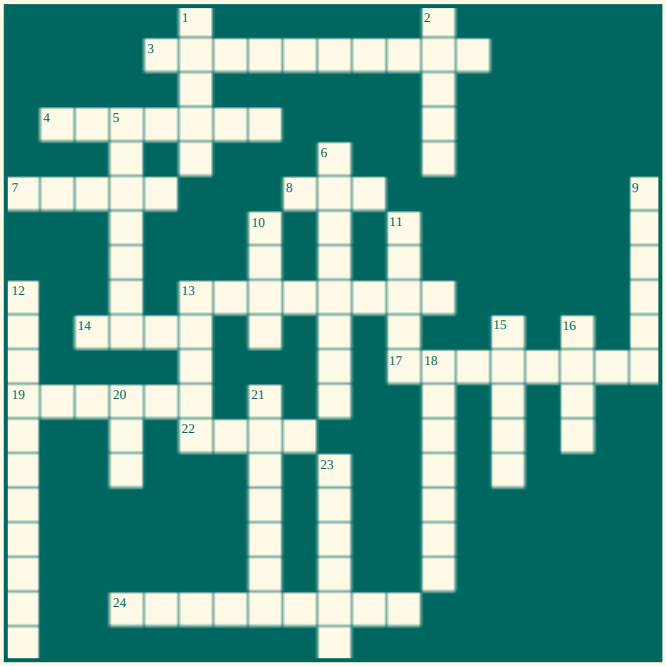
"My Cousin Vinny" Puzzler

Across

3. The type of clock that is ticking for Mona Lisa Vita.
4. Mona Lisa Vita identified the actual vehicle as being a 1963 Pontiac _____.
7. Actor Joe _____ that played attorney Vincent Gambini.
8. Number of years Vincent Gambini studied for the bar.
13. Vincent Gambini's opening statement included "Everything that guy just said is _____."
14. Game which Mona Lisa Vita used to raise bail money.
17. Convenience store (no hyphens) where the murder took place.
19. Judge Chamberlain Haller, played by Fred Gwynne, played this monster in a previous sitcom.
22. Animal in which Vincent Gambini went hunting and Mona Lisa Vita described as "drinking from a brook."
24. Gambini's discussion with the third witness, Mrs. Riley, about the _____ of her glasses.

Down

1. FBI expert testified about this rubber portion of the car.
2. Industry term used to describe the accuracy of a measuring device "Dead on _____."
5. Actor Ralph _____ that played the college student, William Gambini, accused of murder.
6. Vincent Gambini's statement that "I'm _____ with this guy" in concluding the cross examination of the witness.
9. The proper spelling of "These two _____," a famous line by Vincent Gambini which was misunderstood by the Judge.
10. California college in which the two students were transferring to.
11. Type of breakfast food item in southern states.
12. Mitchell Whitfield played Stanley _____, the college student accused of being an accessory to shoplifting.
13. Famous line by Ms. Mona Lisa Vita to Vincent Gambini about his clothing apparel, "Yeah, you _____."
15. Actress Marisa _____ who played Mona Lisa Vita and won an academy award for her role.
16. Food item stolen by William Gambini.
18. The state in which the murder took place.
20. Item that was stuck in the tires of Vincent Gambini's car.
21. Home state of the Gambinis'.
23. In cross examination of the second witness, Vincent Gambini required the witness to identify the "bushy things between the _____."



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