

### FEATURED VERDICT

#### Motor Vehicle

Defense argued plaintiff changed his story about crash

#### Defense

##### *Goff v. Pert*

United States District Court,  
Northern District, Dallas


**Plaintiff Counsel** T. Nguyen and Grant Gerleman, Turley Law Firm, Dallas

**Defense Counsel** Jeffrey Ross, Ross Barnes LLP, Dallas; Constance "Misty" Broome, The Broome Firm PLLC

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### CASES of NOTE

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Truck parts dealer said shop infringed its trademarks . . . . . 20



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Miller claimed residual pain and limitations performing activities of daily living. She sought to recover damages for past and future pain and suffering, past and future mental anguish and physical disfigurement.

The defense did not actively argue the issue of Miller's injuries, instead focusing on liability.

**RESULT** The jury rendered a defense verdict, finding no negligence on the part of 24-Hour Fitness USA.

**DEMAND** \$100,000  
**OFFER** \$24,292

**TRIAL DETAILS** Trial Length: 2 days  
Trial Deliberations: 2 hours

**EDITOR'S NOTE** This report is based on information that was provided by defense counsel. Plaintiff's counsel did not respond to the reporter's phone calls.

—Gary Raynaldo

## INTELLECTUAL PROPERTY

Trademarks — Business Law — Unfair Competition

# Truck parts dealer said shop infringed its trademarks

### MIXED VERDICT \$100,000

**CASE** Neal Technologies Inc. v. Unique Motorsports Inc., No. 4:15-cv-385  
**COURT** United States District Court, Eastern District, Sherman, TX  
**JUDGE** Ron Clark  
**DATE** 8/5/2016

**PLAINTIFF**  
**ATTORNEY(S)** Richard "Rocky" L. Schwartz (lead), Whitaker Chalk Swindle & Schwartz, Fort Worth, TX  
Stephanie R. Barnes, Siebman, Burg, Phillips & Smith, LLP, Plano, TX  
Scott A. Fredricks, Cantey Hanger LLP, Fort Worth, TX  
Clyde M. Siebman, Siebman, Burg, Phillips & Smith, LLP, Sherman, TX  
Philip A. Vickers, Cantey Hanger LLP, Fort Worth, TX

**DEFENSE**  
**ATTORNEY(S)** Gerald W. Roberts (lead), The Roberts Law Firm, Dallas, TX  
Avery Blake Rudd, Ollennu & Rudd Law PLLC, McKinney, TX

**FACTS & ALLEGATIONS** Plaintiff Neal Technologies Inc., a seller of aftermarket diesel engine truck parts, claimed that, starting in at least November 2014, Unique Motorsports Inc., a truck customization and repair shop and used vehicle dealer, infringed trademarks "BulletProof," "Bullet Proof" and "Bullet Proof Diesel," as well as Neal's registered marks "BULLETPROOFDIESEL.COM" and "BULLETPROOFDIESEL.COM (with design)," with respect to the sale of aftermarket diesel engine truck parts.

Unique Motorsports was owned by Dustin Helms and managed by Helms and Nathan Hall.

Neal sued Unique Motorsports and, later, Helms and Hall for willful unfair competition and trademark infringement. Neal claimed that each mark was suggestive. Alternatively, if the marks were merely descriptive, Neal alleged that they had acquired secondary meaning in Texas. If a mark is suggestive, a plaintiff need not prove that it has acquired secondary meaning.

In August 2014, Unique Motorsports installed a sign in front of its place of business stating "THE LEADER IN BULLETPROOF DIESELS." Also, starting no later than December 2014, Unique Motorsports advertised and sold exhaust gas recirculation (EGR) coolers as "Bulletproof EGRs." In November or December 2014, the defendants contacted Neal about becoming preferred installers of Neal products. The defendants did not become preferred installers, but did not take down their sign until at least June 2015 and did not stop using the term "Bulletproof EGRs" in their advertising until at least October 2015.

The defendants argued that Neal's marks were generic or, at best, descriptive. The defense also denied that the marks acquired secondary meaning in Texas before the defendants' use of them or that the defendants had infringed them.

**INJURIES/DAMAGES** The jury was asked how much of Unique Motorsports' profits should be awarded to Neal. The plaintiff's accounting expert opined that Unique Motorsports gross revenue from use of the terms was \$3,285,213.52, and plaintiff's counsel asked the jury to put that figure in the blank for that question. Plaintiff's counsel said the defense offered no evidence to controvert the expert's opinion.

The jury was also asked how much in "damages" should be awarded to Neal. Pointing to the expert's calculation and arguing that every sale by Unique Motorsports was a sale lost by Neal, plaintiff's counsel asked the jury to put \$3,285,213.52 in the blank for that question, as well.

Both questions related to the same loss, which Neal claimed was \$3,285,213.52 and for which it would not be able to recover more than once.

The defense denied that Neal lost any sales as a result of Unique Motorsports' conduct. The defense argued that Neal's customers were well-informed about their choice of products and unlikely to be confused by Unique Motorsports' use of the marks in its advertising.

**RESULT** The jury found that the registered marks were suggestive, but that the defendants did not infringe on them.

The jury found that the unregistered marks were descriptive but that, before the defendants' use, they had not acquired secondary meaning in Texas. Therefore, the jury did not reach the question of infringement of these marks.

The jury found that Unique Motorsports, but not Helms or Hall, had engaged in willful unfair competition. The jury did not find that any "damages" should be awarded to Neal, but did find that \$100,000 of UMI's profits should be awarded to Neal.

**POST-TRIAL** Neal sought a judgment for \$3,285,213.52 and a permanent injunction. The court weighed the six factors of *Pebble Beach Co. v. Tour 18 I Ltd.*, 155 F.3d 526, 554 (5th Cir. 1998) and concluded that Neal was entitled to an award of Unique Motorsports' profits, in an amount subject to the principles of equity. The court awarded \$253,000 in profits, based on 110 "bulletproof build" jobs performed by Unique Motorsports from November 2014 to October 2015, at of profit of \$2,300 a job. The court also taxed all costs against Unique Motorsports and permanently enjoined Unique Motorsports from using Neal's marks or similar terms in connection with promoting, advertising or selling goods or services similar to those provided by Neal. The plaintiff filed its motion for costs, and Unique Motorsports disputed the amount. While the motion was pending, Unique Motorsports filed a petition for Chapter 11 bankruptcy.

**TRIAL DETAILS** Trial Length: 3 days  
Trial Deliberations: 11 hours  
Jury Vote: 8-0

**PLAINTIFF  
EXPERT(S)** John M. Cone, J.D., trademark, Plano, TX  
Karl Schwabauer, CPA, accounting,  
Dallas, TX

**DEFENSE  
EXPERT(S)** None reported

**EDITOR'S NOTE** This report is based on information that was provided by plaintiff's counsel. Defense counsel did not respond to the reporter's phone calls.

—John Schneider

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