

No. A08-0399

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STATE OF MINNESOTA

IN COURT OF APPEALS

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Amanda Nicole Abbott,

Appellant,

vs.

Commissioner of Public Safety,

Respondent.

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RESPONDENT'S BRIEF AND APPENDIX

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## LEGAL ISSUE

Whether Appellant Was Entitled To Obtain The Source Code For The Intoxilyzer 5000 Where She Failed To Present Any Evidence Indicating That The Source Code Was In Respondent's Possession, Custody Or Control, Or Any Evidence Indicating That Production Of The Source Code Would Be Reasonably Calculated To Lead To The Discovery Of Admissible Evidence?

The trial court denied Appellant's Motion for Additional Discovery.

Minn. R. Civ. P. 26.01-.02 (2006);

Minn. R. Civ. P. 34.01 (2006);

*State v. Underdahl*, \_\_ N.W.2d \_\_, No. A07-2293  
(Minn. Ct. App. May 20, 2008);

*Connolly v. Commissioner of Public Safety*, 373 N.W.2d 352  
(Minn. Ct. App. 1985).

## STATEMENT OF THE CASE AND FACTS

This is an appeal from a decision denying Appellant's Motion for Additional Discovery made pursuant to Minn. Stat. §169A.51-.53 (2006), the Implied Consent Law. It arises out of Appellant's DWI arrest on September 27, 2007, and the subsequent revocation of her driving privileges for driving a motor vehicle with an alcohol concentration of .08 or more. By a Petition dated October 1, 2007, Appellant sought judicial review of the revocation order. On or about January 18, 2008, Appellant also served a Motion for Additional Discovery seeking discovery beyond the mandatory provisions of Minn. Stat. § 169A.53, subd. 2(d) (2006). Specifically, Appellant requested "additional discovery in the form of the source code for the Intoxilyzer 5000EN pursuant to the Minnesota Supreme Court's decision in *Underdahl v. Commissioner of Public Safety*, 735 N.W.2d 706 (Minn. 2007)."

This matter came on for hearing in Hennepin County District Court on January 28, 2008, the Honorable Gabriel Giancola presiding. At the hearing, Appellant narrowed her issues for trial to the single question of whether Appellant was entitled to discovery of the computer source code to the Intoxilyzer 5000EN. T.2.<sup>1</sup> After identifying the sole issue for trial, the parties rested on their written submissions. T.2-3.

In her brief in support of her Motion for Additional Discovery, Appellant first argued that production of the source code should be ordered because it was relevant to

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<sup>1</sup> "T." references are to pages of the transcript of the proceedings held in Hennepin County District Court, Fourth Judicial District, on January 28, 2008, before the Honorable Gabriel Giancola.

her test challenge and because “without access to the source code, [Appellant] is prevented from determining the trustworthiness of an alleged instrument failure.” *See* Appellant’s Trial Court Memorandum of Law, attached to Respondent’s Appendix at RA1-RA16.<sup>2</sup> In framing this argument, Appellant relied entirely on factual assertions from her counsel and citations to putative learned treatises. *See id.* at RA1-RA6. Appellant did not, however, attach any record support for the facts asserted by her attorney, nor did she offer the opinion of any expert witness. Appellant further argued that in addition to being relevant, the source code was “discoverable even if it is *not* in the possession, custody or control of the State” (emphasis added). *See* Appellant’s Trial Court Memorandum of Law, attached to Respondent’s Appendix at RA13.

Respondent replied to Appellant’s motion by explaining that it was Appellant’s burden, as a matter of law, to prove that Respondent had possession, custody, or control of the source code. *See* Respondent’s Trial Court Memorandum of Law, reproduced in Respondent’s Appendix at RA17-RA27. Respondent reiterated that it did not have possession, custody, or control of the source code, and offered an affidavit from the Minnesota Bureau of Criminal Apprehension’s toxicology supervisor in support of that assertion. *See* Affidavit of Glenn Hardin, reproduced in Respondent’s Appendix at RA28-RA30. Respondent further asserted that Appellant’s demand for the source code was not reasonably calculated to lead to the discovery of admissible evidence because Appellant had offered nothing more than speculation regarding the *possibility* of a latent

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<sup>2</sup> “RA” references are to pages of Respondent’s Appendix.

defect in the source code that *might* have had an impact on Appellant's final test result. *See* Respondent's Trial Court Memorandum of Law, reproduced in Respondent's Appendix at RA18- RA23. Respondent contended that such unsupported speculation was insufficient as a matter of law to meet even the low threshold for discovery in civil cases. *See id.*

By Order dated January 30, 2008, the trial court denied Appellant's Motion for Additional Discovery. *See generally* Trial Court's Order Denying Petitioner's Motion for Discovery and Sustaining License Revocation and Memorandum, reproduced in Respondent's Appendix at RA31-RA34. The trial court began by rejecting Appellant's contention that disclosure of the source code was mandated by the decision in *Underdahl v. Commissioner of Public Safety*, 735 N.W.2d 706 (Minn. 2007), noting that "[t]he *Underdahl* Court did not mandate that the source code be produced as a matter of course in every case involving an Intoxilyzer 500 [sic] test result." *See* Trial Court Order at RA32. The trial court then rejected Appellant's contention that the source code was relevant, holding that "[a]rguments that something 'might' have occurred are 'mere speculation' and insufficient as a matter of law 'unless supported by additional evidence.'" *See id.* at RA33. The court then noted that Appellant had "submitted no evidence in the form of expert testimony or affidavit establishing that the source code would lead to the discovery of admissible evidence." *See id.* at RA33. The trial court further explained that the burden was on Appellant to show that the source code was in Respondent's possession, custody or control, and then held that "[Appellant] has not

shown that the Commissioner has the source code to produce.” *See id.* at RA34. From that Order Appellant takes the instant appeal.

## ARGUMENT

### I. STANDARD OF REVIEW.

The trial court’s findings of fact are entitled to the same weight as a jury verdict and cannot be reversed if the trial court reasonably made the findings of fact based upon evidence adduced at trial. *See State v. Gardin*, 251 Minn. 157, 86 N.W.2d 711 (1957). Findings of fact will not be reversed or set aside unless clearly erroneous. *See State, Dep’t of Highways v. Beckey*, 291 Minn. 483, 192 N.W.2d 441 (1971). Conclusions of law, on the other hand, may be overturned upon a showing that the trial court erroneously construed and applied the law to the facts of the case. *See Berge v. Commissioner of Public Safety*, 374 N.W.2d 730, 732-33 (Minn. 1985).

Appellant contends that the trial court abused its discretion by denying her Motion for Additional Discovery. *See Appellant’s Brief* at 5-9. A district court has broad discretion to admit or exclude evidence, and its decision will not be disturbed unless it is based on an erroneous view of the law or constitutes a clear abuse of discretion. *See Uselman v. Uselman*, 464 N.W.2d 130, 138 (Minn. 1990). In addition, prejudice must be shown to obtain reversal or the error is considered “harmless.” *See id.* Indeed, a trial judge has wide discretion concerning discovery orders and exercise of that discretion will not be overturned on appeal absent a clear abuse of that discretion. *See Shetka v. Kueppers*, 454 N.W.2d 916, 921 (Minn. 1990). This Court reviews a district court’s order for an abuse of discretion by determining whether the district court made findings

unsupported by the evidence or by improperly applying the law. *See Underdahl v. Commissioner of Public Safety (In re Comm'r of Pub. Safety)*, 735 N.W.2d 706, 711 (Minn. 2007).

Respondent submits that the trial court's evidentiary ruling on Appellant's discovery motion was proper; Appellant offered no competent record support for her argument that the source code was either relevant or in Respondent's possession, custody or control. As a result, the trial court's denying Appellant's discovery motion should be affirmed.

## **II. THE TRIAL COURT DID NOT CLEARLY ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR ADDITIONAL DISCOVERY.**

Appellant argues that the trial court abused its discretion by denying her Motion for Additional Discovery. Respondent submits that the trial court's factual findings were fully supported by the record below and that the trial court properly applied the law when it denied Appellant's Motion. Accordingly, the trial court's decision should be affirmed.

The United States Supreme Court has noted that materials sought in discovery must be "relevant" and that "the district courts should not neglect their power to restrict discovery where 'justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense.'" *Herbert v. Lando*, 441 U.S. 153, 177 (1979) (referring to Fed. R. Civ. P. 26(b), the equivalent of Minn. R. Civ. P. 26.02). Furthermore, as a general rule, a district court should control "fishing expeditions" by exercising its discretion to manage the breadth and depth of discovery. *See In re Milk Indirect Purchaser Antitrust Litig.*, 588 N.W.2d 772, 776 (Minn. Ct.

App. 1999). Moreover, discovery may only be had if the information sought is in the “possession, custody or control of the party upon whom the request is served” as the rule requires. Minn. R. Civ. P. 34.01. The party seeking production of documents bears the burden of demonstrating that the opposing party has the requisite possession, custody or control. See *U.S. v. International Union of Petroleum and Indus. Workers*, 870 F.2d 1450, 1452 (9th Cir. 1989); *Norman v. Young*, 422 F.2d 470, 472-73 (10th Cir. 1970).

Given that the implied consent statute specifically assigns a role to the court as a gatekeeper for further discovery, the moving party must meet *some* threshold of proof to satisfy the court that further discovery is appropriate. See Minn. Stat. § 169A.53, subd. 2(d) (2006); see also *Hasan v. McDonald’s Corporation*, 377 N.W.2d 472, 475 (Minn. Ct. App. 1985) (in granting or denying motions for discovery, courts should consider whether moving party has been diligent in seeking discovery prior to the motion, and whether information is sought based on good faith belief it is relevant and not a mere “fishing expedition”).<sup>3</sup> Here, Appellant has made no such showing. Thus, her claims are without merit.

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<sup>3</sup> Appellant’s first argument appears to be that *Respondent* erred when it asserted to the district court that the appropriate standard for discoverability was the two-prong test set forth in *Hasan v. McDonald’s Corporation*, 377 N.W.2d 472 (Minn. Ct. App. 1985), rather than resting entirely on the standard set forth in Rule 26 of the Minnesota Rules of Civil Procedure. See Appellant’s Brief at 13-15. This argument fails for two fundamental reasons. First, there is no evidence that the district court even used the test set out in *Hasan*. To the contrary, the court expressly cited the standards set forth in Minnesota Rule of Civil Procedure 26.02 and then directly applied those standards to the record proffered by Appellant. See Trial Court Order and Memorandum at RA33. (Footnote Continued on Next Page)

**A. Based On The Record Below, The Trial Court Properly Concluded That The Source Code Is Not In Respondent's Possession, Custody Or Control.**

Citing *Underdahl*, Appellant claims that Respondent has possession, custody or control of the source code pursuant to its contract with CMI, and that the trial court's decision to the contrary is clearly erroneous. Specifically, Appellant claims that "*Underdahl* itself established that the Commissioner has such possession, custody or control due to its contract with CMI, and the trial court is bound by that decision, as is this Court." See Appellant's Brief at 23. But whether Respondent is "contractually entitled to" possession, custody or control of the source code is not the issue here, nor was it the issue before the trial court below.<sup>4</sup> The true issue is whether Respondent is *actually* in possession, custody or control of the source code. With the issue so framed, Respondent submits that the trial court properly relied on the record before it in concluding that Appellant failed to establish that Respondent had the source code in its possession, custody or control.

In concluding that Respondent did not have the source code in its possession, custody or control, the trial court correctly observed that Appellant carried the burden of

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(Footnote Continued From Previous Page)

Consequently, Appellant's argument on this point is moot. Second, even if the trial court had cited *Hasan*, the test for discoverability set forth in that opinion is virtually identical to the standards outlined in Rule 26 and, regardless, provides an appropriate framework for assessing discoverability in implied consent cases, where the scope of initial discovery is restricted by statute, and when the proponent of the discovery waits until the eve of trial to move for expanded discovery (as was the case herein). See T.2.

<sup>4</sup> Appellant even went so far with the trial court as to take the clearly erroneous position that the source code "is discoverable even if it is *not* in the possession, custody or control of the State." See Appellant's trial court brief, at RA13 (emphasis added).

establishing that Respondent did in fact have the code available for production. *See* Trial Court Order and Memorandum at RA34. The trial court then held that Appellant had failed to meet this burden. *See id.* In reaching this result, the trial court had manifest record support. Appellant submitted no competent evidence—by affidavit, live testimony, or otherwise—to establish that Respondent did, in fact, have the code in its possession, custody or control. Appellant did not even submit a copy of the contract between CMI and the State. Respondent, by contrast, submitted the unchallenged Affidavit Glenn Hardin, Toxicology Supervisor for the Minnesota Bureau of Criminal Apprehension, attesting to the presumptive reliability of Appellant’s breath test and explaining as a factual matter that “[t]he source code is not now, nor has it ever been, in the possession or custody or the BCA.” *See* Affidavit of Glenn Hardin at RA30.

Despite this lack of record support, Appellant claims that the *Underdahl* decision “established that the Commissioner has such possession, custody or control due to its contract with CMI.” *See* Appellant’s Brief at 23. But Appellant’s argument completely mischaracterizes the Supreme Court’s decision in *Underdahl*. *Underdahl* addressed only the question of whether the Commissioner was entitled to a writ of prohibition, not whether the source code was *per se* discoverable. As to basic discoverability, the *Underdahl* court was unable to definitively resolve that question “because the factual record before us is inadequate.” *Underdahl*, 735 N.W.2d at 712-13. But the court concluded that “irrespective of whether the state owns any portion of the source code,” the Commissioner could sue CMI to obtain the source code. *Id.* Thus, the *Underdahl* court did not conclude that Respondent had possession, custody or control of the source

code, as Appellant wrongly claims. *Id.* To the contrary, the only conclusion reached in *Underdahl* was that, for purposes of its analysis as to whether a Writ of Prohibition should or should not be granted in that matter, Respondent was not without “an adequate remedy at law” to *gain* possession, custody or control of the source code. *See id.*

The trial court, relying on the record laid by Appellant, and recognizing that the *Underdahl* court did not resolve the issue of possession, custody or control, concluded that Appellant had failed to carry her burden of proving that the source code was available for production from Respondent. Given the lack of record support for Appellant’s position and Appellant’s fundamental misreading of *Underdahl*, it cannot be said that the trial court clearly erred in its finding that Respondent was not in possession, custody or control of the source code.

**B. Even If Appellant Had The Source Code To Produce, The Trial Court Properly Denied Appellant’s Motion Because Appellant Failed To Show That Production Of The Source Code Was Reasonably Calculated To Lead To The Discovery Of Admissible Evidence.**

Appellant also claims that the trial court erred in concluding she failed to establish that production of the source code would be “reasonably calculated to lead to the discovery of admissible evidence.” *See* Appellant’s Brief at 15-23. According to Appellant, the source code is relevant because it “has to do with measuring breath alcohol.” *See* Appellant’s Brief at 20-23. The trial court, however, explained that this mere assertion is insufficient to establish that the code is discoverable, noting that while Appellant is entitled to challenge the validity of the testing method, she must demonstrate (1) that there was a reasonable likelihood of a malfunction during her test, and (2) that the

nature of this possible malfunction suggests a possible programming error. See Trial Court Order and Memorandum at RA33-RA34. Respondent submits that the trial court's decision was based on a plain and proper application of the Rules of Civil Procedure to the record facts, and was especially appropriate given that Appellant failed to introduce any competent evidence suggesting that there was any reasonable likelihood that a problem occurred either with her particular test or with the Intoxilyzer fleet as a whole.<sup>5</sup> Thus, the trial court's finding is fully supported by the record, was not an abuse of discretion, and should therefore be affirmed.

In general, trial courts have broad discretion when granting or denying discovery requests. See *Connolly v. Commissioner of Public Safety*, 373 N.W.2d 352, 354 (Minn. Ct. App. 1985) (citing *Baskerville v. Baskerville*, 246 Minn. 496, 507, 75 N.W.2d 762, 769 (1956)). In order to be "relevant," materials sought in discovery must be "reasonably calculated to lead to the discovery of admissible evidence." Minn. R. Civ. P. 26.02(a) (2006). When a party seeks additional discovery, specifically the source code for the Intoxilyzer 5000EN, the moving party must do more than simply assert that the source code may be relevant. See *State v. Underdahl*, \_\_\_ N.W.2d \_\_\_, No. A07-2293, slip op. at 8 (Minn. Ct. App. May 20, 2008) (pending published opinion)

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<sup>5</sup> To the extent that Appellant is asserting that there may be a problem with the fleet as a whole, Appellant is essentially challenging Respondent's approval of the instrument by rule. See *State v. Underdahl*, \_\_\_ N.W.2d \_\_\_, No. A07-2293, slip op. at 8 n.2 (Minn. Ct. App. May 20, 2008) (recognizing that the Intoxilyzer 5000EN was approved by rule without access to the source code, and concluding that Underdahl's argument "is essentially a challenge to the state's approval process"). While aggrieved parties may challenge the validity of an already-adopted rule, the court with original jurisdiction over such challenges is this Court, not the district court. See Minn. Stat. § 14.44 (2006).

(*Underdahl II*).<sup>6</sup> Instead, the movant must make some showing indicating that the source code “is relevant and thereby discoverable.” *See id.* at 9; *see also State v. Olcott*, A06-2340 (Minn. Ct. App. Apr. 15, 2008) (unpublished opinion) (affirming denial of Intoxilyzer source code motion where driver made no showing of how source code is necessary to challenge the test result or why he could not get the same information from inspecting and testing the BCA Intoxilyzer that is available to him).<sup>7</sup>

In *Underdahl II*, No. A07-2293 (Minn. Ct. App. May 20, 2008), and *State v. Brunner*, No. A07-2428, the companion case to *Underdahl II*, the trial courts granted both drivers’ motions for the state to disclose the source code for the Intoxilyzer 5000EN. *See slip op.* at 2. In support of the motion in *Brunner*, the driver provided the district court with a copy of the testimony of Dr. David Wagner, regarding computerized voting systems. *See slip op.* at 6. The driver did not, however, provide the district court with any evidence specifically referencing the source code for the Intoxilyzer 5000EN. *See id.* In *Underdahl II*, the driver did not even provide this minimal level of documentation. *Id.*

In analyzing the matters, this Court commented on the dearth of evidence supplied to the district court in support of the discovery motion:

Respondents have not shown what an Intoxilyzer “source code” is, how it bears on the operation of the Intoxilyzer, or what precise role it has in regulating the accuracy of the machine. Accordingly, there is no showing as to what possible deficiencies could be found in a source code, how significant any deficiencies might be to the accuracy of the machine’s

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<sup>6</sup> A copy of the *Underdahl II* opinion, which is published but not yet reported, is attached in Respondent’s Appendix at RA35-RA43.

<sup>7</sup> Pursuant to Minn. Stat. § 480A.08, subd. 3 (2006), a copy of the *Olcott* opinion is attached in Respondent’s Appendix at RA44-RA50.

results, or that testing of the machine, which defendants are permitted to do, would not reveal potential inaccuracies without access to the source code.

*Slip op.* at 8.<sup>8</sup> Based on this lack of evidence, this Court went on to reverse the district court, concluding that “[w]ere we to hold that respondents’ speculations satisfy their burden under rule 9, this case would be a prelude to similar, speculative challenges on other aspects of the design and manufacture of Intoxilyzers.” *See id.* slip op. at 9, reproduced in Respondent’s Appendix at RA43.

Similarly, in *Connolly*, the driver submitted interrogatories and a request for production of documents to the Commissioner of Public Safety. *See Connolly*, 373 N.W.2d at 353. In response, the Commissioner sent a letter refusing to answer the interrogatories because they were too burdensome. *Id.* at 354. The Commissioner advised the driver that he could view its entire file, and did not respond to the request for production of documents at all. *See id.* The driver never went to view the file. *See id.* The trial court found that the information sought “could be found in police reports or was inappropriate to the proceeding.” *Id.* In concluding that the trial court did not abuse its discretion in denying the driver’s motion for additional discovery, this Court reasoned, in part, that the driver “had the opportunity to review respondent’s files and obtain the

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<sup>8</sup> Though *Underdahl II* and *Brunner* are both criminal rather than civil cases, the analysis employed by this Court is instructive here given the similarity between Rule 9.01, subd. 2 of the Rules of Criminal Procedure and Minn. Stat. § 169A.53, subd. 2(d), which both assign a gatekeeper function to the district court, beyond merely rubberstamping of motions for additional discovery. *Also compare State v. Hunter*, 349 N.W.2d 865, 866 (Minn. Ct. App. 1984) (noting that criminal rules are not to be used “for fishing expeditions”), with *Milk Indirect Purchaser Antitrust Litig.*, 588 N.W.2d at 776 (noting need to control “fishing expeditions” under Rule 26).

requested information.” *Id.* This Court also concluded that the Commissioner’s reply to the driver’s discovery requests was sufficient under the Rules of Civil Procedure. *See id.*

Like the lower courts in *Underdahl II* and *Connolly*, the trial court below acted properly and did not abuse its discretion in denying Appellant’s Motion. Here, the trial court reviewed all material submitted by Appellant. Like the driver in *Connolly*, Appellant had access to Respondent’s entire file. Indeed, Appellant here had unfettered access to the Intoxilyzer 5000 instrument housed at the BCA, Intoxilyzer maintenance logs and usage reports, and over 800 pages of validation testing studies conducted by the BCA on the Intoxilyzer and its software programming when BCA approved the instrument pursuant to legislative mandate. *See* Affidavit of Glenn Hardin, reproduced in Respondent’s Appendix at RA28-RA30. More importantly, like the driver in *Olcott*, Appellant could not explain how the source code might be relevant to her case. Indeed, Appellant offered no testimony at all—expert or otherwise—to establish that her test results implicated the spectre of a latent programming defect. This defect was not lost on the trial court—it concluded that Appellant “has not shown that even had there been a malfunction, discovery of the source code would assist in demonstrating that the malfunction actually affected the test results.” *See* Trial Court Order and Memorandum at RA34.

Appellant failed to demonstrate any factual basis to support a good faith belief that obtaining any part of the computer source code for the Intoxilyzer would reveal relevant facts related to the reliability of the Intoxilyzer test or her test results. Appellant presented no relevant evidence suggesting there was a problem with either the

administration of the test, the test record itself, or any inconsistency with the amount of alcohol she consumed and the 0.09 test result. Accordingly, Appellant's request for additional discovery is the very portrait of a prohibited "fishing expedition" and the trial court properly denied the motion. As a result, the trial court's ruling should not be disturbed on appeal.

The only "factual" support Appellant offers to bolster her argument are citations to putative learned treatises and bald assertions of counsel, stitched together in an attempt to establish that the source code does indeed "have to do with" measuring breath alcohol concentration. *See* Appellant's Brief at 16-19. Such assertions are obviously incompetent as evidence, however, and cannot form the basis for a conclusion that there is a reasonable likelihood that a problem exists with the Intoxilyzer's programming.

Statements made in learned treatises fit squarely within the definition of hearsay, and consequently are only admissible through the hearsay exception found in Minnesota Rule of Evidence 803(18) (learned treatises). This exception provides that while such statements may be admissible, they come into evidence only through a qualified expert witness and only when read into evidence. The treatises themselves "may not be received as exhibits." *See* Minn. R. Evid. 803(18).

In this case, there was no basis for the trial court or this Court to consider such statements because Appellant proffered no expert witness through which those statements could be admitted. In short, Appellant appears to be arguing that the trial court erred by failing to recognize the expert qualifications of individuals she did not fully identify, and by failing to recognize the manifest correctness of opinions she made no effort to supply.

Such “failings” do not rise to the level of reversible error, and the decision of the trial court should therefore be affirmed.<sup>9</sup>

More importantly, the evidence provided to the trial court by Appellant completely misses the point. No one disputes that the source code has something to do with measuring a breath sample for alcohol. In other words, Appellant’s evidence supports a simple factual truism: the source code has something to do with Appellant’s breath test result. The flaw in Appellant’s argument, however, is that she equates “having something to do with my breath test result” with “relevancy.” As this Court stated in *Underdahl II*, “Rule 9 is not authority for obtaining information on a mere assertion that it has something to do with the defendant’s guilt.” *Slip op.* at 9. Similarly here, Rule 26 is not authority for obtaining information on a mere assertion that it has something to do with Appellant’s breath test result. Appellant employs the same fallacious reasoning and argument rejected by this Court in *Underdahl II*. Both Appellant’s and Underdahl’s “bald assertion” that just because “the Intoxilyzer 5000 and its software were used,” it necessarily follows that access to the source code is required to “confront the

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<sup>9</sup> Appellant takes the additional leap of suggesting that this Court should take judicial notice of these so-called “facts.” Here too, Appellant’s argument fails. Minnesota Rule of Evidence 201 does provide that courts can take judicial notice of certain facts. However, the Court may do so only when those facts are contained in “sources whose accuracy cannot reasonably be questioned.” *See* Minn. R. Evid. 201(b)(2). Respondent submits that the incomplete citations and bald assertions offered by Appellant are entirely susceptible to reasonable questions, and were in fact disputed through the Affidavit of Glenn Hardin, the BCA’s Toxicology Supervisor. Even if this was not the case, the Court still should not take judicial notice because the Court has not been provided with the materials cited. *See* Minn. R. Evid. 201(3) (“A court shall take judicial notice if requested by a party *and supplied with the necessary information.*” (emphasis added)).

instrument's evidence," is simply insufficient as a matter of fact and law, in *Underdahl* as well as here. See *Underdahl*, slip op. at 8-10. Accordingly, this Court should affirm the trial court's decision below and not disturb the underlying ruling on appeal.

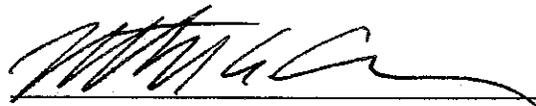
### CONCLUSION

In this case, the trial court did not clearly abuse its discretion in denying Appellant's Motion for Additional Discovery because Appellant failed to establish that the information sought was relevant to her case, or was in Respondent's possession, custody or control. Appellant offered no competent evidence to establish either proposition, and the trial court's Order should therefore be affirmed.

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Respectfully submitted,

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