NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

LEATHERWOOD BROTHERS, LLC., an Arizona Limited Liability Company doing business as THE BIG BANK BAR,	No. 1 CA-SA 09-0313
Petitioner,	DEPARTMENT D
v.	Maricopa County Superior Court No. CV 2009-009488
THE HONORABLE JEANNE GARCIA, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA,	**DECISION ORDER**
Respondent Judge,	
ROBERTO FLORES ORTIZ, surviving husband of Eloisa Flores Aviles, deceased, individually and as statutory representative for the surviving children of Eloisa Flores Aviles; et al.,	
Real Parties in Interest.	

The Court, Presiding Judge Patricia A. Orozco and Judges Diane M. Johnsen and Jon W. Thompson, participating, has considered this special action.

Petitioner asks us to grant relief by reversing the superior court's order compelling production of statements by witnesses named Pittman, Ellis and Kump. The record discloses that the statements at issue were given within a week or two of

the auto accident at issue in the litigation. It also discloses that shortly after the incident, police interviewed Pittman and that the parties have available to them a transcript of that interview.

Petitioner asserts the statements are protected by Arizona Rule of Civil Procedure 26(b)(3) and that the superior court abused its discretion by ordering their production in the absence of a showing by Respondent that the witnesses were hostile, that the witnesses could not recall details about the event, that the statements are sought to impeach and that they contain admissions. In support, Petitioner cites *Klaiber v. Orzel*, 148 Ariz. 320, 323, 714 P.2d 813, 816 (1986).

We exercise our discretion to accept jurisdiction of this special action petition because Petitioner has no equally plain, speedy or adequate remedy for the error it alleges the superior court committed. *See Emergency Care Dynamics, Ltd. v. Superior Court*, 188 Ariz. 32, 33, 932 P.2d 297, 298 (App. 1997).

Contrary to Petitioner's contention, the cases teach that pursuant to Rule 26(b)(3), production of a witness statement protected by the work product doctrine may be compelled when it is given close in time to the events at issue, even in the absence of a showing of witness hostility or failing memory. As

stated in 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2025 (2d ed. 1987):

> There is now a substantial body of authority that . . . suggests that statements taken from witnesses at about the time of the occurrence described in them are unique, in that they provide an immediate impression of the facts. On this view mere lapse of time can in itself suffice to justify production of material otherwise protected as work product.

Accord Coogan v. Cornet Transp. Co., 199 F.R.D. 166 (D. Md. 2001) (statement written by driver at the accident scene); *Rexford v. Olczak,* 176 F.R.D. 90 (W.D.N.Y. 1997) (ordering production of diary kept by party: "Although it is true that defendants can take plaintiff's deposition and ask her about these events, this does not demonstrate a lack of need in this case. It has repeatedly been recognized that a witness's memory long after the events in question is not nearly as reliable as his recollection at or near the time of the event, and this advantage of contemporaneous statements by itself can constitute sufficient justification for disclosure of such statements.") (quoting *Carolan v. New York Telephone Co.*, 1984 WL 368, at *4 (S.D.N.Y. May 17, 1984)); *see McDougall v. Dunn*, 468 F.2d 468, 474 (4th Cir. 1972) (statements taken immediately after an accident "constitute 'unique catalysts in the search for truth' in the judicial process").

We recognized this principle in *Lumber Country, Inc. v. Superior Court*, 155 Ariz. 98, 745 P.2d 156 (App. 1987), when we reversed an order compelling production of statements made to an insurance investigator two months after the accident. We reasoned in that case that although "[a] contemporaneous statement is one given in close proximity to the time of the accident and thus is unique," because two months had elapsed before the statements there were taken, the statements had lost what we called the "quality of uniqueness." *Id.* at 102, 745 P.2d at 160.

Accordingly, we conclude the trial court did not abuse its discretion in this case by ordering production of the statements by the witnesses Ellis and Kump. Based on the record, those statements are unique because they were "given in close proximity to the time of the accident." *Id.* The Pittman statement, however, is not unique because, as we have noted, the parties already are in possession of a transcript of a police interview conducted shortly after the incident. For that reason, we conclude the authorities cited above do not apply to the Pittman statement. Therefore,

IT IS ORDERED the Court of Appeals, in its discretion, accepts jurisdiction in this special action and grants relief

only to the extent that we reverse that portion of the trial court's order compelling production of the Pittman witness statement.

/s/
DIANE M. JOHNSEN, Judge