

**FIFTH DIVISION
BROWN, C. J.,
RICKMAN, P. J., and MERCIER, J.**

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March 26, 2026

**NOT TO BE OFFICIALLY
REPORTED**

In the Court of Appeals of Georgia

A26A0812. SMITH v. DPS GROUP, LLC.

MERCIER, Judge.

Thomas Smith appeals from the trial court's order granting summary judgment to DPS Group, LLC ("DPS") in this personal injury action. For reasons that follow, we affirm.

Summary judgment is appropriate when no genuine issues of material fact remain and the moving party is entitled to judgment as a matter of law. See OCGA § 9-11-56(c). We review the grant of summary judgment de novo, construing the evidence and all reasonable inferences drawn from it in the light most favorable to the non-moving party. See *Thurman v. TCFPA Fam. Med. Ctrs.*, 358 Ga. App. 439, 439 (855 SE2d 431) (2021).

So viewed, the record shows that Smith was employed by the Georgia Department of Corrections as an escort officer, a position that required him to accompany contractors making repairs and improvements at prisons across the state. On May 23, 2022, two workers employed by DPS, an electrical contractor, were sent to Macon State Prison to perform electrical services. Smith escorted them to an administrative area, where they commenced work around a building with a metal awning that covered a walkway. Because it was raining, Smith stood under the awning as one of the DPS workers “was working up top.” After some period of time, Smith heard a cracking noise, and the awning fell on him, injuring his head, neck, and left shoulder.

Smith sued DPS, alleging that he was injured by the awning because the DPS worker failed to perform his work in a safe manner. When asked at his deposition what caused the awning to fall, however, Smith responded: “I assume probably [the DPS worker’s] weight or something. I don’t know. I don’t know what caused it.” Smith further testified that he did not know whether the worker fell or dropped anything on the awning, noting: “I didn’t see him” And he conceded that he did not know “what, if anything, the DPS worker did that — that caused [the awning] to fall[.]”

DPS moved for summary judgment, arguing that Smith did not know what had caused the awning to fall and had not specified any act or omission by DPS or its employees that breached the standard of care. Smith submitted an affidavit in response, averring that “[t]he awning collapsed due to the weight of the DPS employee walking and standing on it.” But the trial court refused to consider this affidavit testimony, finding that it contradicted Smith’s prior deposition statements. The trial court also rejected Smith’s assertion that the doctrine of *res ipsa loquitur* supported an inference of negligence. Concluding that summary judgment was appropriate, the trial court granted DPS’s motion. This appeal followed.

To recover on a claim of ordinary negligence, a plaintiff must prove four elements:

(1) a legal duty to conform to a standard of conduct raised by law for the protection of others against unreasonable risks of harm; (2) a breach of this standard; (3) a legally attributable causal connection between the conduct and the resulting injury; and (4) loss or damage to plaintiff’s legally protected interest resulting from the breach.

Thurman, 358 Ga. App. at 440. Negligence must be established through affirmative proof, and without such proof, we “presume performance of duty and freedom from negligence.” *Id.* (quotation marks omitted). In other words,

the fact that an accident occurred and a plaintiff suffered injury establishes no basis for recovery unless the plaintiff comes forward with evidence showing that the accident was caused by the defendant’s negligence. This is because guesses or speculation which raise merely a conjecture or possibility are not sufficient to create even an inference of fact for consideration on summary judgment. Instead, a plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. Simply put, a mere possibility of such causation is not enough.

Id. at 440–41 (citations and punctuation omitted).

With these standards in mind, we turn to the evidence. When asked at his deposition what caused the awning to fall, Smith candidly stated that he did not know. Although he speculated that the DPS worker’s weight might have contributed to the fall, Smith admittedly could not specify the cause, did not know whether the DPS worker had done anything to trigger the collapse, and, in fact, “did not see him.”

Ultimately, his deposition testimony offered no evidence that negligence by DPS or its employees caused the incident here. See *Thurman*, 358 Ga. App. at 440–41.

Smith later submitted contrary testimony through an affidavit, affirmatively stating that the awning collapsed “due to the weight of the DPS employee walking and standing on it.” But “[i]t is well established that on summary judgment a party’s self-contradictory testimony, if unexplained, must be construed against the party-witness, even when the party-witness is the respondent rather than the movant.” *Tuggle v. Rose*, 333 Ga. App. 431, 433(2) (773 SE2d 485) (2015). Although Smith argues on appeal that his affidavit was not self-contradictory, the trial court found otherwise, and we agree. After testifying that he did not know what caused the awning to fall, Smith changed course without explanation, asserting in his affidavit that the awning fell because the DPS employee was walking and standing on it. The trial court properly rejected such assertion as contradictory. See *id.* (because plaintiff testified at deposition that he did not know how long defendant had held him in a headlock, although it “‘felt like forever,’” plaintiff’s subsequent affidavit testimony that the headlock lasted 20 minutes was rejected as contradictory). See also *Smith v. Six Flags Over Ga. II*, 370 Ga. App. 778, 782(2) (899 SE2d 315) (2024) (“Testimony

is contradictory if one part of the testimony asserts or expresses the opposite of another part of the testimony.” (quotation marks omitted)).

At best, the record shows that a DPS employee was “working up top” before the awning fell. Smith does not know what caused the awning to collapse or what the employee was doing at the time. He also offered little information about the awning, testifying only that it was made of metal and had been painted. He presented no pictures or videos of the area, did not know how the awning was attached to the building, could not describe its size, and has not pointed to any record evidence regarding its structural integrity. Smith “guess[ed]” that it attached from the top and “assume[d]” that the worker’s weight “probably” made it fall. Guesses and speculation, however, cannot raise a question of fact on summary judgment. See *Thurman*, 358 Ga. App. at 440; see also *Cribb v. Moore*, 373 Ga. App. 750, 752 (908 SE2d 783) (2024) (trial court erred in denying defendants’ motion for summary judgment where plaintiffs’ claim regarding fire on defendants’ property was “based upon a pyramid of inferences and speculation as to what could have caused the fire, which is insufficient to create a genuine issue of material fact to survive summary judgment”).

Smith further argues that, even if he cannot establish the cause of the awning's collapse, the doctrine of *res ipsa loquitur* saves his claim. *Res ipsa loquitur* is an evidentiary rule that applies in cases where "there is no evidence of consequence showing negligence on the part of the defendant," but the jury is permitted "to infer facts from the circumstances in which the injury occurred, thereby filling the evidentiary gap." *Family Thrift v. Birthrong*, 336 Ga. App. 601, 604–05(2) (785 SE2d 547) (2016) (quotation marks omitted). This inference, however, is permissible only when:

(1) the injury is of a kind which ordinarily does not occur in the absence of someone's negligence; (2) [the injury was] caused by an agency or instrumentality within the exclusive control of the defendant; and (3) [the injury was not] due to any voluntary action or contribution on the part of the plaintiff.

Id. at 605(2).

The doctrine requires *exclusive* control because, when a defendant has such control, "it is more particularly within [the defendant's] power to explain the character and condition of the instrumentality which may have occasioned injury than within the power of the injured party." *Evans v. Heard*, 264 Ga. 239, 240 (442 SE2d

753) (1994) (quotation marks omitted). Exclusive control is shown in one of two ways: (1) by demonstrating that the defendant owned, operated, and maintained the thing doing damage; or (2) by demonstrating that the defendant “controlled, and was responsible for the management and maintenance” of that item. *Id.* (quotation marks omitted).

Nothing indicates that DPS owned the awning at issue, which was attached to a prison administrative building. To establish exclusive control, therefore, Smith needed to demonstrate that DPS not only “controlled” the awning at the time of the injury, but was also responsible for its management and maintenance. See *Evans*, 264 Ga. at 240. Smith failed to meet this burden. See *Stern v. Pettis*, 357 Ga. App. 78, 85–86(3)(c) (847 SE2d 824) (2020) (“The key issue is not whether the evidence raises a question of fact as to *res ipsa loquitur*, but whether the claimant has *established* the doctrine’s three required elements.”). The record shows that DPS was at Macon State Prison to perform electrical work that did not directly involve the awning. A DPS employee may have been on or around the awning at the time it fell. But the employee’s presence does not establish that DPS was responsible for managing and maintaining the awning, and Smith provided no evidence of such responsibility.

Smith did not offer proof of exclusive control, undermining his reliance on the doctrine of *res ipsa loquitur*. See *Evan*, 264 Ga. at 240–41 (although defendant arguably had control over a trailer that he had borrowed and was pulling behind his vehicle, *res ipsa loquitur* claim involving tire that separated from the trailer failed where record lacked evidence that defendant had undertaken responsibility for managing and maintaining the trailer). No inference of negligence is permitted. See *Stern*, 357 Ga. App. at 87(3)(c) (“To infer negligence based on *res ipsa loquitur*, [plaintiffs] were required to satisfy each of the three doctrinal elements. They failed to do so. The trial court, therefore, properly rejected [plaintiffs’] *res ipsa loquitur* arguments.”). Accordingly, because Smith did not present evidence that an act or omission by DPS or its employees caused his injuries, the trial court properly granted summary judgment to DPS. See *Smith*, 370 Ga. App. at 786–87(4) (“[W]here the cause of the fall is mere speculation, guess, or conjecture, there is not even a scintilla of evidence to create a material issue of fact for jury determination, because such conjecture has no probative value to create an issue of fact.” (punctuation omitted)).

Judgment affirmed. Brown, C. J., and Rickman, P. J., concur.