GUIDRY, J.

A bicyclist appeals a summary judgment dismissing her suit for injuries she sustained when she rode into a concrete pole located in the middle of a sidewalk. Finding summary judgment was improperly granted, we reverse and remand this matter to the trial court for further proceedings.

FACTS AND PROCEDURAL HISTORY

On July 12, 2011, Reina Abolofia, a college student, filed a petition for damages against the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College (LSU), alleging:

> On or about March 1, 2011, at approximately 10:00 p.m., [Ms. Abolofia] was riding her bicycle on LSU's campus south of the intersection of Nicholson Drive and Burbank Drive, in the Parish of East Baton Rouge, State of Louisiana....
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> ....
>
> Suddenly and without warning, [Ms. Abolofia] collided with a metal pole filled with concrete that was installed in the middle of the bicycle path.
>
> ....
>
> The metal pole was unpainted and unmarked, preventing [Ms. Abolofia] from seeing the unreasonably hazardous obstruction.

As a consequence of the above-related collision, Ms. Abolofia alleged that she sustained injuries to her neck, back, hand, and other injuries to be established at trial. On February 29, 2012, Ms. Abolofia amended her petition for damages to add Southgate Towers, LLC and the insurers of LSU and Southgate as defendants in her lawsuit. In adding Southgate as a defendant, Ms. Abolofia alleged that the "metal pole filled with concrete ... was installed by LSU and/or Southgate in the middle of the bicycle path."

Southgate filed an answer denying liability for Ms. Abolofia's injuries and subsequently filed a motion for summary judgment seeking dismissal of Ms. Abolofia's claims against it, contending that (1) the pole Ms. Abolofia collided

with was not a "defect" in accordance with La. C.C. arts. 2317 and 2317.1; (2) it did not have custody or control of the pole for which liability could be imposed under La. C.C. arts. 2317 and 2317.1; and (3) it owed no duty to Ms. Abolofia under La. C.C. art. 2315 to protect her from the risk of colliding with the pole.

Following a hearing on the motion, the trial court granted the motion and rendered summary judgment dismissing Ms. Abolofia's claims against Southgate with prejudice in a judgment signed December 2, 2013. As its reasons for judgment, the trial court adopted Southgate's Memorandum in Support of Summary Judgment, Supplemental Memorandum in Support of Summary Judgment, and Reply Memorandum in Support of Summary Judgment and further stated that the obstacle Ms. Abolofia "allegedly collided with was 'open and obvious,' such that liability for [Ms. Abolofia's] alleged injuries cannot attach to [Southgate] as a matter of law." It is from this judgment that Ms. Abolofia urges the present appeal.

ASSIGNMENTS OF ERROR

Ms. Abolofia presents nine assignments by which she essentially contends the trial court erred in: (1) finding that the pole constituted an open and obvious hazard for which Southgate could not be liable; (2) finding the pole was an open and obvious hazard at night; (3) finding there were no genuine issues of material fact that would preclude summary judgment; (4) finding there were no genuine issues of material fact as to whether Southgate had custody, control, and/or garde of the pole; (5) finding there were no genuine issues of material fact as to whether Ms. Abolofia had violated city or university regulations by using her bicycle on the pathway; (6) finding there were no genuine issues of material fact as to whether Southgate had installed the pole; (7) finding there were no genuine issues of material fact as to whether Southgate had installed the portion of the sidewalk on which the pole was located; (8) finding there were no genuine issues of material

fact as to whether Ms. Abolofia had prior knowledge of the pole; and (9) finding there were no genuine issues of material fact as to whether a spotlight that was located near the pole at issue and "in disrepair" created an unreasonable risk of harm.

APPLICABLE LAW

A motion for summary judgment is a procedural device used to avoid a full scale trial when there is no genuine issue of material fact. Johnson v. Evan Hall Sugar Cooperative, Inc., 01-2956, p. 3 (La. App. 1st Cir. 12/30/02), 836 So. 2d 484, 486. Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, admitted for purposes of the motion for summary judgment, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B)(2). An appellate court reviews a trial court's decision to grant a motion for summary judgment *de novo*, using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. George S. May International Company v. Arrowpoint Capital Corporation, 11-1865, p. 4 (La. App. 1st Cir. 8/10/12), 97 So. 3d 1167, 1170.

The mover bears the burden of proving that he is entitled to summary judgment. La. C.C.P. art. 966(C)(2). However, if the mover will not bear the burden of proof at trial on the subject matter of the motion, he need only demonstrate the absence of factual support for one or more essential elements of his opponent's claim, action, or defense. See La. C.C.P. art. 966(C)(2). If the non-moving party fails to produce contrary factual support sufficient to establish it will be able to satisfy the evidentiary burden of proof at trial, there is no genuine issue of material fact. La. C.C.P. art. 966(C)(2). Whether a particular fact in dispute is "material" for summary judgment purposes is viewed in light of the substantive

law applicable to the case. MB Industries, LLC v. CNA Insurance Company, 11-0303, p. 15 (La. 10/25/11), 74 So. 3d 1173, 1183.

DISCUSSION

Claims for damages premised on injuries caused by a thing are typically asserted pursuant to La. C.C. art. 2317 and 2317.1, which articles provide, respectively:

> **Art. 2317. Acts of others and of things in custody**
>
> We are responsible, not only for the damage occasioned by our own act, but for ... the things which we have in our custody. This, however, is to be understood with the following modifications.

> **Art. 2317.1. Damage caused by ruin, vice, or defect in things**
>
> The owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon a showing that he knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case

A defect is defined as a condition that creates an unreasonable risk of harm. Moory v. Allstate Insurance Company, 04-0319, p. 8 (La. App. 1st Cir. 2/11/05), 906 So. 2d 474, 480, writ denied, 05-0668 (La. 4/29/05), 901 So. 2d 1076. Thus, in order to establish a claim of custodial liability pursuant to La. C.C. arts. 2317 and 2317.1, a plaintiff has the burden of proving: 1) the property which caused the damage was in the "custody" of the defendant; (2) the property had a condition that created an unreasonable risk of harm to persons on the premises; (3) the unreasonably dangerous condition was a cause in fact of the resulting injury; and (4) the defendant had actual or constructive knowledge of the risk. Graupmann v. Nunamaker Family Limited. Partnership, 13-0580, p. 6 (La. App. 1st Cir. 12/16/13), 136 So. 3d 863, 867.

In determining whether a condition is a defect or presents an unreasonable risk of harm, a risk-utility balancing test is used. Broussard v. State ex rel. Office

of State Buildings, 12-1238, pp. 9-10 (La. 4/5/13), 113 So. 3d 175, 183-84. The risk-utility balancing test considers four pertinent factors: (1) the utility of the complained-of condition; (2) the likelihood and magnitude of harm, including the obviousness and apparentness of the condition; (3) the cost of preventing the harm; and (4) the nature of the plaintiff's activities in terms of its social utility or whether it is dangerous by nature. Broussard, 12-1238 at p. 10, 113 So. 3d at 184. As observed by the Louisiana Supreme Court in Broussard, a defendant generally does not have a duty to protect against an open and obvious hazard; however, in order for a hazard to be considered open and obvious, the hazard should be one that is open and obvious to all, *i.e.,* everyone who may potentially encounter it. Broussard, 12-1238 at p. 10, 113 So. 3d at 184. Of particular note, in Broussard, the court held that "a fact-finder could reasonably infer the defect, while apparent to [the plaintiff], was not open and obvious to all who encountered it." Broussard, 12-1238 at p. 19, 113 So. 3d at 190.

Assignments of error numbers one, two and eight address Ms. Abolofia's knowledge of the pole, and as such, whether that knowledge mandates a finding that the pole was an open and obvious hazard such that the pole did not present an unreasonable risk of harm for which Southgate could be liable. While we find no merit in Ms. Abolofia's assertion that a genuine issue of material fact exists as to whether she had prior knowledge of the pole,[1] we do find merit in her assertion that the trial court erred in finding, based on the evidence presented, that the pole was an open and obvious hazard, and as such, did not constitute an unreasonable risk of

[1] The record discloses that there were two poles located on the sidewalk on which Ms. Abolofia traveled and that a portion of the sidewalk was located on property owned by LSU and a portion was located on property owned by Southgate. Likewise, one of the two poles was located on the LSU portion of the sidewalk and the other pole was located on the Southgate portion of the sidewalk.

During her deposition, Ms. Abolofia was shown pictures of both poles, and asked "[d]id you notice the poles when you rode in the daylight?" Ms. Abolofia responded, "I saw both. I remembered only one." She then went on to explain that she remembered the pole with which she had not collided, but she did not remember the pole with which she did collide. When she was further pointedly asked, "[b]ut you had seen [the pole with which she had collided]," Ms. Abolofia responded "[i]t was broad daylight. Yes."

harm. At the hearing on the motion for summary judgment, the trial court expressly stated "open and obvious, she had knowledge of it, it cannot be something that is dangerous or in effect she saw it. It's open and obvious."

As the court held in Broussard, the plaintiff's awareness of the condition is not determinative of whether a condition is open and obvious. Instead, the court explained:

> The open and obvious inquiry thus focuses on the global knowledge of everyone who encounters the defective thing or dangerous condition, not the victim's actual or potentially ascertainable knowledge. Simply put, we would undermine our comparative fault principles if we allowed the fact-finder to characterize a risk as open and obvious based solely on the plaintiff's awareness of that risk. The plaintiff's knowledge or awareness of the risk created by the defendant's conduct should not operate as a total bar to recovery in a case where the defendant would otherwise be liable to the plaintiff. Instead, comparative fault principles should apply, and the plaintiff's "awareness of the danger" is but one factor to consider when assigning fault to all responsible parties under La. Civ. Code art. 2323.

Broussard, 12-1238 at p. 18, 113 So. 3d at 188-89 (case citation omitted). Thus, the mere fact that Ms. Abolofia was aware of the pole is not sufficient to establish that the pole was an open and obvious hazard. Further, as argued by Ms. Abolofia and recognized by this court in Falcon ex rel. Falcon v. Louisiana Department of Transportation, 13-1404, p. 12 (La. App. 1st Cir. 12/19/14), ___ So. 3d ___, ___, 2014 WL 7212607, at *6, an object that does not present an unreasonable risk of harm during the day may do so at night.

Additionally, in its memoranda in support of its motion for summary judgment, which the trial court adopted as its reasons for granting Southgate's motion, Southgate pointed out "the lack of others being injured" by the presence of the pole as evidence that the pole did not pose an unreasonable risk of harm. But again, as the court in Broussard pointed out, while "the absence of prior reported injuries may be one of many factors for the trier-of-fact to consider, it is not an absolute bar to recovery." Broussard, 12-1238 at p. 16, 113 So. 3d at 187. The

court then observed that there have been numerous appellate decisions in which it was found a condition presented "an unreasonable risk of harm even where the plaintiff's injury was the first reported at a certain place." Broussard, 12-1238 at p. 16, 113 So. 3d at 187.

Moreover, there is evidence in the record to indicate that the pole did present a risk of harm. Frederick Fellner, the assistant director of landscape services for LSU, testified in his deposition that he instructed an employee to install a reflector and reflector tape on the pole once he saw it. When asked why he had instructed someone to install the reflector and reflective tape on the pole, Mr. Fellner responded, "I'm responsible for anything that I see that's unsafe on the campus, and I do remember being concerned when I saw that." Likewise, John Hopper, a construction contractor who worked for Southgate, testified in his deposition that he would not have installed a pole in the sidewalk, even if the owner of Southgate asked him to, because of the liability of someone running into the pole. Similarly, Emmett David, director of LSU Facility Services at the time of the accident, said the pole was an "obstruction."

Considering the highly factual nature of a determination of whether a condition presents an unreasonable risk of harm, see Broussard, 12-1238 at p. 13, 113 So. 3d at 185-86, and the trial court's error in finding that the existence of the pole in the sidewalk did not constitute a unreasonable risk of harm principally because the existence of the pole was open and obvious, we find merit in Ms. Abolofia's assignments of error numbers one, two and eight.

In assignments of error numbers four, six, and seven, Ms. Abolofia argues that the trial court erred in failing to find that a genuine issue of material fact exists as to whether Southgate had custody, control, and/or garde of the pole at issue or whether it installed the pole or the portion of the sidewalk in which the pole was located. As the plaintiff in this matter, Ms. Abolofia would bear the burden of

proving that Southgate had custody, control or garde of the pole. See Graupmann, 13-0580 at p. 6, 136 So. 3d at 867. Thus, Southgate, as the movant for summary judgment had only to demonstrate the absence of factual support for this element of Ms. Abolofia's claim. See La. C.C.P. art. 966(C)(2).

Southgate supported its motion for summary judgment by presenting the affidavit of Mickey Robertson, a professional surveyor, who attested that the location of the pole with which Ms. Abolofia collided was on LSU property. Southgate also presented the affidavit of its owner and manager, Robert Day, wherein he attested that Southgate did not design, construct, install, alter, or maintain nor authorize the design, construction, installation, or maintenance of the pole installed in the LSU portion of the sidewalk. He further attested that Southgate never cleaned, altered, repaired, or marked the pole, derived no benefit from the pole, nor exercised custody or control over the pole installed in the LSU portion of the sidewalk. Additionally, Southgate submitted the deposition testimony of Mr. Day, Mr. Fellner, and Warren "Joe" Kelley, associate vice chancellor of LSU at the time the accident occurred, as further evidence of the fact that the pole at issue was located in the portion of the sidewalk owned and constructed by LSU.

In opposition to Southgate's motion, Ms. Abolofia also presented the deposition testimony of Mr. Fellner, Mr. Day, and Mr. Kelly, and additionally, submitted the deposition testimony of Mr. David and Mr. Hopper. Both Mr. Day and Mr. Hopper testified regarding Mr. Day's instructions to Mr. Hopper to remove the pole that had been installed in the *Southgate* portion of the sidewalk. And while Mr. Hopper denied personally installing the pole in the Southgate portion of the sidewalk, Mr. Day testified that the pole in the Southgate portion of the sidewalk was installed by V&H contractors. Also, while Mr. Day alleged that the pole in the Southgate portion of the sidewalk was installed at the request of

LSU, which assertion Mr. Kelley denied, Mr. Day did admit instructing V&H to "match" the pole installed in the LSU portion of the sidewalk when V&H installed the pole. Mr. Day, representing Southgate, expressly denied installing or authorizing the installation of the pole in the LSU portion of the sidewalk.

In contrast, the LSU witnesses who testified -- Mr. Fellner, Mr. David and Mr. Kelley -- did not deny that anyone associated with LSU had installed the pole in the LSU portion of the sidewalk; rather, they all testified that they did not know who or when the pole was installed in the LSU portion of the sidewalk. Most notably, Mr. Fellner testified that he did not recall installing a pole in the LSU sidewalk, but acknowledged that while it is not customary for poles to be installed in the middle of LSU sidewalks, "it is done."

In her brief on appeal, Ms. Abolofia argues that "there is a genuine issue of material fact regarding who maintained or had *garde* of the area where the pole was located." In support of this argument, she cites testimony by Mr. Kelley, wherein he testified that during LSU's construction of its portion of the sidewalk, the sidewalk was initially poured just short of LSU's property line because Southgate was working on the subsurface drainage system for its development. He did not know how far short of the property line the original pour ended, but he did know it ended "just before the swale." He could not answer whether the LSU pour stopped before or after the wooden bollards; he just knew it stopped short of the property line to allow Southgate's drainage work. He went on to explain:

> So once that drainage work was finished - - I don't remember exactly when the - - I don't remember if we poured the rest of the concrete or we stopped and then [Southgate] poured the concrete to meet us. I just don't recall. I know we stopped it.
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> But the last dozen feet, I don't know if we went back and repoured that or he had his contractor pour it after they got all the drainage work done. It could have happened either way. I wasn't standing there when it happened so I don't know.

In his deposition, Mr. Fellner unconditionally testified that his department installed the portion of the sidewalk that existed on LSU property. And Mr. Kelley testified

that "if Fred Fellner said an LSU crew did it [poured the portion of the sidewalk located on LSU property], I would believe him."

Additionally, Ms. Abolofia argued that "LSU representatives testified they normally only maintained the area up to the roped off area which does not include the area where the pole was located." In support of this argument, Ms. Abolofia cites to testimony by Mr. Fellner, in which he stated that LSU does not cross the line of wooden bollards, which were connected by rope, to do maintenance nor did LSU have any maintenance responsibility beyond the wooden bollards; however, he later qualified that statement by stating "unless outside of the bollards is LSU property." Mr. Fellner then acknowledged that LSU does maintain past the bollards, but "not a large patch of grass," and he admitted he did not know "exactly where the property line runs." As he explained, "[t]he bollards are pretty close to the swale line, if not in a swale line, a ditch line. What we normally do is mow everything on the inside, and *then on the outside*, we'll string trim." (Emphasis added.)

Pictures of the portion of the sidewalk where the accident occurred show the pole to be in line with the wooden bollards referred to above. More importantly, the pole is located on the concrete sidewalk and not in the grass where the wooden bollards were located. Thus, the testimony regarding maintenance, *in the grass* and beyond the area of the wooden bollards is clearly insufficient to indicate that Southgate maintained the LSU portion of the sidewalk wherein the pole was located. Nevertheless, Mr. Day did admit that he instructed V&H Contractors to install a pole that was similar in make and appearance as the pole with which Ms. Abolofia collided in the Southgate portion of the sidewalk.

Circumstantial evidence may establish the existence of a genuine issue of material fact to defeat summary judgment; however, the response of the adverse party must set forth specific facts showing a genuine issue of fact exists. Garrison

v. Old Man River Esplanade, L.L.C., 13-0869, p. 7 (La. App. 4th Cir. 12/18/13), 133 So. 3d 699, 703. Circumstantial evidence is evidence of one fact, or of a set of facts, from which the existence of the fact to be determined may reasonably be inferred. Cangelosi v. Our Lady of the Lake Regional Medical Center, 564 So. 2d 654, 664-65 (La. 1989). If circumstantial evidence is relied upon, that evidence, taken as a whole, must exclude every other reasonable hypothesis with a fair amount of certainty. This does not mean, however, that it must negate all other possible causes. Rando v. Anco Insulations Inc., 08-1163, p. 33 (La. 5/22/09), 16 So. 3d 1065, 1090.

Despite the legislative mandate that summary judgments are now favored, factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, and all doubt must be resolved in the opponent's favor. Willis v. Medders, 00-2507, p. 2 (La. 12/8/00), 775 So. 2d 1049, 1050. If reasonable men might differ as to the significance of evidence presented on the motion, summary judgment is improper. Rager v. Bourgeois, 06-0322, p. 6 (La. App. 1st Cir. 12/28/06), 951 So. 2d 330, 333, writ denied, 07-0189 (La. 3/23/07), 951 So. 2d 1105. Moreover, the likelihood that a party will prevail on the merits does not constitute a basis for rendition of summary judgment. Rager, 06-0322 at p. 5, 951 So. 2d at 333; see also Dibartolo v. Stage One-The Hair Schools, 09-511, p. 5 (La. App. 3d Cir. 11/4/09), 23 So. 3d 1038, 1041, writ denied, 09-2630 (La. 2/12/10), 27 So. 3d 849 (wherein the appellate court observed that even if the trial court's "prognostication" that it could not see a jury running with the plaintiff's theory of her case was accurate, the "likelihood of success at trial is irrelevant to the question of the propriety of summary judgment.").

Thus, because Ms. Abolofia offers the circumstantial evidence of Southgate admitting that it installed a similar pole in the portion of the sidewalk that was located on its property and the uncertain testimony of Mr. Kelley and Mr. Fellner

as to whether LSU actually poured the portion of the sidewalk that included the pole, it is evidence regarding specific facts, the genuine issue of which precludes summary judgment. See Garrison, 13-0869 at p. 7, 133 So. 3d at 703. Hence, we find merit in Ms. Abolofia's assignments of error numbers three, four,[2] six and seven.

Ms. Abolofia's fifth assignment of error addresses the trial court's implicit finding that she violated LSU regulations and/or ordinances of the City of Baton Rouge/Parish of East Baton Rouge by riding her bicycle on the sidewalk. Mr. Fellner, Mr. Kelley, and Mr. David all acknowledged that the sidewalk at issue was used by bicyclists as well as pedestrians. When asked to explain his testimony that the sidewalk at issue was designated for bicycles and pedestrians and why the sidewalk differed from other sidewalks on campus where bicycle use was prohibited, Mr. Kelley explained:

> The fact that this pathway is 7, 800 yards away from a high population density, we didn't have students walking back and forth between classrooms and classroom buildings; this was a route into and away from the campus and not within the campus. The routes within the campus between buildings, those walkways were bicycle prohibited. You could only ride a bicycle on the street and not on the walkway.
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> And that's if you get a copy of the Parking and Traffic Regulations, it says in there very clearly, bicycles are to be ridden on the street in the main part of the campus.
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> When you get beyond the building area, the pathways that go up Dalrymple Drive, that go around the lake, that go up Highland Road, that go down Skip Berman Drive, and Gourrier Lane, those were all for bikes and pedestrians.

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[2] We observe that in its brief on appeal and in its memoranda in support of its motion for summary judgment, Southgate asserts that Ms. Abolofia would also be unable to establish that it knew of the defect or that it could have prevented the accident by the exercise of reasonable care. Our *de novo* review of the record before us, however, reveals that to the extent that it may be determined that the pole presented an unreasonable risk of harm, Mr. Day's testimony that he told V&H Contractors to "match" the pole located on the portion of the sidewalk on LSU's property is evidence that Southgate knew of the pole. And a conclusion that Southgate could have prevented the harm by simply not installing the pole would logically flow from a finding that it did, in fact, install the pole.

He then acknowledged that bicyclists could be subject to a city ordinance, "[o]nce they leave LSU property and leave other private properties and enter onto a public street." Notably, the location of the accident was on LSU property.

Based on this evidence, we agree that it is questionable whether Ms. Abolofia was in violation of any campus regulation or city ordinance at the time of the accident. Moreover, the assertion that Ms. Abolofia's negligence per se would prohibit her recovery is clearly a legally wrong conclusion under our comparative fault system.[3] See La. C.C. art. 2323.

Ms. Abolofia failed to brief her final assignment of error that a genuine issue of material fact remains as to whether the "spotlight in disrepair" created an unreasonable risk of harm. Based on her failure to brief that assignment of error, we deem the error to be abandoned in accordance with Uniform Rules, Courts of Appeal, Rule 2-12.4. See Shilling ex rel. Shilling v. State ex rel. Dept. of Transp. and Development, 05-0172, p. 4 n.1 (La. App. 1st Cir. 12/22/05), 928 So. 2d 95, 99 n.1, writ denied, 06-0151 (La. 4/24/06), 926 So. 2d 541.

CONCLUSION

For the foregoing reasons, we reverse the summary judgment rendered in favor of Southgate Towers, LLC and remand this matter to the trial court for further proceedings. All costs of this appeal are assessed the appellee, Southgate Towers, LLC.

REVERSED AND REMANDED.

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[3] Such an assertion is found in Southgate's original memorandum in support of its motion for summary judgment, wherein it cites to a 1937 state appellate court decision as authority for this assertion.