Filed 5/4/11

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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| WORKMEN'S AUTO INSURANCE COMPANY,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>GUY CARPENTER & COMPANY, INC.,<br><br>Defendant and Respondent. | B211660<br>(c/w B213853)<br><br>(Los Angeles County<br>Super. Ct. No. BC329991) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark V. Mooney, Judge. Affirmed.

Archer Norris, Thomas S. Clifton; Greines, Martin, Stein & Richland, Robin Meadow, Cynthia E. Tobisman; and Kronick Moskovitz Tiedmann & Girard, for Plaintiff and Appellant.

Bingham McCutchen, Robert A. Lewis, Frank Kennamer and Geoffrey T. Holtz, for Defendant and Respondent.

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Workmen's Auto Insurance Company (company) sued Guy Carpenter & Company, Inc. (Carpenter) for negligence, breach of fiduciary duty and breach of

contract. After the trial court eliminated the fiduciary duty claim during pretrial proceedings, a jury decided in favor of Carpenter. The company appeals. It contends that the trial court erred when it granted summary adjudication regarding the allegation that Carpenter did not obtain the best terms for reinsurance, when it sustained a demurrer without leave to amend the fiduciary duty cause of action, and when it denied the company permission to conduct discovery on and add allegations for price fixing. We find no error and affirm. In particular, we hold that an insurance broker cannot be sued for breach of fiduciary duty.

## FACTS

### *Various pleadings and rulings regarding breach of fiduciary duty*

In the first amended complaint, the company alleged that it is an insurer, Carpenter is a reinsurance intermediary and Carpenter placed reinsurance for the company with PMA Capital Insurance Company of Philadelphia, Pennsylvania (PMA). The pleading contained causes of action for negligence, breach of fiduciary duty and breach of contract. Regarding breach of fiduciary duty, it was asserted that Carpenter breached its duty by failing to secure timely payments from PMA, failing to secure the best available terms of reinsurance, and acting with the intent to injure the company by incurring inflated commissions.

Carpenter moved for summary adjudication regarding the allegation that it did not secure the best available terms. Even though the motion was not authorized by Code of Civil Procedure section 437c, subdivision (f)(1)[1] because it did not dispose of a cause of

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

Section 437c, subdivision (f)(1) provides: "A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if that party contends that the cause of action has no merit or that there is no affirmative defense thereto, or that there is no merit to an affirmative defense as to any cause of action, or both, or that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it

action, an affirmative defense, a claim for damages or an issue of duty, the company did not object. The trial court granted the motion.[2] The ruling left the cause of action for breach of fiduciary duty still standing because it did not adjudicate all the alleged breaches.

The company filed a second amended complaint that again alleged breach of fiduciary duty. Carpenter demurred to the breach of fiduciary duty cause of action, and the demurrer was sustained with leave to amend.

***Third amended complaint;[3] the demurrer***

In its third amended complaint, the company alleged: It entered into a brokerage agreement which appointed Carpenter as the company's reinsurance agent and intermediary. Carpenter was given the authority, inter alia, to (1) act as reinsurance intermediary for all reinsurance and limits regarding insurance programs for finite risk, quota share, per person, auto program and homeowners; (2) place various reinsurance agreements covering classes of risks authorized by the company; (3) negotiate terms and conditions of reinsurance for the benefit of the company; (4) complete and document agreements that accurately reflected the company's understanding of the benefits accruing to it under such agreements; (5) prepare and complete the written documentation

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completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty."

[2] In our view, the trial court exceeded its subject matter jurisdiction when it granted the motion because the relief was not authorized by statute. "[A]n act in excess of statutory authority [is] an act in excess of subject matter jurisdiction." (*People v. Superior Court* (*Mitchell*) (2010) 184 Cal.App.4th 451, 458.) Neither party, however, has raised this issue.

[3] The company failed to offer us a summary of the allegations in the third amended complaint. Rather, in the procedural history in its opening brief, the company stated generally that it "sued Carpenter . . . alleging claims for professional negligence, breach of fiduciary duty and breach of contract, urging [that Carpenter's] failure to properly document the reinsurance transactions and to disclose matters of importance regarding the reinsurance program." We have briefly summarized the allegations to provide context for our opinion.

and wording of reinsurance agreements as well as memorialize commencement dates, termination dates and amendments; and (6) perform all other brokerage functions customary in the reinsurance industry. In 2001, Carpenter negotiated with PMA and secured a finite quota share reinsurance agreement for certain risks covered by the company.[4] In the ensuing years, Carpenter breached its fiduciary duties to the company and caused over $35 million in damages.

Carpenter again demurred to the fiduciary duty cause of action. The trial court sustained it without leave to amend.

***Further proceedings***

The company filed a fourth amended complaint. Subsequently, it filed a fifth amended complaint alleging causes of action for negligence and breach of contract. Carpenter filed an answer. The company served discovery intended to determine whether Carpenter had placed the company in a price-fixed reinsurance scheme. When Carpenter refused to comply, the company filed a motion to compel but did not prevail. On March 19, 2008, which was within a month of the trial date, the company moved for leave to file a sixth amended complaint in order to add price fixing allegations. The motion was denied because it was untimely, Carpenter would be prejudiced and the proposed pleading was defective.

The case proceeded to trial on the company's causes of action for negligence and breach of contract. The jury found in favor of Carpenter. Judgment was entered in favor of Carpenter with an award of costs.

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[4] "Under quota share reinsurance, the reinsurer accepts a fixed percentage of the loss and liability on a line of policies in return for an equal percentage of the premiums that the reinsured has charged the policyholders of that line. The reinsurer also shares in the same percentage of the reinsured's expenses that are related to the policies that have been reinsured. Expenses include commissions and administrative expenses, as well as the costs associated with adjusting claims." (2 Cal. Insurance Law & Practice (Matthew Bender, 2010) Reinsurance, § 11.02[5][b], p. 11-20.)

This timely appeal followed.[5]

## DISCUSSION

### I. The demurrer to the third amended complaint.

A. Standard of review.

Case law requires us to independently review the success of a demurrer. (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1500–1501 (*Lazar*).) In doing so, "'[w]e treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Blank*).)

The company advocates a different standard of review, one which has no support in the law and which we therefore decline to adopt. It contends that "[t]he situation is akin to where a trial court grants a nonsuit or refuses to instruct the jury on a plaintiff's theory of liability. Because the trial court has denied the appellant an opportunity to have a jury weigh its theory of liability, the standard of review 'is the opposite of the traditional substantial evidence test'—the reviewing court 'must assume the jury might have believed appellant's evidence and, if properly instructed, might have decided in appellant's favor.'"

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5 The company filed two appeals, B211660 and B213853. On March 12, 2009, we entered an order consolidating the two appeals for all purposes, including briefing, oral argument and decision.

For authority, the company cites to Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2010) ¶¶ 8:69-8:75, pp. 8-34 to 8-35 (Eisenberg).[6] To explain why Eisenberg is not authority for the proposition advanced, we have examined Eisenberg in detail.

Paragraph 8:69 begins Eisenberg's discussion of the impact of substantial evidence review on statements of fact on appeal and avers: "The substantial evidence rule significantly impacts the manner in which appellants must state the facts and respondents may recite the facts in their briefs, as well as the manner in which appellate courts will state the facts in their opinions." (Eisenberg, *supra*, ¶ 8:69, p. 8-34.) Next, paragraphs 8:70 through 8:73 discuss the requirements and options for a statement of facts in an appellant's and respondent's brief. Continuing on, paragraph 8:74 discusses the statement of facts in a decision on appeal and states, inter alia: "On substantial evidence review, the appellate court's opinion will state the facts in a manner that resolves all conflicts and draws all inferences in favor of the prevailing party. [Citations.]" (Eisenberg, *supra*, ¶ 8:74, p. 8-35.)

Finally, paragraph 8:75 states: "On certain appeals—such as appeals . . . from orders of dismissal following sustaining of demurrers . . . —appellate courts must view the evidence in the light most favorable to appellant; the substantial evidence rule is essentially reversed because . . . appellant was deprived of the benefits of a trial on the merits . . . . [Citations.]" (Eisenberg, *supra*, ¶ 8:75, p. 8-35.) In support of this statement, paragraph 8:75 cites *GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.* (2000) 83 Cal.App.4th 409, 423 (*GAB*), disapproved on other grounds in *Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1154.

The problem for our purposes is that *GAB* did not involve a demurrer. At the pinpoint cite referenced by Eisenberg, *GAB* discussed the rule that instructional error requires reversal only if it is reasonably probable that the error prejudicially affected the

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[6] The paragraphs relied upon by the company appear in Chapter 8, part C. of Eisenberg. Chapter 8 is entitled "Scope and Limits of Appellate Review" and part C is entitled "Standards of Appellate Review."

judgment. To make this determination, a reviewing court must consider whether the evidence was sufficient for a properly instructed jury to find in the appellant's favor. (*GAB*, *supra*, at p. 423.) In our view, the literal language of paragraph 8:75 in Eisenberg contains a misstatement of the law vis-a-vis appellate review of orders sustaining demurrers.[7]

As secondary authority, the company refers us to *GAB*, *Meyer v. Blackman* (1963) 59 Cal.2d 668, 671 (*Meyer*), and *Whiteley v. Philip Morris Inc.* (2004) 117 Cal.App.4th 635, 655 (*Whiteley*). *GAB*, as previously discussed, does not support the company's position regarding the appropriate review of an order sustaining a demurrer. Neither does *Meyer* or *Whiteley*. *Meyer* explained that "'while in most appeals it is the duty of the reviewing court to indulge every reasonable intendment in favor of sustaining the trial court, substantially the reverse is true when the appeal is from an order of nonsuit. In the latter case the appellate court must view the evidence as though judgment had gone in favor of the appellant, and order a reversal if such a judgment can be sustained.' [Citation.]" (*Meyer*, *supra*, at pp. 671-672.) *Whiteley*, like *GAB*, merely cited law regarding instructional error, stating: "'With respect to our review of issues relating to [the failure to give requested jury instructions], as well as the question of their prejudicial impact, we do not view the evidence in the light most favorable to the successful [party] and draw all inferences in favor of the judgment. Rather, we must assume that the jury, had it been given proper instructions, might have drawn different inferences more favorable to the losing [party] and rendered a verdict in [that party's] favor on those

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[7] What Eisenberg presumably meant is that when reviewing an order sustaining a demurrer, an appellate court views the *allegations* in the light most favorable to the appealing party. We note that at paragraph 8:116, Eisenberg states: "On appeal from a judgment of dismissal after a demurrer is sustained without leave to amend, the [C]ourt of [A]ppeal assumes the truth of all facts properly pleaded by the plaintiff-appellant. [Citation.]" (Eisenberg, *supra*, ¶ 8:116, p. 8-74.)

issues as to which it was misdirected. [Citations.]' [Citation.]" (*Whiteley, supra,* 117 Cal.App.4th at p. 655.)[8]

Simply put, the company failed to persuade us to deviate from the rules set forth in cases such as *Lazar* and *Blank*.

Notably, the company changed its argument on the standard of review in its reply brief and at oral argument. It asserted that we must analyze the legal sufficiency of the allegations in the operative pleading. If error appears, it argues that we can look at the trial to determine whether it had the opportunity to litigate an overlapping claim or whether the evidence presented disposed of the dismissed claim. If so, the company says we can apply the harmless error rule.

B. The nature of a broker's duties in California.

According to the company, we must determine whether Carpenter was the company's agent and, if so, whether that agency imposed fiduciary duties on Carpenter as a matter of law such that Carpenter can be held civilly liable for breaching those duties. The first issue is a nonissue because, as a reinsurance intermediary-broker, Carpenter is an agent.[9] It has been held that an "independent insurance broker is not an agent of the

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[8] In a footnote in its opening brief, the company states: "We recognize that the authorities above do not directly address our procedural setting, but the logic of favorable review cases compels the same standard here. Review of the sustaining of a demurrer requires favorable review of *the complaint's allegations*, and usually there is no occasion to consider the trial evidence. But the situation in the present case is functionally identical to what would have happened if the trial court had refused instructions on [the company's] breach of fiduciary duty claim on the same basis (i.e., on the basis that there could be no fiduciary duty as a matter of law). The favorable standard of review would undoubtedly apply."

[9] The Reinsurance Intermediary Act defines a reinsurance intermediary as either a reinsurance intermediary-broker or a reinsurance intermediary-manager. (Ins. Code, § 1781.2, subd. (g).) As the term is defined, Carpenter qualifies as a reinsurance intermediary-broker. "'Reinsurance intermediary-broker' means any person, other than an officer or employee of the ceding insurer, firm, association, or corporation that solicits, negotiates, or places reinsurance cessions or retrocessions on behalf of a ceding insurer without the authority or power to bind reinsurance on behalf of that insurer." (Ins. Code, § 1781.2, subd. (g).)

insurer, but rather is an agent of the insured. [Citations.]" (*Marsh & McLennan of Cal. Inc. v. City of Los Angeles* (1976) 62 Cal.App.3d 108, 117.) In our view, the sole battlefield is the second issue. We conclude that even if an insurance broker has certain fiduciary like duties, it cannot be sued for breach of fiduciary duty in a manner that conflicts with existing insurance law. In reaching this conclusion, we confess that agency law and insurance law are in conflict, resulting in a legal conundrum. That conundrum is resolved only by stare decisis and public policy.[10]

1. *The conflict.*

"[A]n insurance [broker] will be liable to his client in tort where his intentional acts or failure to exercise reasonable care with regard to the obtaining or maintenance of insurance results in damage to the client. [Citation.]" (*Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 909.) For example, a "broker's failure to obtain the type of insurance requested by an insured may constitute actionable negligence." (*Nowlon v. Koram Ins. Center, Inc.* (1991) 1 Cal.App.4th 1437, 1447; *Desai v. Farmers Ins. Exchange* (1996) 47 Cal.App.4th 1110, 1120.) But as a general proposition, a broker does not have a duty of care to advise a client on insurance matters unless "(a) the agent misrepresents the nature, extent or scope of the coverage being offered or provided . . . , (b) there is a request or inquiry by the insured for a particular type or extent of coverage . . . , or (c) the agent assumes an additional duty by either express agreement or by 'holding himself out' as

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[10] In its reply brief and at oral argument, the company suggested that case law involving regular insurance brokers should not be applied to reinsurance intermediary-brokers because they have far more complex and comprehensive relationships with their clients. The problem with this argument is two-fold. First, the company waived it by not raising it sooner. (*Wurzl v. Holloway* (1996) 46 Cal.App.4th 1740, 1754, fn. 1.) The opening brief assumes that the existence of an agency relationship establishes a fiduciary duty. That is the issue briefed by Carpenter. It would be unfair to consider a newly minted argument. Second, the company never analyzed the allegations in the third amended complaint, so its claim that reinsurance is different from regular insurance has not been properly raised and argued. Even though this is a demurrer case, the company's opening brief focuses on trial evidence.

having expertise in a given field of insurance being sought by the insured." (*Fitzpatrick v. Hayes* (1997) 57 Cal.App.4th 916, 927; *Jones v. Grewe* (1987) 189 Cal.App.3d 950, 954 (*Jones*) [an insurance agent does not have a duty of care "to advise the insured on specific insurance matters" absent an express agreement or holding out as an expert]; *Free v. Republic Ins. Co.* (1992) 8 Cal.App.4th 1726, 1730 [no general duty of care to advise regarding the sufficiency of insurance].)

Turning to the issue at hand, we are unaware of even a single California precedent permitting a client to sue an insurance broker for breach of fiduciary duty. We note that *Eddy v. Sharp* (1988) 199 Cal.App.3d 858, 865 suggested in dicta that a broker owes a fiduciary duty to the entity for which the broker procures insurance. And it has been acknowledged that a broker acts in a fiduciary capacity when he receives and holds premium or return premium.[11] (*Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Associates, Inc.* (2004) 115 Cal.App.4th 1145, 1158 (*Hydro-Mill*).) Thus, in a technical sense, a broker is charged with certain fiduciary duties whether or not the broker-insured relationship is fiduciary. (*Ibid*.) But as one leading treatise noted, it is unclear "'in what respect the "fiduciary duty" owed by an independent insurance agent differs from the duty of due (reasonable) care. As used in [reference] to an independent agent, "fiduciary duty" may refer merely to avoidance of conflict of interest, self-dealing, excessive compensation, etc.' [Citation.]" (*Ibid*.) Recently, a federal court held: "This [c]ourt will not expand the doctrine of fiduciary duty to include insurance brokers, given that it has not been recognized by California courts." (*Miniace v. Pacific Maritime Assoc.* (N.D. Cal., Sept. 13, 2005, No. C 04-03506 SI) 2005 U.S. Dist. Lexis 40708, p. *34.)

A case that offers a modicum of light in the legal darkness is *Kotlar v. Hartford Fire Ins. Co.* (2000) 83 Cal.App.4th 1116, 1123 (*Kotlar*). In *Kotlar*, an insurance broker

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[11] Insurance Code section 1733 provides in relevant part: "All funds received by any person acting as a [licensed broker or agent] . . . as premium or return premium on or under any policy of insurance or undertaking of bail, are received and held by that person in his or her fiduciary capacity. Any such person who diverts or appropriates those fiduciary funds to his or her own use is guilty of theft and punishable for theft as provided by law."

was sued for breaching a duty to provide the insured with notice of the insurer's intent to cancel a policy. No such duty existed in case law, and the court declined to create one. Though the appellant attempted to analogize a broker-insured relationship to an attorney-client relationship, the court stated that the analogy was "wide of the mark. The relationship between an attorney and client is a fiduciary relationship of the very highest character, and attorneys have a duty of loyalty to their clients. [Citation.] Thus, while an attorney must represent his or her clients zealously within the bounds of the law [citation], a broker only needs to use reasonable care to represent his or her client. [Citation.]" (*Ibid*.) To support the distinction, the court noted that a "dual agency can exist where a broker represents both the insured and the insurer. [Citation.] For example, an insurance broker acts as an agent for the insured in procuring insurance for the insured, but the broker may also be the agent of the insurer in respect to the policy. [Citation.] Lawyers, on the other hand, normally do not represent both parties to a transaction." (*Ibid*.) Though the holding was not articulated in the most direct language possible, *Kotlar* is authority for the proposition that a broker's duties are defined by negligence law, not fiduciary law.

*Hydro-Mill* cites and is consistent with *Kotlar*. In *Hydro-Mill*, a broker was held liable for professional negligence, breach of contract, negligent misrepresentation and breach of fiduciary duty. The *Hydro-Mill* court reversed based on a two-year statute of limitations. In declining to apply a four-year statute of limitations to the breach of fiduciary duty claim, the court stated: "[T]he applicable statute of limitations is determined by—as variously phrased—the nature of the right sued upon, the primary interest affected by the defendant's wrongful conduct, or the gravamen of the action. [Citations.] Here, the complaint shows that the allegations of professional negligence subsume all of the allegations for breach of fiduciary duty. The statement of decision indicates that liability on both of those causes of action is based on the same findings: [The broker] failed to obtain the requested insurance coverage and did not disclose that failure. In short, [the client's] causes of action, regardless of appellation, amount to a claim of professional negligence. Because a two-year statute of limitations governs that

type of claim [citation], [the client] cannot prolong the limitations period by invoking a fiduciary theory of liability." (*Hydro-Mill*, *supra*, 115 Cal.App.4th at pp. 1158–1159.) Like *Kotlar*, *Hydro-Mill* held that a broker's failure to disclose information is actionable only if it breaches the duty of care.[12]

Older cases reached the same result. In *Wilson v. All Services Ins. Corp.* (1979) 91 Cal.App.3d 793 (*Wilson*), a broker was sued on five theories, including negligence and breach of fiduciary duty, for placing insurance without looking beyond the insurer's certificate of authority to conduct business and investigating its financial condition. The court held that the urged investigation was not required by the duty of care. It then held: "Each of the four remaining counts incorporates all of the allegations of the [negligence count] and, no matter how denominated (breach of express and implied agreements, breach of fiduciary duty, breach of warranty), depends for its validity upon the existence of an alleged duty on defendant's part. . . . Since no such duty exists, defendant is not liable to plaintiffs under any of the theories pleaded." (*Id*. at p. 799.) In *Jones*, brokers were sued for negligence and breach of fiduciary duty for failing to obtain sufficient liability insurance to protect client assets. The brokers demurred, arguing that they did not have a duty to provide the clients with liability insurance to cover every conceivable eventuality and therefore the complaint failed to state a claim for negligence. The demurrer was sustained without leave to amend and the action was dismissed. The *Jones* court affirmed, stating that the appellant "failed to state a cause of action for negligence[.]" (*Jones*, *supra*, 189 Cal.App.3d at p. 957.) The opinion focused on the duty of reasonable care and was conspicuously silent with respect to the fiduciary duty

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[12] In *Westrec Marina Management, Inc. v. Jardine Ins. Brokers Orange County* (2000) 85 Cal.App.4th 1042 (*Westrec*), the court reversed an order granting a new trial motion and affirmed a judgment against a broker for negligence, breach of contract and breach of fiduciary duty. The court was not asked to decide whether a broker can be sued for breach of fiduciary duty, so *Westrec* does not factor into our analysis. (*Palmer v. GTE California, Inc*. (2003) 30 Cal.4th 1265, 1278 ["'an opinion is not authority for a proposition not therein considered"'].)

claim. Impliedly, *Jones* held that the fiduciary duty claim was not viable because the only issue was the duty of care.

To be gleaned from *Kotlar*, *Hydro-Mill*, *Wilson* and *Jones* is this: the agency of a broker must be viewed only through the lens of insurance law because it is a constellation of rules and policies all its own.

Given the foregoing, and given that a broker is an agent, there is an inherent conflict between insurance law and agency law. Agency law establishes that "[t]he relations of principal and agent, like those of beneficiary and trustee, are fiduciary in character. . . . [¶] . . . An agent must disclose to his principal every fact known to him bearing upon the [subject matter of the agency], the concealment of which would lead to the injury of the principal [citation]." (*Kinert v. Wright* (1947) 81 Cal.App.2d 919, 925 (*Kinert*); *Chodur v. Edmonds* (1985) 174 Cal.App.3d 565, 571 (*Chodur*) ["[a]n agent is a fiduciary"].) Further, an agent has an obligation of "diligent and faithful service the same as that of a trustee. [Citations.]" (*Ibid*.) As explained by *Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 29 (*Wolf*), a fiduciary is bound to act with utmost good faith for the benefit of the other party. If applied in the insurance context, *Kinert*, *Chodur* and *Wolf* would require brokers to disclose all material knowledge and advise client's on specific insurance matters even if the broker is not required to do so by the duty of care. Indeed, "the duty of undivided loyalty the fiduciary owes to its beneficiary . . . [is] far more stringent" than the duty of care. (*Wolf*, *supra*, at p. 30.) "'Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A [fiduciary] is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive is then the standard of behavior.' [Citation.]" (*Ibid*.) Thus, it is impossible for us to reconcile insurance law and agency law.

2. *Stare decisis; public policy.*

This appeal requires us to decide whether to give insurance law or agency law primacy. In our view, it must be the former.

The doctrine of stare decisis establishes that once a rule is declared in an appellate decision, that rule should ordinarily be followed by other courts considering the same legal issue. "It is based on the assumption that certainty, predictability, and stability in the law are the major objectives of the legal system; i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law. Another justification for the doctrine is convenience; lawyers and the courts are relieved of the necessity of continually reexamining matters settled by prior decisions." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 481, pp. 540-541.) Applying this doctrine in order to achieve certainty, predictability, stability and convenience in the insurance industry, we are compelled to preserve the status quo rather than expand the duties of brokers. If we imposed new duties on brokers, our opinion would conflict with decades of case law regarding the duty of brokers to make disclosures, offer advice, etc. The profession would be thrown into limbo because the exact scope of a broker's duties would have to be defined through years of litigation. In the meantime, the cost of errors and omissions insurance for brokers might well increase, which would likely increase the cost of insurance for others. These problems are a strong recommendation for caution.

Furthermore, we are dealing with a contractual relationship. "A person may not ordinarily recover in tort for the breach of duties that merely restate contractual obligations. Instead, '"[c]ourts will generally enforce the breach of a contractual promise through contract law, except when the actions that constitute the breach violate a social policy that merits the imposition of tort remedies."' [Citations.]" (*Aas v. Superior Court* (2000) 24 Cal.4th 627, 643.) Decades of cases have drawn a policy line between what brokers must do and need not do. Because that line has been drawn, we decline to revisit the issue.

C. Analysis.

The company argues that agents owe fiduciary duties to their principals as a matter of law, including duties of honesty, loyalty, integrity and faithful service as well as the duty to make a full and fair disclosure of facts. Insofar as the company is arguing that the

fiduciary duty cause of action alleged breaches of heightened duties not imposed by or subsumed within the duty of care, we cannot concur for the reasons discussed in part I.B., *ante*. And to the degree the fiduciary duty cause of action mimics the negligence cause of action, which was argued to a jury, the former cause of action is redundant and any error was harmless under the principles set forth in California Constitution, article VI, section 13 and *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800 [there is no miscarriage of justice unless a result more favorable to the appealing party would have been reached in the absence of the error].

**II. The motion for summary adjudication regarding the claim that Carpenter did not secure the best available terms.**

A. Standard of review.

"Summary judgment is subject to independent review. [Citation.] To assess the record for error, we utilize a three-step analysis: "'First, we identify the issues framed by the pleadings. Next, we determine whether the moving party has established facts justifying judgment in its favor. Finally, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable, material fact issue. [Citation.]" [Citation.]" (*Supervalu, Inc. v. Wexford Underwriting Managers, Inc.* (2009) 175 Cal.App.4th 64, 71.)

B. Analysis.

In the first amended complaint, the company alleged that Carpenter breached its fiduciary duty by failing to obtain the best available terms of coverage from reinsurers. The trial court improperly granted summary adjudication of this allegation because Carpenter's motion did not dispose of the entire fiduciary duty cause of action as required by section 437c, subdivision (f)(1). But any errors in the ruling are moot. The entire cause of action for breach of fiduciary duty was subsequently and properly dismissed following a demurrer.

**III. The price fixing allegations.**

A. Standard of review.

A trial court's ruling on a motion to compel discovery is reviewed for an abuse of discretion. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 732.) A trial court "'has wide discretion in allowing the amendment of any pleading [citations], [and] as a matter of policy the ruling of the trial court in such matters will be upheld unless a manifest or gross abuse of discretion is shown. [Citations.]'" (*Record v. Reason* (1999) 73 Cal.App.4th 472, 486.)

B. Analysis.

The company informs us that the attorney general of Connecticut filed suit against Carpenter for price-fixing and other antitrust violations, and that the Connecticut case "implicated Carpenter in a price-fixing conspiracy with the same reinsurers with whom Carpenter had placed [the company's] excess loss insurance program." As a result, the company argues that it should have been allowed to conduct discovery and allege price fixing claims.

Citing section 2017.010, the company informs us that a party has the right to obtain discovery of any matter relevant to the subject matter of a lawsuit if it is reasonably calculated to lead to admissible evidence. Next, the company notes that an amendment should be permitted so long as it relates to the same general set of facts previously alleged and the opposing party is not prejudiced. (*Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 945.) Based on this law, the company states that the "absence of the fiduciary duty claim prejudicially affected the trial court's consideration of [the company's] request to conduct discovery . . . and to amend its complaint to allege that[] Carpenter placed [the company's] excess loss reinsurance business in a price-fixed reinsurance program[.]" It also states that "because of the absence of the fiduciary duty claim, the trial court's exercise of discretion 'start[ed] from a mistaken premise'—that is, that Carpenter was not [the company's] fiduciary. If, in fact, this was a fiduciary duty case, then [the company's] price-fixing allegations would have gone to the heart of whether Carpenter was discharging its obligations to [the company], or instead placing its

own interest ahead of [the company] in order to obtain illegal kickbacks or compensation. Because the trial court acted under a false premise, it cannot be said to have exercised its discretion at all. [Citation.] [¶] . . . In a trial of the fiduciary duty claim, [the company] should be permitted to pursue claims that Carpenter placed it in a price-fixed reinsurance scheme."

The company's arguments lack merit for a variety of reason. First, the trial court did not improperly exclude the fiduciary duty claim. Second, the company made no attempt to demonstrate that the requested discovery was reasonably calculated to lead to admissible evidence. Third, it did not argue that the proposed amendment was related to the same general facts alleged in the fifth amended complaint. Fourth, it did not argue that the motion was improperly denied due to delay, prejudice to Carpenter or factual insufficiency. Regarding these last three points, "[i]t is not our responsibility to develop an appellant's argument." (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1206, fn. 11.)

**DISPOSITION**

The judgment is affirmed.

Carpenter is entitled to its costs on appeal.

**CERTIFIED FOR PUBLICATION.**

_____, J.
ASHMANN-GERST

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
CHAVEZ