

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0614**

Timothy J. Keane,
Appellant,

vs.

Ronald H. Groth, et al.,
Respondents.

**Filed February 25, 2019
Affirmed; motion denied
Bratvold, Judge**

Hennepin County District Court
File No. 27-CV-17-15370

Phillip Gainsley, Minneapolis, Minnesota (for appellant)

William L. Davidson, Paul C. Peterson, João C.J.G. de Medeiros, Lind, Jensen, Sullivan & Peterson, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Jesson, Presiding Judge; Halbrooks, Judge; and
Bratvold, Judge.

U N P U B L I S H E D O P I N I O N

BRATVOLD, Judge

This is an appeal from a judgment dismissing appellant’s complaint in response to a motion to dismiss. Appellant’s complaint alleged one count, defamation, and was based on statements that respondents made in an answer filed in a different lawsuit. Appellant argues that the district court erred by granting respondents’ motion to dismiss because

(1) absolute privilege is an affirmative defense and not a proper basis for dismissal under Minn. R. Civ. P. 12.02; and (2) the allegedly defamatory statements were not privileged. We conclude that the district court did not err in granting respondents' motion to dismiss because absolute privilege appeared from the face of appellant's complaint. Thus, we affirm.

FACTS

Appellant-attorney Timothy J. Keane represented Crown Hydro, LLC (Crown) in transactions related to a proposed hydroelectric facility. Under Keane's advice and counsel, Crown entered into a contract with Kathryn Dusenbery, who loaned Crown \$250,000. The transaction was memorialized in a promissory note and a security agreement signed by Crown and Dusenbery.

Later, Dusenbery sued Crown for breach of contract and other claims. Attorney Ronald H. Groth and Groth Law Firm, Ltd. (collectively, respondents) represented Crown in Dusenbery's lawsuit. Groth prepared and filed an answer to Dusenbery's complaint on behalf of Crown. The answer asserted several allegations that are at issue in Keane's appeal. For example, the answer stated:

52. At all times material hereto, [Dusenbery], upon information and belief, had and/or has a romantic relationship with Keane. . . .

54. By and through their close and romantic relationship, [Dusenbery] and Keane, in direct violation of Keane's fiduciary duty owing to [Crown] . . . , agreed, conspired, aided, abetted, and acted in complicity with Keane by a plan to defraud, intimidate, threaten, and force [Crown] . . . to sell and turn over control of [Crown] to Keane and [Dusenbery] including, without limitation, inducing

[Crown's owner] to permit [Dusenbery] to secure financial leverage over [Crown]

Dusenbery filed a motion to strike these statements, which the district court granted because the statements were “immaterial” and “scandalous.” The district court also granted Dusenbery’s motion for summary judgment and entered judgment in her favor. Crown appealed. We affirmed on the breach-of-contract claim, but reversed and remanded other claims. *See Dusenbery v. Hawks*, 895 N.W.2d 640, 647 (Minn. App. 2017). Additionally, we concluded that the district court erred in granting Dusenbery’s motion to strike. *Id.* at 646 n.4.

In a separate action, Keane sued respondents for defamation, alleging that respondents in the *Dusenbery* answer published “untrue and defamatory” statements, which were malicious, unlawful, and “tend[ed] to harm [Keane’s] reputation and to lower [his] good standing in the estimation of the community.” Keane alleged that the statements constituted defamation per se. In lieu of filing an answer, respondents moved to dismiss pursuant to Minn. R. Civ. P. 12.02(e) and argued that Keane’s claims were “barred in their entirety by absolute privilege and absolute immunity,” and that Keane’s complaint failed to state a claim upon which relief may be granted. After a hearing, the district court granted the motion to dismiss.

Keane asked permission to bring a motion to reconsider, which the district court granted. Keane moved for reconsideration based solely on a Minnesota Supreme Court opinion that was released after the rule 12 hearing but before the court’s order. The district court denied the motion to reconsider in a written order that also stated its decision was

“not an endorsement of Mr. Groth’s behavior as a lawyer.” The district court directed entry of judgment for respondents and Keane appealed.

D E C I S I O N

I. The district court did not err by considering respondents’ affirmative defense of absolute privilege as raised in respondents’ rule 12 motion.

A motion to dismiss under Minn. R. Civ. P. 12.02(e) tests the legal sufficiency of a plaintiff’s claim for relief. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). A complaint must “allege sufficient facts to state a claim.” *Noske v. Friedberg*, 670 N.W.2d 740, 742 (Minn. 2003). In assessing a complaint under rule 12, a district court must consider “the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party.” *Bodah*, 663 N.W.2d at 553. “A claim is sufficient against a motion to dismiss for failure to state a claim if it is possible on any evidence which might be produced, consistent with the pleader’s theory, to grant the relief demanded.” *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 603 (Minn. 2014). Our standard of review is de novo. *Bodah*, 663 N.W.2d at 553.

Thus, for the purposes of appellate review, we accept Keane’s allegations that (1) respondents’ statements in Crown’s answer were false, (2) respondents’ statements were published by being communicated to others besides Keane, and (3) respondents’ statements affected Keane in his profession.¹ It is possible that supporting evidence could

¹ We note that Keane’s complaint directly refers to Crown’s answer in Dusenbery’s lawsuit. In deciding a rule 12 motion, a district court may consider the complaint along with any documents referred to in the complaint. See *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 739 n. 7 (Minn. 2000).

be produced on these three allegations, therefore, if we construe all reasonable inferences in favor of Keane, these allegations sufficiently state a claim of defamation. *See Bodah*, 663 N.W.2d at 553; *Walsh*, 851 N.W.2d at 603. The district court also determined that Keane had alleged a prima facie case for defamation. But this does not end our analysis because the district court granted respondents' motion to dismiss after determining that Keane's complaint alleged facts establishing that respondents' statements were absolutely privileged.

The general rule is that defamatory statements published during a judicial proceeding are absolutely privileged. *See Matthis v. Kennedy*, 67 N.W.2d 413, 417 (Minn. 1954). Keane argues that the district court erred in granting respondents' rule 12 motion because absolute privilege is an affirmative defense that has to be specifically pleaded in an answer, therefore, it is inappropriate to bar his complaint before respondents' answer has been filed.² Keane also argues that a plaintiff is not required to anticipate and plead facts that are sufficient to overcome an affirmative defense, such as privilege, which has not yet been asserted.

Keane is correct that absolute privilege is an affirmative defense that must be asserted in a responsive pleading or it is waived. *See Rehn v. Fischley*, 557 N.W.2d 328,

² Keane also argues that whether absolute privilege is "conclusively established" on the face of his complaint is a new issue that respondents did not argue in the district court. Keane moved for this court to strike this argument from respondents' brief. In an order, we denied Keane's motion because the district court considered whether an affirmative defense can be established on the face of the complaint, and there are numerous references in the record to this argument from both parties.

332 (Minn. 1997). But what is at issue here is whether a district court may properly dismiss a complaint when the allegations on the face of the complaint establish an affirmative defense before the defendant has filed a responsive pleading. We conclude that a motion to dismiss may be granted before an answer has been filed if an affirmative defense “clearly and unequivocally appears from the face of the complaint.” *See Pederson v. Am. Lutheran Church*, 404 N.W.2d 887, 889 (Minn. App. 1987), *review denied* (June 30, 1987).

In *Pederson*, the district court granted the defendant’s motion to dismiss, even though the defendant had not filed an answer, because the statute of limitations barred the plaintiff’s claim. *Id.* at 888. We affirmed after concluding that it was apparent from the face of the complaint that the statute of limitations had run. *Id.* at 889. Because the accrual of plaintiff’s cause of action and the expiration of the limitations period was evident from the complaint’s allegations, we held that it was reasonable “to require that facts to support a possible tolling of the limitations period appear on the face of the complaint.” *Id.* at 889-90. Because the complaint contained “no facts to toll th[e] running” of the statute, we concluded that the district court correctly dismissed the complaint even though no answer had been filed. *Id.* at 889, 890.³

³ The Eighth Circuit has also recognized that “it may be unusual to uphold an affirmative defense at the pleading stage, [but] when the defense is established on the face of the complaint, dismissal is appropriate.” *Burlison v. United States*, 627 F.2d 119, 122 (8th Cir. 1980) (affirming rule 12 dismissal based on government immunity); *see also Noble Sys. Corp. v. Alorica Cent., LLC*, 543 F.3d 978, 983 (8th Cir. 2008) (“If an affirmative defense such as a privilege is apparent on the face of the complaint, . . . that privilege can provide the basis for dismissal under Rule 12(b)(6).”).

Here, we conclude that the district court correctly determined that absolute privilege barred Keane’s defamation claim based solely on Keane’s complaint, which alleges that respondents defamed him in “an answer” filed in response “to a commercial transaction complaint” in “a court of public record.” Keane’s complaint also states that respondents asserted that Keane was in a “romantic relationship” with Dusenbery, “breach[ed] . . . his fiduciary duties to his clients,” and that these statements were “published assertions” that were “untrue and defamatory.” Moreover, Keane’s complaint alleges that respondents’ statements “affected [him] in his business, trade, profession, office or calling, and therefor[e] constitute defamation per se.” Taken together, the allegations in Keane’s complaint assert a claim of defamation for statements that respondents made in a judicial proceeding. Therefore, it was appropriate for the district court to test the sufficiency of Keane’s complaint by considering whether his defamation claim overcame the general rule that defamatory statements published during a judicial proceeding are absolutely privileged. *See Matthis*, 67 N.W.2d at 417.

Keane argues that his complaint sufficiently pleaded allegations in avoidance of the affirmative defense of privilege, pointing to paragraph 11 of his complaint, which alleges that “[p]ublic policy and the administration of justice would not be served in affording defendants the narrow limits of absolute privilege afforded in litigation.” But paragraph 11 goes to the merits—whether absolute privilege bars his claim—and not whether the district court erred in considering respondents’ affirmative defense of absolute privilege. We conclude that the district court properly considered respondents’ affirmative defense

because Keane’s complaint, on its face, alleged facts sufficient to establish absolute privilege as a defense to his defamation claim.

II. The district court did not err in dismissing Keane’s complaint because respondents’ statements were absolutely privileged.

Absolute privilege bars a defamation claim if (1) an attorney makes a defamatory statement (2) “during the course and as part of a judicial proceeding,” and (3) the statement has “some relation” to the proceeding. *See Matthis*, 67 N.W.2d at 419 (quoting Restatement (First) of Torts § 586 (1938)); *see also Expose v. Thad Wilderson & Assocs., P.A.*, 889 N.W.2d 279, 286 (Minn. 2016) (noting that the absolute-privilege doctrine generally applies when the three *Matthis* requirements are met). Absolute privilege precludes recovery in defamation “even for intentionally false statements, coupled with malice.” *Matthis*, 67 N.W.2d at 416. This court reviews de novo whether a district court has erred in granting a motion to dismiss. *See Bodah*, 663 N.W.2d at 553.

Here, Keane concedes the first two *Matthis* requirements: respondents’ defamatory statements were made by an attorney during the course of a judicial proceeding. Keane challenges the district court’s dismissal for two reasons. First, he argues that the third *Matthis* requirement—the relevance of the comments to the legal action—is not met because respondents’ defamatory statements were not relevant to Dusenbery’s lawsuit. Second, Keane contends that applying absolute privilege to protect respondents’ statements does not advance the administration of justice. We consider the arguments in turn.

A. *The third Matthis requirement—“some relation” to the judicial proceeding*

In determining the third *Matthis* requirement, the “all-important question” is whether the statement has “reference to and relation to the subject matter of the action.” *Matthis*, 67 N.W.2d at 418. The privilege “embraces anything that may possibly be pertinent.” *Id.* at 420. “In determining what is . . . related to the subject under inquiry, much latitude must be allowed to the discretion of those who are entrusted with the conduct of a cause in court.” *Id.* If there is a “relat[ion] in any manner, then all doubt must be resolved in favor of the defendant under the absolute-privilege rule.” *Id.* In short, “relevance is defined broadly.” *Mahoney & Hagberg v. Newgard*, 729 N.W.2d 302, 308 (Minn. 2007).

Matthis is instructive because the supreme court considered the relevancy of defendant’s statement that the plaintiff was as an “adulteress”; the alleged defamation occurred during a court hearing in a guardianship dispute where the defendant acted as counsel on his own behalf. *Matthis*, 67 N.W.2d at 415-16, 420. The supreme court affirmed judgment for the defendant even though the court stated that the defamatory comment “may well have been unwise” and may have violated “the rule of courtesy and decorum” that is expected in a judicial proceeding. *Id.* at 420. Nevertheless, the court concluded that the comment was relevant because the guardianship dispute involved the legality of plaintiff’s marriage to the ward, and the plaintiff’s reputation was not “so foreign to the issue” that it could not be pertinent. *Id.* In other words, the statement fell within the realm of “anything that may possibly be pertinent.” *Id.* at 418.

With *Matthis* in mind, we consider whether respondents’ statements were sufficiently related and relevant to Dusenbery’s lawsuit to satisfy the third *Matthis*

requirement. Keane was Crown’s attorney when it entered into a loan contract with Dusenbery. If, as alleged in Crown’s answer to Dusenbery’s complaint, Dusenbery was in a romantic relationship with Keane, this fact may support Crown’s claim that it was “fraudulently induced into . . . borrowing and accepting funds from [Dusenbery].” Because respondents’ defamatory statements about Keane “may possibly be pertinent,” we conclude that the third *Matthis* requirement is satisfied. *Id.*

Keane also contends that there is a question of fact on the relevance requirement because the district court in Dusenbery’s lawsuit struck Crown’s allegations about Dusenbery and Keane as “immaterial” and stated that the “allegations do not provide a viable affirmative defense.” We are not persuaded. On appeal, this court reversed the district court’s decision to strike the disputed allegations from Crown’s answer. In fact, our opinion concluded that we did not agree that the disputed allegations in Crown’s complaint “are irrelevant.” *Dusenbery*, 895 N.W.2d at 646 n.4.

B. Administration of justice

Keane argues that respondents must satisfy a fourth requirement before absolute privilege applies, which is that the defamatory statements must be “protected in the interest of the administration of justice” and that the district court erred “in not applying the fourth factor.”⁴ The district court specifically considered the public policy concerns that support

⁴ Keane cites to *Mahoney & Hagberg v. Newgard* to support his contention that there is a fourth requirement for absolute privilege. 729 N.W.2d at 306. But *Mahoney* only explicitly lists the three *Matthis* requirements. *Id.* *Mahoney* also states that courts consider “competing policy interests” in applying absolute privilege, but not as a definitive fourth requirement. *Id.* at 309. We acknowledge that a few unpublished opinions of this court explicitly list four requirements. But unpublished opinions are not binding legal precedent.

extending absolute privilege to defamatory statements made in judicial proceedings and stated that it had to consider whether “the administration of justice requires complete immunity.” The district court also stated that absolute privilege is “a policy decision” to protect defamatory statements made in legal proceedings and has been applied to statements “even more egregious than this.”

Respondents argue that the administration-of-justice requirement applies only when a defamation claim may extend absolute privilege to a new context. Respondents also contend that Keane’s defamation claim is not a new context, nor does it require an extension of the law, therefore, absolute privilege applies. In *Expose*, the Minnesota Supreme Court held that absolute privilege did not apply to protect defamatory statements made to prosecutors and investigators before trial. *Expose*, 889 N.W.2d at 287. In doing so, the supreme court stated that it would apply absolute privilege “only when the administration of justice requires complete immunity from being called to account for language used.” *Id.* at 286 (quotation omitted). The supreme court also stated that it would determine whether there are “competing policy interests that would counsel against application of the privilege.” *Id.*

Assuming, without deciding, that the administration-of-justice requirement applies here, we proceed to consider Keane’s argument that public policy concerns explain why his case is different. First, Keane argues that respondents’ defamatory statements were

See Minn. Stat. § 480A.08, subd. 3(c) (2018) (stating that “[u]npublished opinions of the court of appeals are not precedential”).

particularly “vicious attacks.” Second, he argues that he should be allowed to proceed with his complaint because he was not a party to Dusenbery’s lawsuit and had no opportunity to address respondents’ defamatory statement in that forum. We are not persuaded that Keane’s arguments “counsel against application of the privilege.” *Id.*

First, Keane relies by analogy on an attorney-discipline proceeding to demonstrate that the law does not tolerate vicious personal attacks by an attorney. *In re MacDonald* involved an attorney who, among other things, wrote disparaging letters about a judge to the board of judicial standards. 906 N.W.2d 238, 243 (Minn. 2018). The attorney argued that the First Amendment protected her from discipline for what she viewed as legitimate criticisms of a judge. *Id.* at 246. But the supreme court disagreed, stating that attorneys “are subject to a modified version of the constitutional standard for defamation claims,” which is what a reasonable attorney would do under the same or similar circumstances. *Id.* Applying this standard, the court decided to discipline the attorney. *Id.* at 250.

Here, Keane argues that this court should apply the standard used in *MacDonald* to respondents’ statements and determine that no reasonable attorney would make the defamatory statements that respondents did in Crown’s answer, therefore, the administration of justice does not favor protecting respondents from Keane’s defamation claim. But *MacDonald* was an attorney-discipline proceeding. It was not a civil defamation case against an attorney for making defamatory statements in a legal proceeding. The two proceedings serve different interests.

When an attorney makes statements in a legal proceeding on behalf of a client, absolute privilege protects the attorney from defamation claims because he is “in character”

as the pleader in the case. *Matthis*, 67 N.W.2d at 417. The supreme court has held that the administration of justice requires that attorneys should not fear retaliation “for language used” in the course of vigorously representing a client in judicial proceedings. *See id.* On the other hand, in attorney-discipline proceedings, the attorney’s alleged wrong is “against society as a whole.” *In re Graham*, 453 N.W.2d 313, 322 (Minn. 1990) (quoting *In re Terry*, 394 N.E.2d 94, 95 (Ind. 1979)). As a result, “[t]he societal interests protected by [defamation and professional disciplinary] law are not identical.” *Id.* (quoting *Terry*, 394 N.E.2d at 95). We conclude that the supreme court’s analysis of the First Amendment issue in *MacDonald* provides no guidance or analogy to the application of absolute privilege in this case.

Second, we address Keane’s argument that he was not a party to Dusenbery’s lawsuit and “has been unable to defend his reputation in a judicial setting.” From this, Keane reasons that his defamation claim should be allowed to proceed so he has a forum to counter respondents’ statements. But Keane does not point to any special exception in the caselaw for defamatory statements against non-parties. And indeed, his situation is not unique.

In *Hammer v. Forde*, the plaintiff alleged that the defendant was liable for defamatory statements made in a complaint in a previous lawsuit. 145 N.W. 810, 811 (Minn. 1914). The plaintiff was not a party to the previous lawsuit. *Id.* Yet the defendant referred to the plaintiff by name in the complaint, alleging that the plaintiff acted “with personal malice” and injured his property. *Id.* *Hammer* affirmed the district court’s decision to sustain a demurrer to the plaintiff’s complaint based on privilege. *Id.* The supreme court

reasoned that “[i]t is not important that the one claimed to have been libeled was not a party to the suit provided some fair legal basis may be suggested for the materiality of the allegations concerning him.” *Id.*⁵

Reading *Hammer* together with *Matthis*, the “fair legal basis” would be whether the alleged defamatory statement is “relevant” to the legal dispute. *See Matthis*, 67 N.W.2d at 418. Long-standing Minnesota precedent has recognized that the administration of justice is promoted by applying absolute privilege to defamatory statements made during judicial proceedings so long as the *Matthis* requirements are satisfied. *See id.* at 419; *see also Expose*, 889 N.W.2d at 286; *Mahoney*, 729 N.W.2d at 308. And, as we have already discussed, respondents’ defamatory statements meet the *Matthis* requirements.

Our decision to affirm the district court does not mean we condone Groth’s statements or his decision to make them during the course of judicial proceedings. We take this opportunity to echo the sentiments of the district court:

Quite understandably, Mr. Keane argues these statements contaminated his enviable reputation in the law community, of which he asserts he has been a part for 32 years, achieving recognition in professional excellence in both skill and ethics as well as national distinction by one of the most highly

⁵After oral argument, respondents’ moved for this court to take judicial notice of district court records from *Mahoney & Hagberg v. Newgard* for the purpose of demonstrating that absolute privilege applied when an affiant made defamatory statements against a non-party in a legal proceeding. 729 N.W.2d at 302. In light of our analysis of *Hammer*, which involved defamatory statements against a non-party, we do not need to consider respondents’ request that we take judicial notice of the records in *Mahoney*. *Cf. Drewitz v. Motorwerks, Inc.*, 728 N.W.2d 231, 233 n.2 (Minn. 2007) (denying motion to strike as moot when appellate court did not rely on contested documents in reaching decision). Accordingly, we deny respondents’ motion.

regarded lawyer rating services. There is no excuse for Mr. Keane being put in a position to defend his reputation. There is no doubt that the statements related to Mr. Keane asserted in the collections action are embarrassing and unprofessional.

But our sympathy for Keane does not affect or alter the application of Minnesota law to his defamation claim. We note, as did the district court, that other avenues may be available to Keane.

We conclude the district court did not err in dismissing Keane's complaint and we affirm the judgment in favor of respondents.

Affirmed; motion denied.