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ASTROS

A foul ball, a child's fractured skull and first overture to Astros about a settlement

By David Barron |

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A 25-month-old girl who suffered a fractured skull when struck by a foul ball at an Astros game last month continues to recover from her injuries, and her family has hired a prominent Houston attorney to consult with the Astros about the matter.

In a letter addressed Wednesday to Astros owner Jim Crane, attorney Richard Mithoff provided the first public details about the child who was hit in the head May 29 by a line drive off the bat of Chicago Cubs outfielder Albert Almora Jr. during a game at Minute Maid Park.

While no legal action has been filed, attorneys say Mithoff's letter represents the first public overture to the Astros toward conversations that could lead to a financial settlement.

It also satisfies, for now, the public's interest in the condition of the crying child who was photographed being carried toward a ballpark exit by her grandfather as Almora slumped behind the plate in distress after seeing the ball hit the child.

"The family wanted to thank everyone for their concern, and that was first and foremost," Mithoff said. "Secondly, we wanted to see whether any conversations can take place that can lead to a discussion of options that would make sense for the fans and the ballparks and the clubs.

"I know Jim Crane and know him to be a responsible owner, and I think he will do the right thing."

Mithoff said in his letter that the girl suffered a seizure and was found to have abnormal brain electrical activity while being treated at a local

hospital. She also suffered bleeding and swelling of the brain and is on medication to prevent further seizures.

"She is doing relatively well, but she has had seizure and the abnormal EEG, and so it's going to be a matter of time," the attorney said. "It's too early to tell what kind of residual (damage) there may be, but any time there is a fractured skull and bleeding of the brain involved, it's a serious matter.

"She is receiving excellent care, and everyone is hoping and praying for the very best."

Mithoff said the girl, who celebrated her second birthday in May, will undergo further evaluation in July at Baylor College of Medicine's Blue Bird Circle Clinic for Pediatric Neurology at Texas Children's Hospital.

He said she has had seizures and continues to have an abnormal electroencephalogram reading, which measures the brain's electrical activity.

The child and her family were seated on the third base side of the ballpark, just beyond the field-level seats that are protected by netting installed by the Astros in 2017 that extend to the far end of each dugout.

Her injury, compounded by her youth, was among a recent spate of ballpark fan injuries that prompted the Washington Nationals and Chicago White Sox to announce plans add protective netting and the Los Angeles Dodgers to say they are studying plans to add netting.

The Astros, meanwhile, said Tuesday that they are studying options for additional netting but at this point have no plans to make any additions at Minute Maid Park during the 2019 season.

Mithoff would not elaborate on the nature of discussions he hopes to have with the Astros. He said the letter to the Astros was sent as a courtesy now that he and family attorney Steve Polotko are representing the family.

“The Astros’ risk management representative reached out to the family, and now that the family is represented by counsel, I wanted to let the other side know that I am involved so that they can get in touch with me,” Mithoff said. “It’s not unusual to let the other party know when one party has retained counsel.”

The attorney said he would consult with the child’s family before discussing publicly any potential legal remedies.

“I will continue to consult with them, but I want to make sure the child is taken care of, and that is where their attention is,” he added.

Baseball has long been shielded from legal action in fan injuries by what is known as the “baseball rule,” which states that a ticket holder “assumes all risk and danger incidental to the baseball game, and all other activities, promotions or events at the Ballpark before, during and after the baseball game, including, but not limited to, the danger of being injured by baseballs, equipment, objects or persons entering spectator areas.”

That stipulation, which is included on the Astros’ website, says that the ticket holder releases the Astros and Major League Baseball from liability for “injuries or loss of personal property resulting from all risk and danger incidental to the baseball game and the risks or any incidents associated with crowds of people.”

“That certainly is one of the areas we are looking at,” Mithoff said. “The rule has been in effect for a long time. We also know there has been a movement by at least two clubs to install (more) fencing or netting. We are going to be looking at every option and trying to advise the family accordingly.

“I think that fan safety has to be first and foremost, and the issue needs to be addressed as soon as practical. I am confident the Astros will do the right thing and do it, hopefully, in due course.”

Houston attorney Joel Simon, a trial attorney who has represented companies and individuals in cat-

astrophic and serious injury matters, said letters such as Mithoff’s are common practice as a prelude to potential settlement discussions.

“In part, this letter was sent to let the Astros know that an attorney of the caliber of Richard Mithoff, who is as respected and accomplished as any lawyer in Houston, is engaged in the case,” Simon said. “I’m sure that will grab the Astros’ attention.”

While the Astros have the precedent of the baseball rule on their side, they also face a potential test in the court of public opinion, the attorney said.

“We’re not dealing with a 40-year-old, beer-drinking fan who maybe lunged for a ball when he shouldn’t have. We’re talking about a child,” Simon said. “I think that changes the dialogue.”

Nathaniel Grow, a professor of business law and ethics at Indiana University who has written about the baseball rule, said that while no state courts have been unwilling to overturn the provision, that possibility could emerge from such a high-profile case.

“With such a super-sympathetic plaintiff, there is that chance. But there have been other similarly young victims, and the court has been reluctant to overturn the rule,” he said. “State legislatures also could overturn, but none have. If anything, three or four passed laws 20 years ago to codify (the baseball rule).”

Grow said baseball has dealt with similar incidents by making recommendations for additional safety matters and is likely to do so again. In the meantime, he agreed that a negotiated settlement is the most likely outcome in the Houston case.

Mithoff has been one of Houston’s most respected attorneys for decades, handling such high-profile cases as the aftermath of the 2010 Deepwater Horizon oil spill in the Gulf of Mexico, Enron-related litigation on behalf of J.P. Morgan Chase and highly publicized bus and plant explosions.

An Astros spokeswoman said Wednesday via e-mail, “The Astros continue to send our thoughts and prayers to the young girl and her family. We continue to respect the family’s request for privacy and have no further comment at this time.”

The Astros in 2017 were among the first Major League Baseball teams to extend netting to the far edge of each dugout, and that policy was adopted for all MLB teams in 2018. At least nine teams have additional netting beyond the dugouts, with some extending to the areas where the outfield walls run parallel with the foul lines.